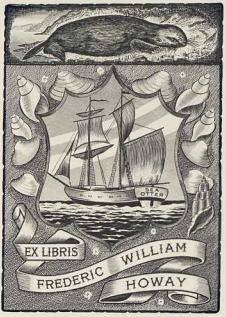

The F. W. Howay and R. L. Reid
Collection of Canadiana
The University of British Columbia

FUR SEAL ARBITRATION.

PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS

UNDER THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN CONCLUDED AT WASHINGTON FEBRUARY 29, 1892,

FOR THE

DETERMINATION OF QUESTIONS BETWEEN THE TWO GOVERNMENTS CONCERNING THE JURISDICTIONAL RIGHTS OF THE UNITED STATES

IN THE

WATERS OF BERING SEA.

VOLUME XV.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895.

151,418
HR
F5050.3
S3B4
v. 15

FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

HON. EDWARD J. PHELPS,

ON BEHALF OF THE UNITED STATES.

FORTY-THIRD DAY, JUNE 22ND, 1893.

Mr. PHELPS.—I congratulate the Tribunal, Mr. President, on its approach to the end of this debate; I cannot express my regret that my duty compels me at this late day to continue it. It has had much to commend it to your attention; it has presented most important and interesting questions; it has been dignified by the occasion and the circumstances that have attended it; it has been adorned as well as elucidated by the distinguished advocates who have preceded me; but it is impossible not to feel now, that it has been prolonged beyond all our anticipations, and that the whole subject has become a weariness. The inexhaustible patience, the more than kindly courtesy which you, Sir, and your eminent associates have accorded to us, have been mentioned in appropriate terms by my learned friends on the other side. It is not for them, it is not for us, to thank you; the acknowledgment should come, and will come, no doubt, in due time, from the great Nations at whose invitation and for whose benefit you have undertaken this onerous task. To that patience and kindness I have still to appeal, most reluctantly, and perhaps at some length. It would be a very undeserved compliment to the able arguments we have listened to during these twenty-eight days from my learned friends on the other side, to assume that they could be brushed hastily aside.

The discussion, Sir, has taken a wide range. I do not complain of it; I have no right to complain of it. It is not for me to assume to set bounds to the limits of this subject, or to prescribe the considerations upon which it has to be determined. That is a matter entirely for the better and less partial judgment of the Tribunal. It is for me, however, and it will be my endeavour, to recall the discussion to the real questions we conceive to be involved, and to the real grounds upon which, as we believe, their determination must proceed.

Now, Sir, what are the questions proposed by the Treaty for decision? They are chiefly two, the one the alternative of the other. The first is, (and in one view of the case it is the only question), whether the Canadian sealers and the renegade Americans who seek the protection of the British flag in order to defy with impunity the laws of their country, have a right to which the United States must submit, to continue the destruction in which they have been engaged.

Several other questions are in form propounded by the Treaty. They are but incidental and subsidiary to this. They cannot be made otherwise than secondary, because in their very nature they are so. They are only important so far as the answer to them throws light (if it does throw light) upon the only question ever in dispute between the two countries on that subject—does the right exist in these individuals to continue the business they have been engaged in? When you have decided that, you have decided all that is in dispute. Until you have decided that you have decided nothing. It is useless to explore the dead bones of the diplomacy of seventy-five years ago, to try and extract a meaning from language which perhaps was employed to conceal

meaning, unless by so doing, assistance can be obtained in deciding this principal question.

What then is the business these men have been engaged in? It is so long since this case was stated, that perhaps I may be excused for briefly restating it. The Islands have been in possession of Russia, down to the time when they were ceded to the United States, ever since their discovery. They were discovered and first occupied by Russia, and her title has never been questioned, and is not questioned now. Nearly one hundred years ago that country established upon the Islands an industry, a husbandry, in the protection and management of the seals which resorted there in almost countless numbers. Whatever else took place between Russia and other countries, that industry remained unimpaired, undisturbed. No man, no nation, ever claimed in any instance which the preparation of the case on either side has disclosed, the right to go there, to touch one of these animals, or to interfere in any way whatever with the industry that Russia was carrying on. In 1867 the province of Alaska, including those Islands, was transferred to the United States for a large consideration, between seven and eight million dollars, and, as I shall have occasion to show later in the case, the existence of that industry, which was all that gave the province any present or immediately future value, was the chief inducement to the purchase. After that, considerably later, not to any serious or appreciable extent till 1884 perhaps, they began from Canada to destroy these seals; and in what way? What is it they have since been doing, and which they claim the right to continue to do? It is the extermination of the race. If we have not proved that, we have not proved anything.

I shall not take leave of you, Sir, if that question can be said to be still in doubt, without demonstrating from the evidence the absolute correctness, the absence of all exaggeration in the statement I have made. It is a matter of evidence, printed and lying before you, out of which any intelligent man who will give time enough and trouble enough, can make it perfectly apparent that the process that is being carried on is the extermination of the race of seals. How? By destroying on their annual passage to the Islands the females pregnant with young, just about to be delivered, in large numbers, 80 or 85 per cent of the whole catch being of that sort, and the destruction, after their young have been born, of the mothers who are nursing them, and who go out to sea for sustenance, and if destroyed, leave their young to starve on the islands.

That is the method of the destruction. That is the result which is claimed here as a right—as a part of the freedom of the sea to which a great nation must submit, not at the hands or for the benefit of another nation or even a province, but for a little knot of adventurers of one sort and another who find their temporary and miserable profit in that sort of business. Coming as they do from both nations, it is only just to say that we cannot charge all of this upon Canada, except so far as the flag of Great Britain enables Americans to join with the Canadians in this employment. It is the right to do that thing, in that way, with those consequences, that is in question in this case, and which is asserted on the part of Great Britain on this hearing—never before—and denied on the part of the United States.

Now, Sir, how has that question been met by my learned friends? It has not been met. All the resources of the most accomplished advocacy have been exhausted in escaping from it—in avoiding it—in circumventing it—in approaching it from every direction except the straight forward one. My learned friends have felt as any man must

feel, who is capable of feeling, that the bare statement of this case in its naked and simple facts, exactly as they are established, involves a proposition it is impossible to encounter: that there is no law, there is no learning, there is no pretense of justice that can possibly encounter such a proposition with success. It must therefore be approached indirectly. Your minds, as my learned friend, the Attorney General said, must be "prepared" before you can examine it. He devotes a couple of days of argument to preparing your minds. What preparation does a judicial tribunal need for meeting a case that is brought before it? What is a tribunal expected to do except to look the case square in the face, ascertain the facts, and apply to those facts the law?

What is my learned friend's recipe for the preparation of a judicial Tribunal so that they may be brought indirectly to a result it would be impossible to propose to them directly? Why, you must get rid of your ideas of right and wrong, because that is not law. You must bear in mind that you do not sit to do right; far from it; you sit to administer the law, which is, or may be, a very different thing from the right. You must remember that the extermination of the seal is not a matter of any very great consequence, after all, since it only involves the ladies going without their sealskin cloaks; and that, as to cruelty, that always accompanies the taking the life of an animal. You cannot help that, and, if you give him what they are pleased to call "a fair sporting chance" for his life, all the dictates of humanity are answered.

Then the discussion of the case is taken up by starting at some remote point and coming down sideways so as to consider abstract propositions, and not the actual concrete case that is put before you. A day or two has been devoted to arguing the question of the legality of the seizures of the British vessels made by the United States Government in 1886 and 1887. What have you to do with that? Is any such question proposed for decision by the Treaty? The only function the Tribunal is entrusted with, or needed to be entrusted with on that subject, is to find such facts, at the instance of either party, as the party might think would be material in future negotiations, provided the facts are true. But those facts are all agreed upon; they are put in writing, and submitted to the Tribunal, and there is no question about them. There never was. They are notorious, well understood, undeniable facts. A little question as to the precise form of their statement arose, which was easily accommodated between counsel; and the Tribunal is thus relieved from the duty of finding any facts in respect of those seizures at all. Then, for what purpose and upon what principle are two days devoted to the argument of a question not before the Court, which may come up between these Governments hereafter, or may not? It is probable that it never will, because the whole amount in controversy on that point is not worth a dispute or a prolonged debate. Mr. Blaine once offered to pay it, as you have seen in this correspondence, if he could settle the important rights of the country for the future in respect of this industry, saying that it was too small to stand in the way, especially as the money was going to individuals who might have supposed and probably did suppose that they were authorized to do what they did.

It is because it was far more agreeable, and was felt by the accomplished advocates to be far more prudent to discuss some other question than the right of the Canadians to exterminate the seals in this barbarous and inhuman manner, that my friends evade that point and say, next, "let us talk about the right of search in time of peace". That is a ground upon which they are formidable. We have had a large array of authorities to show that the right of search does not exist in the time

of peace. Well, who said that it did? Who has said anything about the right of search? Or the right of seizure? That is as little involved.

Then, we are told that the question of Regulations, which is the alternative question to the principal one I have stated, alternative in one event, must be discussed in an entirely different argument from the question of the right. Why? We found no difficulty on our side in taking up those two questions in their legitimate order. What is the trouble with my learned friends? It is the same trouble. The moment you begin to talk about Regulations, you have to approach the actual facts of this case. The moment you begin to talk about Regulations, this wretched business of the destruction of gravid females and nursing-mothers stares you in the face; and it is not convenient to discuss the question of right in the light of such facts as that. It is much better as an abstraction than as a reality. I might pursue, if it were necessary, through the arguments of my learned friends, the straits to which they have been driven in order to discuss this question abstractedly from the facts on which it arises, as if there ever was a question of law in the world capable of being separated from the facts that gave rise to it; as if it were possible, in the actual administration of justice between man and man, or nation and nation, ever to separate or to sever the question of law that is supposed to control, from the actual facts and circumstances on which it depends.

A great deal of time has been devoted, also, to attempting to prove that the United States, earlier in this discussion, put itself principally upon the ground of a derivative title from Russia to close up Behring Sea, or to do what is substantially equivalent to that, to extend territorial jurisdiction over Behring Sea; and my learned friends seem to be quite unhappy that we have not persevered in that proposition, because they think they can triumphantly overthrow it. You have not failed to observe that they have two stock propositions, the sheet-anchors of their case. The first is that you cannot shut up the open sea. On that they are powerful and triumphant. And the second is that a municipal Statute is bounded in its operation by the limits of the territory in which it exists. To these they perpetually return, and really seem to feel hurt that we should put the case upon very different grounds.

I am not going over the ground so well covered by my Associate, Mr. Carter, who took the pains, unnecessarily, to point out how inaccurate that was. If the memory of the demonstration he was able to make on that subject has faded from the minds of the Tribunal (and it is long enough ago, perhaps), I commend to the perusal of the Members, if they attach any importance to this point, first, the printed Argument of the United States, pages 27 to 40, and, secondly, the reported argument of Mr. Carter which is in print before you. I content myself (for I shall try to read very little of this wearisome correspondence) with supplementing the references he made with two letters which, in the multiplicity of the papers, he omitted to refer to.

I will ask your attention to a letter in the third British Appendix page 350, dated November 1, and addressed by Sir Julian Pauncefote to the Marquis of Salisbury—a letter that of course we had no access to and did not see, until it appeared in the British Case, and I shall read but a few words from it. It is an account of the first interview he had with Mr. Blaine on this subject when he arrived in the United States as Minister of Great Britain, under instructions to renew the negociations with regard to the Behring Sea. He reports the interview nine days after he reached Washington.

I lost no time after my arrival here on the 15th ulto. in seeking an interview with Mr. Blaine on the Behring's Sea question.

He states the conversation; and (in reply to what Mr. Blaine said), remarks:

I observed that this appeared like an assertion of the *mare clausum* which I could hardly believe would be revived at the present day by his Government or any other; to which he replied that his Government had not officially asserted such a claim and therefore it was unnecessary to discuss it. As a matter of fact there had been no interference with any Canadian vessels in Behring's Sea except such as were found engaged in the capture and destruction of fur-seals. But his Government claim the exclusive right of Seal fishery, which the United States and Russia before them, had practically enjoyed for generations without any attempt at interference from any other country. The fur-seal was a species most valuable to mankind. And the Behring's Sea was its last stronghold. The United States had bought the Islands in that sea, to which these creatures periodically resort to lay their young and now Canadian fishermen step in and slaughter the seals on their passage to the islands, without taking heed of the warnings given by Canadian Officials themselves, that the result must inevitably be the extermination of the species. This was an abuse, not only reprehensible in itself and opposed to the interests of mankind, but an infraction of the rights of the United States. It inflicted, moreover a serious injury on a neighbouring and friendly State, by depriving it of the fruits of an industry on which vast sums of money had been expended and which had long been pursued exclusively, and for the general benefit. The case was so strong as to necessitate measures of self-defence for the vindication of the rights of the United States and the protection of this valuable fishery from destruction.

Now, Sir, if you care to consider the utterly immaterial question whether the position of the United States as asserted by its counsel on this trial differs from that which was earlier taken by Mr. Blaine, I ask you to discriminate if you can, between the position of Mr. Blaine at the outset of these negociations, and the proposition I have endeavoured to state to you to-day as being the only one this case presents. Sir Julian gives the remainder of the interview, which I need not read—it is before you—and, as corroborating what I said a little while ago about the unimportance of these seizures, I will only read from the concluding paragraph of the letter:

As regards compensation, if an agreement should be arrived at, he (Mr. Blaine), felt sure that his Government would not wish that private individuals who had acted *bona fide* in the belief that they were exercising their lawful rights should be the victims of a grave dispute between two great countries, which had happily been adjusted. He was not without hope therefore, that the wishes I had expressed might be met, and that all might be arranged in a manner which should involve no humiliation on either side.

His tone was most friendly throughout and he manifested a strong desire to let all questions of legal right and international law disappear in an agreement for a close season, which he believes to be urgently called for in the common interest.

This is the report of the language of the dead statesman, coming to us through the eminent representative of Great Britain in the United States, Sir Julian Pauncefote, and published in their evidence. Surely, no one who has Mr. Blaine's reputation at heart need blush for the record thus made. And if the United States have been unfortunate in this matter at all, it is that they did not adhere as Russia did, firmly and resolutely, to ground that was unanswerable, and never give way for a moment to any suggestion of negotiation, or settlement, or arbitrament, short of the plain necessity and justice of the case.

I shall refer to another letter, Sir, with your permission, which will be found on page 365 of the same volume. This is again from Sir Julian Pauncefote to the Marquis of Salisbury, is dated on the 12th of December, 1889, and to make it intelligible I first refer to a preceding letter of December 7th, 1889, from Lord Salisbury to Sir Julian Pauncefote on the same page:

I have been informed that a telegram has been received by the Secretary of State for the Colonies from the Governor-General of Canada, reporting that his council have expressed the following views in regard to reopening negotiations with the United States Government on the subject of the Behring's Sea seal fishery.

It is held by the Government of Canada, on evidence which they deem sufficient, that no real danger exists of the extermination of the seal fishery in Behring's Sea. They therefore contend that, if the United States Government are not of that opinion, that Government should make the proposals which they consider necessary for the protection of the species. If, however, the renewal of negotiations is considered expedient by Her Majesty's Government, Canada will agree to that course on the following conditions:

If this formed an important chapter in the history of Great Britain, the future historian might enquire which was the Empire and which was the Province. Canada graciously informs Her Majesty's Government upon what terms she will agree to negotiations with the United States, one of which is,

that the United States Government shall first abandon any claim to regard the Behring's Sea as a *mare clausum*, and that any existing legislation in the United States, which would seem to support that claim, shall be either amended or repealed.

Some other conditions are added which I will not stop to read; and Sir Julian Pauncefote writes in reply:

Immediately on the receipt of your Lordship's telegram of the 7th instant, containing certain proposals of the Dominion Government in relation to the Behring's Sea question and instructing me to report whether, in my opinion, those proposals furnished a basis of possible negotiation, I obtained an interview with Mr. Blaine and I sounded him on the subject of Canada being directly represented in any diplomatic negotiations which might be renewed for the settlement of the controversy. Mr. Blaine at once expressed his absolute objection to such a course. He said the question was one between Great Britain and the United States, and that his Government would certainly refuse to negotiate with the Imperial and Dominion Governments jointly, or with Great Britain, with the condition that the conclusions arrived at should be subject to the approval of Canada.

I did not touch on the other proposals for the following reasons.

As regards the abandonment of the *mare clausum* claim, no such claim having been officially asserted by the United States Government, they would naturally object to withdraw it; and as regards the suggested amendment of their legislation, such a proposal would gravely embitter the controversy, and is hardly necessary, as I conceive that there is nothing in the terms of such legislation, if correctly interpreted, with due regard to international law, which supports the *mare clausum* claim.

With those citations, Sir, I leave upon the argument of my learned friend, Mr. Carter, the question, utterly immaterial I repeat, whether the ground we have placed this case upon was or was not the original ground asserted by the United States. I need not remind you, that this subject engaged the attention of the previous administration to that with which Mr. Blaine was connected, when the United States began by seizing the sealing vessels in two successive years, and that Mr. Bayard, the former Secretary of State absolutely declined to enter into the discussion of these Russian questions. They were introduced, in the first place, by the Earl of Iddesleigh when Foreign Secretary of Great Britain, in a letter through Sir Lionel West, then British Minister, which elicited no reply except a courteous acknowledgment of its receipt. Then they were brought forward again by Lord Salisbury in another letter during Mr. Bayard's administration. And my learned friend, the Attorney General very much complained that it met with no response. On two occasions, in two successive Administrations, through two Secretaries of Foreign Affairs on one side and two Secretaries of State on the other, it was attempted on the part of Great Britain to carry this controversy into the field of old diplomatic difficulties between Russia and the United States, and Russia and Great Britain. The United States declined to discuss it, and, as has been pointed out—I shall not go over it again—always asserted through Mr. Bayard, as well as through Mr. Blaine, the proposition I have stated.

It is true that Mr. Blaine was afterwards drawn by the great adroitness of Lord Salisbury—a diplomat of very great ability, sagacity and

experience—few men living are perhaps his equal—and who felt quite as strongly as my learned friends feel that England could not put itself on record before the world by justifying the action of Canada, to transfer the discussion in some measure from the actual facts that were going on in Behring Sea and the North Pacific, to the old story about the Ukase of 1821 put forth by Russia and subsequently more or less modified at the instance of the two countries. Finally, Mr. Blaine was drawn into a discussion of this, and I need not say, discussed it with great ability. We shall not shrink from that discussion at its appropriate place, as a support and corroboration to a title which we prefer to put in its origin on stronger and clearer grounds. And when it is said that Mr. Blaine remarked that if the Behring Sea was included in the Pacific Ocean within the meaning of the Treaties of 1824 and 1825, the United States had no further claims, we will see whether such a remark was justified or not, and whether he could not have safely stood there. It is not because we hesitate in attempting to support the views expressed by Mr. Blaine in this correspondence, that we put those questions in a secondary place. It is because they are secondary, necessarily and unavoidably, and could not be made otherwise, even if we agreed to consider them as primary.

Then, say my learned friends, still avoiding the plain issue of fact, this is a question of the freedom of the sea. You must beware how you step. You are approaching dangerous ground. You are in danger of interfering with the freedom of the sea; and, in the Attorney General's concluding observations the other day, he remarked in very eloquent language, which his own emotion showed was not mere rhetoric, that the question is one of the freedom of the sea, important far beyond and above the preservation of the seal.

It *is* a question of the freedom of the sea. I accept that issue. I agree that it is a question of the freedom of the sea, but it is not whether the sea at this day is free in the general acceptation of that term. That question has been settled for more than a century, and the United States is the last Government in the world that could afford to have the determination of it changed. Not all the seals in the world would compensate the United States for having the freedom of navigation, of commerce, of passage, and of use of all the open seas of the globe fail to be maintained intact. But the question is, what are the limits of the freedom of the sea? How far does it go? Where does it stop? Is it mere absence of restraint, the absence of law; an unbridled and unlimited freedom to do on the sea what the laws of all civilized countries repress everywhere else? Is that what was conceded by the nations, when a hundred years ago they came by common consent to change the old doctrine of *mare clausum* that had always prevailed till then, whenever it was found desirable by a maritime nation to assert it, into the doctrine of *mare liberum?* How much did they give away? How much did they surrender? Why the moment you attempt to give freedom such a definition upon the high sea as it obtains nowhere else on earth, you restore piracy; you restore every outrage capable of being perpetrated on the sea. It is manifest that is not what the freedom of the sea means. It has limits; there are things we cannot do upon the sea; there are bounds we cannot overstep. Where does freedom begin to be regulated by law? I shall come to that further on.

Now, in passing away for the present from the subject of the freedom of the sea, our general proposition, which I may state as well here as anywhere, is this:—that this slaughter of the seals, which I have attempted to describe, is, in the first place, barbarous and inhuman, and wrong in

itself. In the next place, it is contrary to those rules of law which are established by the municipal government of every civilized country on earth for the protection of all wild animals that are of any value and, to a certain extent, of those harmless wild animals that may be said to be of no pecuniary value. In the third place, it is the destruction of an important and valuable industry, long established and maintained by the United States on the Islands, to which these seals are appurtenant; to which they are attached; where they belong; where alone they may be made the subject of any husbandry that is not extermination. And, finally, that this extermination of a race of animals, a race that have *not only their own right* to live as long as they can live harmlessly, but are a valuable race to mankind, to commerce, to trade, to an industry supporting many people, is conduct that the freedom of the sea does not embrace, and that no individual, whether he can make a profit out of it or not, has a right to do upon any part of the high sea, an act of that character, entailing such consequences.

It is important before entering upon the discussion of the exact question of legal right which I propose to address myself to, to consider what has been up to the commencement of this trial the attitude of these nations with respect to the question, not for the purpose of showing, as my learned friends have attempted, that either side has laid greater stress later on than they did in the beginning on particular points—that is of no consequence—but to show what in our judgment is important to be understood and taken into account.

I may briefly allude to the correspondence which has been read, which I need not go over again. The first thing was the seizure of these vessels in 1886. It was followed by letters of inquiry from Great Britain, later on by letters of remonstrance not at all upon the ground of defending the vessels in what they were doing, but upon the question whether whatever that conduct was they could be seized in the manner in which they were seized and condemned by the United States Government. Mr. Bayard's first letter in reply was one in which briefly, somewhat indirectly, but very distinctly, the general right of the United States was affirmed. But he presently took a different—perhaps not a different—but a more desirable view. Experienced statesmen and diplomatists do not need to be told how important it is for nations to avoid the discussion of abstract questions as long as it can be avoided. No good comes from it. It is not their business to enlarge the learning of the world. It is not in their power to change the law of the world except as between themselves, and therefore, wise statesmen avoid abstract discussion, and endeavour to meet the exigency of the particular case. They prefer the precept of scripture. "Agree with thine adversary quickly while thou art in the way with him, lest *the adversary* deliver thee to the judge". Mr. Bayard, a large-minded far seeing man, of that sagacity which is the sagacity of wisdom and not of cunning, saw at once that instead of entering into the endless debate about the extension of abstract principles to this case, it were far better for two nations of the same race and blood, having a common interest and a common law, to agree to settle this dispute, and to leave the abstractions to such future generations as should be unfortunate enough to be obliged to settle them. Therefore leaving the question of right and putting it aside, but not for a moment receding from it, his suggestion was "Cannot we agree? You are as much influenced by the dictates of humanity, and justice as we are:—Your interest is the same as ours. You desire to do right as we do; let us agree."

He made that proposal not only to Great Britain but to Russia and Japan, who are interested in the matter of the seals, and to various other nations who are not. I need not read again the letter he addressed to M. Vignaud, the Secretary of Legation in Paris, and which in the same words was sent to the other American Ministers, proposing that in this work of humanity and justice all should concur, and waive the question of the United States to assert itself in its own defense.

I wish to read one letter not before read, from Mr. Lothrop, a very able American lawyer then Minister of the United States, at St. Petersburgh, addressed to the Secretary of State in response to this communication. It is to be found in the first volume of the United States Appendix, page 192, and is dated December 8th 1887.

Sir, I have the honor to transmit herewith the translation of a note from the Foreign Office, received at the legation yesterday, on the proposition of the United States for an international agreement touching the capture of seals in Behring Sea. The earnestness felt here in the matter is plainly indicated by the language of the note, which speaks of unrestrained seal-hunting as a thing which not only threatens the wellbeing but even the existence of the people of the extreme north-east coast.

This language represents a view which I have heard here in conversation, of course not officially, and which is substantially as follows:

The seal fishery on our Behring coasts is the only resource our people there have; it furnishes all the necessaries of life; without it they perish. Now, international law concedes to every people exclusive jurisdiction over a zone along its coasts sufficient, for its protection; and the doctrine of the equal rights of all nations on the high seas rests on the idea that it is consistent with the common welfare and not destructive of any essential rights of inhabitants of the neighboring coasts.

Such common rights, under public law, rest on general consent, and it would be absurd to affirm that such consent had been given where its necessary result would be the absolute destruction of one or more of the parties. Hence the rule cannot be applied blindly to an unforeseen case, and these alleged common rights must rightfully be limited to cases where they may be exercised consistently with the welfare of all. Behring Sea partakes largely of the character of an inclosed sea; two great nations own and control all its inclosing shores. It possesses a peculiar fishery, which, with reference to its preservation, can only be legitimately pursued on land, and even there only under strict regulations. To allow its unrestrained pursuit in the open waters of the sea is not only to doom it to annihilation, but, by necessary consequence, to destroy all its coast inhabitants. If this result is conceded it follows that the doctrine of common rights can have no application to such a case.

I have thought it might not be uninteresting to give this as a view which has found expression here, and, if found necessary, I think it not improbable that Russia would feel that she was driven to act on it.

The note of Mr. de Giers is enclosed by Mr. Lothrop in this communication. I will read it. It is very brief.

Mr. Minister.—Mr. Wurts, under date of August 22 (September 2), was good enough to communicate to me the views of the Government of the United States of America upon the subject of the desirableness of an understanding, among the governments concerned, for the regulation of the taking (*la chasse*) of the fur-seal (*lontres*) in the Behring Sea, in order that an end might be put to those inconsiderate practices of extermination which threaten to dry up, at their source an important branch of international commerce.

We concur entirely in the views of the Government of the United States. Like it we also have been for a long time considering what means could be taken to remedy a state of things which is prejudicial not only to commerce and to revenue, but which will soon work disastrous results, not only to the well-being but even to the existence of our people in the extreme Northeast. The establishment of a reasonable rule, and of a lawful system in the use (*l'exploitation*) of the resources, which furnish their only industry, is for those people of vital importance.

The pressing interest which the Imperial Government has been thus called to consider had already suggested to it the idea of an international agreement, by which this interest might find its most efficient protection. It is by this way that the different questions involved can be best resolved, and among which there exists, in our opinion, a close connection.

It was after the writing of that letter of Mr. Bayard's to Mr. Vignaud, certainly before it was received at the Foreign office of Great Britain, that the letter I have before alluded to from Lord Salisbury came, in

which for the first time, as far as he was concerned, though it had been mentioned before by Lord Iddesleigh, he introduced the discussion of the old Russian pretensions,—the letter to which my learned friend complains that Mr. Bayard did not reply. In the meantime, however, which is probably one reason why Mr. Bayard did not think it necessary to enter into that dispute, he had transmitted to the United States Minister at London instructions to approach the British Government, and to ask for a Convention by which the seals might be protected, not upon the ground that the Government had not a right to protect itself, but upon the ground I have stated, upon which it was far better to reach that result, as he was sanguine, and justified in the belief as the event showed, that it would be immediately accorded by Great Britain. What was the result of that proposal? There was a little delay, explained in the correspondence on the part of the Minister in London, on account of the absence of Lord Salisbury, perhaps in the belief that such things would be better discussed personally than on paper; but when the Minister and Lord Salisbury met, the whole matter was settled in one interview; a second was not necessary. The proposition of the United States for a close time in the killing of the seals between the 1st of April and the 1st of November, subsequently modified, I may say, to the 15th of October, was agreed to; and there on the map [Pointing], are the boundaries to which it was extended. I am speaking of it as it was originally; it was enlarged afterwards. Between the United States Minister and Lord Salisbury, an Agreement covering the water comprised within *those* lines and excluding within that limit all the seals killed between the 1st of April and the 15th of October was agreed to. I do not mean to say that a Treaty was made; but it was agreed that one should be made.

Now, my learned friend, Mr. Robinson, yesterday alluded to what he thought proper to call "the misunderstanding" between the Minister and Lord Salisbury, in respect to the agreement I have referred to. If it was that, it would not play much of a part here; and, therefore, I may usefully enough pause to consider whether it was a misunderstanding, or a very explicit and direct understanding on both sides. My learned friend, with a sort of compassion for the weakness of Lord Salisbury, which, I presume, his Lordship does not feel the need of, intimates that nobody could be less informed on matters connected with seals than Lord Salisbury; and that he was the kind of a statesman who when the proposal was made, would fall immediately upon the neck of the United States Minister, and say,—"By all means; anything you want in a Treaty between two great nations, I shall be only too happy to agree to. Let us swear eternal friendship". Those who know that statesman do not need to be told that his weakness does not lie in that direction. He does not speak before he thinks; he thinks before he speaks. He does not make Conventions or Agreements of any kind to bind his country, until he is quite sure that he understands what they mean.

And I am going to take the trouble to show you that Lord Salisbury did perfectly understand what he was about, and that in the course of the negotiation, which continued about the details of this agreement up to the time when it disappeared, never having been recalled by him or by Great Britain, when the United States made up their mind that it would not go any further, he had all the information from all quarters that existed, and that at no time did he intimate that in making the agreement he had acted without knowledge or upon mis-information. And that after he had heard from Canada, and received the official

comment upon it and protest against it by Canada (which I shall allude to hereafter) he did not put himself for a moment with the United States upon any other ground than this—that time was wanted, but that the convention would ultimately be carried into effect. I shall prove this by reading some few of the letters that bear directly upon that point, so that it will be seen exactly how Great Britain, in a manner most honourable to herself, and to the statesman who had charge of her Foreign Affairs, met this proposal of the United States.

The letter of November 12th 1887 from the United States Minister to Mr. Bayard at page 171 of the 1st Volume of the United States Appendix, states the Minister's account, and is the first thing that appears in the correspondence to show what took place. He says:

Referring to your instructions numbered 685, of August 19th 1887, I have now to say that owing to the absence from London of Lord Salisbury, Secretary of State for Foreign Affairs, it has not been in my power to obtain his attention to the subject until yesterday.

I had then an interview with him, in which I proposed on the part of the Government of the United States that by mutual agreement of the two Governments a code of regulations should be adopted for the preservation of the seals in Behring Sea from destruction at improper times and by improper means by the citizens of either country; such agreement to be entirely irrespective of any questions of conflicting jurisdiction in those waters.

His Lordship promptly acquiesced in this proposal on the part of Great Britain, and suggested that I should obtain from my Government and submit to him a sketch of a system of regulations which would be adequate for the purpose.

I have therefore to request that I may be furnished as early as possible with a draft of such a code as in your judgment should be adopted.

I would also suggest that copies of it be furnished at the same time to the Ministers of the United States in Germany, Sweden and Norway, Russia, France, and Japan, in order that it may be under consideration by the Governments of those countries. A mutual agreement between all the Governments interested may thus be reached at an early day.

Mr. Bayard had to take time to answer the request of the British Government as to what these Regulations should be. It was only agreed at the first interview that a code should be adopted, and the United States were invited to propose one. Here is a reply on February 7th from Mr. Bayard that covers three pages, and which will usefully repay perusal. I shall only be able to read some extracts from it. The substance of the letter is to state these leading facts as they now appear before you; the migration of the seals; the period of the year; the great slaughter of the females and the death of the young; the extermination to which it conducted, and various other considerations, and embracing—this is the important point—a proposal for these Regulations. That is the substance of it. I will read this passage:

The only way of obviating the lamentable result above predicted appears to be by the United States, Great Britain, and other interested powers taking concerted action to prevent their citizens or subjects from killing fur-seals with firearms, or destructive weapons, north of 50° of north latitude, and between 160° of longitude west, and 170° of longitude east from Greenwich, during the period intervening between April 15th and November 1st.

To prevent the killing within a marine belt of 40 or 50 miles from the islands during that period would be ineffectual as a preservative measure.

And so forth.

Then comes a letter from the United States Minister to Mr. Bayard, on page 175, in which he says:

I have received your instruction No. 782, under date of February 7, relative to the Alaskan seal fisheries. I immediately addressed a note to Lord Salisbury, inclosing for his perusal one of the printed copies of the instruction, and requesting an appointment, for an early interview on the subject.

I also sent a note to the Russian Ambassador, and an interview with him is arranged for the 21st instant.

The whole matter will receive my immediate and thorough attention and I hope for a favorable result. Meanwhile I would ask your consideration of the manner in which you would propose to carry out the regulations of these fisheries that may be agreed upon by the countries interested. Would not legislation be necessary; and, if so, is there any hope of obtaining it on the part of Congress?

Another letter from the same to the same on the same page, of February 25th, 1888, says:

Referring to your instructions, numbered 782 of February 7, 1888, in reference to the Alaska seal fisheries, and to my reply thereto, numbered 690, of February 18, I have the honor to inform you that I have since had interviews on the subject with Lord Salisbury and with Mr. de Staal, the Russian Ambassador.

Lord Salisbury assents to your proposition to establish, by mutual arrangement between the Governments interested, a close time for fur-seals, between April 15 and November 1, and between 160° of longitude west, and 170° of longitude east, in the Behring Sea.

He will also join the United States Government in any preventive measures it may be thought best to adopt, by orders issued to the naval vessels in that region of the respective Governments.

I have this morning telegraphed you for additional printed copies of instructions 782 for the use of Her Majesty's Government.

The Russian Ambassador concurs, so far as his personal opinion is concerned, in the propriety of the proposed measures for the protection of the seals, and has promised to communicate at once with his Government in regard to it. I have furnished him with copies of instructions 782 for the use of his Government.

Then there is the reply of Mr. Bayard on the 2nd of March continuing the subject. It need not be read; but I will read Mr. White's letter. The Minister having returned home temporarily, the subject was left in the hands of Mr. White, who became Chargé, to carry out the details which had been substantially agreed on; and Mr. White writes to Mr. Bayard on April 7th, 1888.

Referring to your instructions. * * * I have the honor to acquaint you that I received a private note from the Marquis of Salisbury this morning stating that at the request of the Russian Ambassador he had appointed a meeting at the Foreign Office next Wednesday, 11th instant "to discuss the question of a close time for the seal fishery in Behring Sea," and expressing a hope that I would make it convenient to be present, and I have replied that I shall be happy to attend.

Then there is Mr. White's letter to Mr. Bayard on April 20th, 1888, on page 179 of the same book. He speaks first of having met the Marquis of Salisbury and M. de Staal and then says:

M. de Staal expressed a desire, on behalf of his Government, to include in the area to be protected by the convention the Sea of Okhotsk, or at least that portion of it in which Robben Island is situated, there being, he said, in that region large numbers of seals, whose destruction is threatened in the same way as those in Behring Sea.

He also urged that measures be taken by the insertion of a clause in the proposed convention or otherwise, for prohibiting the importation, by merchant vessels, into the seal protected area, for sale therein, of alcoholic drinks, firearms, gunpowder, and dynamite.

Lord Salisbury expressed no opinion with regard to the latter proposal, but, with a view to meeting the Russian Government's wishes respecting the waters surrounding Robben Island, he suggested that, besides the whole of Behring Sea, the sea of Okhotsk and the Pacific Ocean north of north latitude 47° should be included in the proposed arrangement.

There you get (if Mr. White is correct and we shall see whether he is or not soon), the Southern line of this previously indicated area extended to the west, and, by the apparent construction of the language, I should think extended to the east—certainly to the west. And there is another letter which I will refer to, about that. Then he says:

I referred to the communications already made by Mr. Phelps on this subject to Lord Salisbury, and said that I should be obliged to refer to you the proposals which had just been made, before expressing an opinion with regard to them.

I have accordingly the honor to ask for instructions in reference to the same.

Meanwhile the Marquis of Salisbury promised to have prepared a draft convention for submission to the Russian embassador and to myself. I shall lose no time in forwarding you a copy of this document when received.

I have omitted a paragraph in Mr. White's letter, that I should have read. At the bottom of page 179 he says:

His lordship intimated furthermore that the period proposed by the United States for a close time, April 15th to November 1st, might interfere with the trade longer than absolutely necessary for the protection of the seals, and he suggested October 1st, instead of a month later, as the termination of the period of seal protection.

Then Mr. Bayard replies to Mr. White. The letter is on page 180 of the same book, under date of May 1st, 1888.

Your dispatch No. 725 of the 20th ultimo stating the result of your interview with Lord Salisbury and the Russian ambassador relative to the protection of seals in Behring Sea, and requesting further instructions as to their proposals, has been received.

As you have already been instructed, the Department does not object to the inclusion of the sea of Okhotsk, or so much of it as may be necessary, in the arrangement for the protection of the seals. Nor is it thought absolutely necessary to insist on the extension of the close season till the 1st of November.

Only such a period is desired as may be required for the end in view. But in order that success may be assured in the efforts of the various Governments interested in the protection of the seals, it seems advisable to take the 15th of October instead of the 1st as the date of the close season, although, as I am now advised the 1st of November would be safer.

The suggestion made by Lord Salisbury that it may be necessary to bring other Governments than the United States, Great Britain, and Russia into the arrangement has already been met by the action of the Department, as I have hitherto informed you. At the same time the invitation was sent to the British Government to negotiate a convention for seal protection in Behring Sea, a like invitation was extended to various other powers, which have without exception returned a favorable response.

In order, therefore, that the plan may be carried out, the convention proposed between the United States, Great Britain, and Russia should contain a clause providing for the subsequent adhesion of other powers.

Mr. White then writes to Mr. Bayard on the 20th of June, 1888. It is on page 181:

I have the honor to inform you that I availed myself of an early opportunity to acquaint the Marquis of Salisbury and the Russian ambassador of the receipt of your instructions numbered 804, of May 3rd.

(That is the last letter I read:)

And shortly afterwards (May 16) His Excellency and I called together at the Foreign Office for the purpose of discussing with his lordship the terms of the proposed convention for the protection of seals in Behring Sea. Unfortunately Lord Salisbury had just received a communication from the Canadian Government stating a memorandum on the subject would shortly be forwarded to London, and expressing a hope that pending the arrival of that document no further steps would be taken in the matter by Her Majesty's Government.

Now I turn from this American evidence to some letters that are to be found in the same third volume of the British Appendix from which I have been reading before. I have shown the Tribunal (because I attach so much importance to this that I think it ought to be clearly perceived whether this was a misunderstanding or not), what view was entertained in regard to it, and what was understood about it by the American representatives in London, and through them, by the United States Government at home. I refer to a letter from the Marquis of Salisbury to Sir R. Morier and also to Sir Lionel West the British Minister at Washington. Duplicates of this letter seem to have been sent out, one to Sir Robert Morier and the other to Sir Lionel West. It

is to be found at page 196 of the 3rd volume of the British Appendix to the Case.

SIR: The Russian Ambassador and the United States Chargé d'Affaires called upon me this afternoon to discuss the question of the seal fisheries in Behring's Sea, which had been brought into prominence by the recent action of the United States.

The United States Government had expressed a desire that some agreement should be arrived at between the three Governments for the purpose of prohibiting the slaughter of the seals during the time of breeding; and, at my request, M. de Staal had obtained instructions from his Government on that question.

M. de Staal, you will recollect, Sir, was the Russian Ambassador:

At this preliminary discussion it was decided provisionally, in order to furnish a basis for negotiation, and without definitively pledging our Governments, that the space to be covered by the proposed Convention should be the sea between America and Russia north of the 47th degree of latitude;—

that gives the entire southern line—

that the close time should extend from the 15th of April to the 1st November;

that was written before Mr. Bayard's suggested modification that he would take the 15th October—

that during that time the slaughter of all seals should be forbidden; and vessels engaged in it should be liable to seizure by the cruisers of any of the three Powers, and should be taken to the port of their own nationality for condemnation; that the traffic in arms, alchol, and powder should be prohibited in all the islands of those seas; and that as soon as the three Powers had concluded the Convention, they should join in submitting it for the assent of the other Maritime Powers of the northern seas.

The United States Chargé d'Affaires was exceedingly earnest in pressing on us the importance of dispatch on account of the inconceivable slaughter that had been and was still going on in these seas. He stated that in addition to the vast quantity brought to market, it was a common practice for those engaged in the trade to shoot all seals they might meet in the open sea, and that of these a great number sank, so that their skins could not be recovered.

On the 28th of July there appears in the British Appendix the same Volume, page 209, a letter from the United States Minister who had then returned to London to the Marquis of Salisbury; I ask you to notice this date, July 28th, 1888.

This letter is as follows:

MY LORD: I beg to recall your Lordship's attention to the subject of the proposed Convention between the Government of the United States, Great Britain and Russia for the protection of the seal fisheries in Behring Sea. A considerable time has now elapsed since the last conversation I had the honour to have with your Lordship in regard to it, when it was mutually believed that an early agreement might be arrived at.

I am sure your Lordship will concur with me in conceiving it to be for the interest of all parties that a conclusion should be reached as soon as possible. And my Government instructs me respectfully to urge upon Her Majesty's Government the propriety, under existing circumstances, of immediate action.

I understand the Russian Government to be prepared to concur in the proposed Convention as soon as the other Governments concerned are ready to assent to it.

Here, sir, you have from Lord Salisbury in his letter to the British representatives abroad, a statement which precisely concurs in every particular with that of the American Minister, and the American chargé d'affaires, in representing this agreement to their Government.

Then there took place a correspondence, or perhaps I should say there had taken place in the meantime a correspondence from April to July between the Governments, containing a suggestion made in the form of a letter of the United States Minister, that has been read, as to the means by which this convention should be carried into effect, and whether legislation would not be necessary in both countries to empower the Governments and the courts of the Government to enforce

the provisions of the stipulations; and it appears from that correspondence that the suggestion made by the American Minister to Lord Salisbury, as it was made to his own Government, was acceded to; that it was proposed by his Lordship to have introduced into Parliament a bill for the enforcement of this proposed Convention; that a copy of it was promised to the American Minister, at his request, for the use of his Government; that subsequently Her Majesty's Government thought it would be better to enforce the convention in Great Britain through orders in Council, and that was understood by Mr. White to mean that no act of Parliament was necessary, but that the Executive would enforce it through orders in Council. That mistake of his was subsequently corrected by an explanation from the British Foreign Office that they only meant that instead of passing a definite bill prescribing the manner in which a Convention should be carried out which was not yet formally executed, an act should be passed empowering the Privy Council to issue such orders and under such circumstances as might be necessary.

I allude to this correspondence only to say that it is apparent from it that the convention was agreed to be executed on both sides, and that the details of it were all understood, and that it was likewise the subject of consideration and of conclusion as to the means by which it should be carried into effect; and whether an act was introduced into Congress for that purpose, I really do not know. Now, sir, why are we here?

Sir RICHARD WEBSTER.—There is a letter of the 3rd of September on page 220, from Lord Salisbury to Sir Lionel West, which I think should be read in connection with what you are saying.

Mr. PHELPS.—I will read it with much pleasure:

With reference to my despatch of the 16th April last, relative to the proposals received from the Government of the United States for concerted action on the part of the Powers interested in the matter, with a view to the establishment of a close season for the preservation of the fur-seals resorting to Behrings Sea, I have to inform you that I have recently had a long conversation with Mr. Phelps on the subject.

He stated that his Government were very anxious that an agreement should be arrived at as soon as possible.

I pointed out the difficulties felt by the Canadian Government, and said that while the scheme was favorable to the industries of the mother country, considerable apprehension was felt in Canada with respect to its possible effect on colonial interests.

I added that I was still sanguine of coming to an arrangement, but that time was indispensable.

That letter is on my notes to have been read a little later in another connection.

Sir RICHARD WEBSTER.—I beg your pardon, Mr. Phelps.

Mr. PHELPS.—It does not disturb me at all. I am glad to read it at this time to oblige my learned friend; because I was about to put the inquiry—I had put the inquiry—How come we here? After the agreement that you learn from both these Governments had been made, its details adjusted, the methods of its being carried into effect considered and arranged, and after repeated applications by the United States Government, based upon the urgency of the case, had been met by saying that it was necessary to consult Canada. We have been spoken of as complaining of that. Certainly not; it was the duty of the British Government to consult the province on that subject, and we at once acquiesced, as will be seen from the correspondence, in the propriety of waiting until an answer could be had. Then we find as late as September, after the communication from Canada that I am about to read from, Lord Salisbury writes that he had had a conversation

with the American Minister, who was pressing for the fulfillment of the Convention, and had told him that time was necessary, but that he was still sanguine that it would be executed.

Now, what was the difficulty? The difficulty was the protest of Canada. It was communicated from the Foreign Office to the Colonial Government. Time was demanded, and an official reply was sent back to Her Majesty's Government, which is the reply Lord Salisbury alludes to in the letter I have just read, as the cause of the delay. On page 212 of the same book, the third volume of the British Appendix, under date of August 18th, is a letter from John Bramston, whom I believe my friend said was—

Sir RICHARD WEBSTER.—He was a Secretary of the Colonial Office.

Mr. PHELPS.—A Secretary of the Colonial Office.

SIR: With reference to the letter from this Department of the 10th instant, I am directed by Lord Knutsford to transmit to you, to be laid before the Marquis of Salisbury, a copy of a dispatch from the Governor-General of Canada forwarding a Minute of his Privy Council on the subject of the proposal of the United States Government for the establishment of a close time for seals in Behring's Sea.

In view of the explanations of the Dominion Government, which state very clearly the strong objections to the proposed close season, it appears to Lord Knutsford that it will be necessary for the United States Government to make some modified proposal if the negotiations are to have any useful result.

The enclosure in that is "The Report of a Committee of the Honorable Privy Council for Canada, approved by His Excellency, the Governor-General in Council, on the 14th July, 1888." I will read the whole of it, as it is brief:

The Committee of the Privy Council have had under consideration a despatch dated the 8th March, 1888, from the Right Honorable the Secretary of State for the Colonies, transmitting a copy of a letter from the Foreign Office, with a note from the United States Minister in London, submitting a proposal from Mr. Secretary Bayard for the establishment of a close season for the seal fishing in and near Behring's Sea, to extend from the 15th April to the 1st November of each year, and to be operative in the waters lying north of latitude 50 degrees north and between longitude 160 degrees west and 170 degrees east from Greenwich, in which despatch Lord Knutsford asks to be favored with any observations which the Canadian Government may have to offer on the subject.

The Minister of Marine and Fisheries to whom the said despatch and inclosures were referred, submits a Report thereon, dated the 7th July, 1888, protesting against Mr. Bayard's proposal as an unjust and unnecessary interference with, or rather prohibition of, rights so long enjoyed to a lawful and remunerative occupation upon the high seas.

The Committee concur in the said Report, and advise that a copy thereof, and of this Minute, if approved, be transmitted by your Excellency to the Right Honorable Secretary of State for the Colonies.

Then follows the Minute from the Department of the Marine and Fisheries, as the result of the Report of the Committee of the Privy Council, signed by George E. Foster, Acting Minister of Marine and Fisheries, in which the grounds of the objection were stated.

I cannot take your time, Sir, to read the whole of this, nor is it necessary. It is in print before you. I only read enough to point out that their objection is that the increase of the seals is so great, the number so large, that the pelagic sealing complained of by the United States does not even stop the increase. Therefore, that the convention cannot be necessary for the preservation of the seal, and that the real object of the United States is not the preservation of the seal, which is in no sense endangered, but is an attempt to obtain a monopoly of the sealskins, and to deprive Canada of that share in the product obtained upon the high seas which can be taken, not merely without risk to the existence of the herd, but without stopping its increase.

He refers to a report of the United States Agent from which it appears, as he says:

1. That none but young male seals are allowed to be killed on the Pribilof Islands, and of these only 100,000 annually.
2. That a careful measurement of the breeding rookeries on St. Paul and St. George Islands showed 6,357,750 seals exclusive of young males.
3. That 90 per cent of the pups bred by these go into the water, leaving a mortality of but 10 per cent at the place of breeding.
4. That fully one-half of the above 90 per cent of pups returned the following year as yearlings to the rookeries, leaving thus a total mortality of 45 per cent from various causes at sea.

It needs but a slight consideration of these figures to demonstrate that an addition of millions each year must be made to the surviving seal life in the North Pacific Ocean.

The Agent in his Report says: "This vast number of animals, so valuable to the Government, are still on the increase. The condition of all the rookeries could not be better".

That report is stated to have been dated July 18th, 1887.

Sir RICHARD WEBSTER.—It is a United States document.

Mr. PHELPS.—Yes; it is quoted from a United States document.

Against the enormous yearly increase of seal life may be placed the average slaughter as given in the Memorandum attached to Mr. Bayard's letter, viz., 192,457 for the whole world, or for the seals near to Behring's Sea as follows:

Pribilof Islands	94,967
Commander Islands et Robbin Reef	41,893
Japan Islands	4,000
North-west coast of America	25,000
Or a total of	165,860

With an annual clear increase of millions, and an annual slaughter of less than 200,000 in the North Pacific Ocean, it surely cannot be contended that there is any necessity for such stringent and exclusive measures as the one proposed in order to preserve the seal fishery from threatened destruction. Not only would it appear that the present rate of catch could be permitted, and a continual increase of the total number of seals be assured, but it would seem that this annual take might be many times multiplied without serious fears of exhaustion so long as the present condition of breeding on the Pribilof Islands are preserved.

And he goes on to discuss the subject. The purport of it all is, as I have said, that while this proposal of the United States is totally unnecessary, altogether uncalled for, the real motive of it is to establish an absolute and complete monopoly on the islands.

Senator MORGAN.—Mr. Phelps, before we rise for the recess, I would like to know whether in the understanding that there is between the counsel in this Case, in regard to the geographical definition of Behring Sea, the line is to be drawn inside the Aleutian range or outside?

Mr. PHELPS.—Do you mean, Senator, on the question of whether it is included in the Pacific Ocean?

Senator MORGAN.—No; I mean in reference to the words in the treaty "In or habitually resorting to Behring Sea."

Sir RICHARD WEBSTER.—I might perhaps save trouble on this matter by saying and I think Mr. Phelps will agree that the matter is a little involved, but so far as Her Majesty's Government is concerned we have not the slightest objection to the passes into Behring Sea being considered as part of Behring Sea. I do not think it would be accurate to consider the passes into the sea as being a part of it, but for the purposes of the Regulations I was discussing yesterday, we have not the slightest objection to those passes being considered a part of the sea.

Mr. PHELPS.—Yes, Sir. That answers Senator Morgan's question. If you will permit me a moment, Mr. President, the Minute that I have

been reading from is dated the 7th day of July, 1888. It was approved by the Governor-General in Privy Council on the 14th of July, 1888 and it was transmitted by Lord Stanley of Preston to Lord Knutsford on the 3rd of August 1888, and would be in the possession of the British Foreign Office in about the usual time after that.

The Tribunal here adjourned for a short time.

Mr. PHELPS.—My learned friend, Sir Richard Webster desires that I should refer to another letter upon the same subject, which I had not mentioned this morning. I do it with great pleasure, because it is by no means my intention to deduce any conclusions from any part of this correspondence which are not sustained by the whole of it. It is a letter from Lord Salisbury to Sir Julian Pauncefote of the 22nd October 1890, and it is in the 3rd British Appendix, page 18 of the second part. The Tribunal will remember before I read from this letter, that the correspondence I have been reading took place at, and immediately following, the time when the Agreement between the two Governments for a convention that I was speaking of took place.

Senator MORGAN.—In 1888?

Mr. PHELPS.—Yes, the letters on both sides. Now on the 22nd October 1890, Lord Salisbury writes to Sir Julian Pauncefote a letter which is produced here, in which, being pressed upon this subject, he gives an explanation:

> I understand his complaint—

that is to say, in Mr. Blaine's correspondence—

> to be that, in a conversation with Mr. Phelps, reported by that gentleman in a despatch dated the 25th February, 1888, I had assented to the American proposition to establish, by mutual arrangement between the Governments interested, a close time for fur-seals between the 15th April and the 1st November in each year, and between 160° west longitude and 170 east longitude in the Behring's Sea; that I had undertaken to cause an Act to be introduced in Parliament to give effect to this arrangement as soon as it could be prepared, and that I subsequently receded from these engagements.
>
> The conversation in question took place on the 22nd February 1888, and my own record of it, written on the same day in a despatch to your predecessor, is as follows:
>
> Mr. Phelps then made a proposal on the basis embodied in Mr. Bayard's despatch of the 7th February, a copy of which accompanies my previous despatch of this day's date. Mr. Bayard there expresses the opinion that the only way of preventing the destruction of the seals would be by concentrated action on the part of the United States, Great Britain, and other interested Powers, to prevent their citizens or subjects from killing fur-seals with firearms or other destructive weapons north of 50° north latitude, and between 160 west longitude and 170° east longitude from Greenwich, during the period intervening between the 15th April and the 1st November. I expressed to Mr. Phelps the entire readiness of Her Majesty's Government to join in an Agreement with Russia and the United States to establish a close time for seal fishing north of some latitude to be fixed.

And he subsequently discusses that at a length I need not read, speaking very kindly of the United States Minister and giving his views which are before you.

I am very glad that this letter, as it is in the case, where it would naturally encounter and probably has before encountered the eye of the Tribunal, should have been brought to my attention by my learned friend on the other side. I appeal from that letter which is not after all very different from what appeared from the former correspondence—I appeal from Lord Salisbury's recollection in 1890, to what he said in the repeated letters I read this morning, written immediately after that agreement was made. If the Tribunal take the trouble, which I will not stop to do, to compare the letters which I have read this morning from the British Government as well as from the representative of the American Government with the subsequent recollection of Lord Salis-

bury in 1890, I think they will find in which he was correct, and in which he was undoubtedly mistaken. In that letter (you will remember those letters) he suggested the 47th parallel. He states the agreement to have been that both the dates were fixed, and the limits were fixed, when now he seems to be of a recollection that all he agreed to was something or other to be fixed hereafter.

Now still on the point whether there could have been any misunderstanding or rather want of information on the part of Lord Salisbury, I want to call your attention to a letter on the 24th page of this book, the third British Appendix, from Messrs. Lampson the great fur house of London through whose hands as it has appeared and will appear in another connection all these seal skins passed. They are a very old established house, and the letter I refer to is a letter from these gentlemen to the Earl of Iddesleigh when he was Secretary for Foreign Affairs, dated the 12th November 1886, almost two years before the making of the Agreement between Lord Salisbury and the American Minister:

MY LORD: We understand a question of international law has arisen between the Government of the United States on the one hand, and the Governments of Great Britain and of the Dominion of Canada on the other hand, respecting the seizure by the United States Revenue cutter "Corwin" of certain Dominion fishing-vessels engaged in capturing fur-seals in the waters of Alaska.

As the future existence of the fur-seal skin traffic, in which we have for years past been engaged, largely depends upon the settlement of this question, we beg to submit for your consideration, the following facts:

Situated in the waters of Alaska, latitude 57° north, longitude 170° west, is the Pribilof group of islands, belonging to the United States.

These islands, which are occupied every year from May to October by a large number of fur-seals for the purpose of breeding, have been leased to an American Company under stringent conditions, which restrict them from killing more than 100,000 young males *per annum*, and strictly prohibit them from killing any female seals whatever.

The fur-seal being a polygamous animal, the annual increase is not affected by the killing of this limited number of young males; and it has been found that the wise nursing by these means of this very important fishery has not only resulted in the preservation of the seals during the past sixteen years, but has also given an ample supply of skins for purposes of trade.

During the last few seasons, however, fishing vessels have been fitted out from ports in British Columbia and the United States, and have been engaged in the wholesale slaughter of female seals, which, during the breeding season, swarm in the waters round the island for a considerable distance out to sea.

Last summer several of the Dominion vessels were seized by the United States cutter, and it is stated that a case is being prepared by the Dominion Government, for presentation to the United States Government, disputing the legality of the said captures.

Should Great Britain deny the right of the United States Government to protect the fishery in an effectual manner, there can be no doubt that the Alaska fur-seals, which furnish by far the most important part of the world's supply of seal-skins, will be exterminated in a very few years, just as in the South Atlantic the Shetland and Georgia fur-seals which used to furnish even finer pelts than the Alaskas, have already been.

It is evident, therefore, that the benefit derived by the Dominion fishing-vessels from the slaughter of these female seals will be short lived.

We would next point out that the 100,000 skins, the annual produce of the islands (worth *l.* 350,000 at present prices) have been shipped to us for sale and manufacture in London for sixteen years past, thus affording in this city employment for a large amount of capital and means of subsistence to some 10,000 people, many of whom are skilled workmen earning wages up to *l.* 3 per week.

We need, therefore, hardly suggest that it would be a short sighted and disastrous policy to allow such an industry to be destroyed, especially at a time when so much distress is already prevalent among the working classes.

We therefore earnestly trust the British Government will, after verifying the above facts, see its way to give its friendly support to the United States in the exercise of their right to protect and preserve an article of commerce equally effecting the interests of both countries. We have telegraphed to New-York for the

"Monograph of the Seal Islands" by Professor Elliott, which fully describes the seal life upon the islands. When we have received the book we shall have the pleasure of handing it to your Lordship.

Senator MORGAN.—What is the date of that?

Mr. PHELPS.—November 12th 1886, before any communication had passed between the United States and the British Government on that subject excepting a letter of inquiry from the Foreign Office to the United States State Department, after it had heard of the arrest of these vessels, desiring to be informed of the particulars. I cite it for the purpose of showing that when this agreement during the long period between September 1887 and September 1888 was in process of being made and of having its details settled and the legislation necessary provided for it, the British Foreign Office not only had this paper of Mr. Bayard's, which I referred to this morning stating all these facts, and this communication from Canada in July 1888 which I referred to, but they had for two years the remonstrance of this important house of their own subjects, in view of their own interests and what they conceived to be British interests quite irrespective of the United States, so that the subject was in no respect a new one. And so Lord Salisbury instead of dealing with a subject he was not conscious he understood, had complete information from various sources in respect to all the facts, connected with it.

But if there was a misunderstanding at the time of it, if when he gets this information from Canada, he felt he had been misled, that he had acted too hastily, that he had been misinformed by Mr. Bayard, and that the facts stated in Mr. Bayard's communication did not stand the test of examination, or were exaggerated, or were inaccurate, he would have said so. He states himself when writing to the Colonial Office and to his Representative at Washington, at the same time that the American Minister was stating it to his own Government, that he was putting the matter off—expressing his regret—sanguine for more than thirty days after he had received these communications from Canada that the agreement would be carried out, and saying that only time was necessary to effect it;—and during all that time he never suggested either to the American Government or to its Representative, to the Colonial Government of Canada, to the Colonial Office, or to any of the ministers of the British Government anywhere, "we must recall this agreement, we have been hasty, we have acted without sufficient information". And whatever Lord Salisbury may remember as late as 1890 about the indefiniteness of the Agreement, which he does not deny that he made, is completely contradicted by his own letters in which he stated with the utmost particularity the very details which in 1890 he thinks were left for future adjustment.

Lord Salisbury was mistaken in that recollection; he had not before him, when he made that statement, these letters signed by himself. He was pressed,—a high-toned and honourable man, as incapable of receding from any Agreement that he had made as any man in the world, jealous of the honour of his Country, he was pressed with the position that the British Government found itself in. You see it transparent through all this correspondence. If, as I have said, he had been drawn hastily into this Agreement, or had entered into it under some misunderstanding, or if Canada had presented a remonstrance which justified him in receding, he would have done so. Instead of that, all through the summer he was saying, "Time only is necessary; we shall yet bring it about".

Then, when pressed at Washington by Mr. Blaine with this delay, no excuse for which had been offered by Her Majesty's Government, because they had heard from Canada, they had got this formal report from the Privy Council of Canada signed by the Minister, and that source was exhausted, still pressed, as he writes himself, by the American Minister calling upon him and urging dispatch, he writes a letter to which I must allude, and which will be found in the 1st Volume of the United States Appendix, page 238. It is quoted from by Sir Julian Pauncefote to Mr. Blaine, in a note of June the 30th, 1890:

I have received a dispatch from the Marquis of Salisbury with reference to the passage in your note to me of the 4th instant, in which you remark that in 1888 his Lordship abruptly closed the negotiations because "the Canadian Government objected", and that he "assigned no other reason whatever".

In view of the observations contained in Lord Salisbury's dispatch of the 20th of June, of which a copy is inclosed in my last preceding note of this date, his Lordship deems it unnecessary to discuss at any greater length the circumstances which led to an interruption of the negotiations of 1888.

With regard, however, to the passage in your note of the 4th instant above referred to, his Lordship wishes me to call your attention to the following statement made to him by Mr. Phelps, the United States Minister in London, on the 3rd of April, 1888, and which was recorded in a despatch of the same date to Her Majesty's Minister at Washington:

Under the peculiar political circumstances of America at this moment, said Mr. Phelps, with a general election impending, it would be of little use, and indeed hardly practicable, to conduct any negotiation to its issue before the election had taken place.

Now, let me say for myself, without making myself a witness, that I am quite willing it should stand as Lord Salisbury remembers it, for the purposes of this case; I did make a similar remark to his Lordship. It had reference, however, to a very different subject, a proposed Treaty between the United States and the British Government on the subject of the Fisheries on the East Atlantic. I said it was of no use to make a Treaty with the expectation that it would pass the United States Senate where a vote of two-thirds is required to confirm it, with a political majority in the Senate adverse to the Government. And subsequent events showed the correctness of that opinion, because an excellent Treaty was made which failed of ratification by a strict party-vote. But let it stand, because I do not propose to testify.

In the third British Appendix, page 189, is Lord Salisbury's letter to Sir Lionel West stating this observation of mine. This is April 3rd, 1888, the time it was made, the time he refers to in his communication with Sir Julian Pauncefote that I have just referred to, and he says,

The United States Minister called upon me to-day, previous to his return to America. He was anxious to speak to me especially with reference to the condition of the seal fishery in Behring Sea. He expressed the hope instructions would soon arrive which would enable the Russian Ambassador to negotiate on the subject of establishing a close time during which the capture of seals in certain localities should not be permitted; and he added that, whenever that Convention could be arranged, it would put an end to all the difficulties which had arisen with respect to the seal-fishery in that sea.

Mr. Phelps was very anxious for dispatch, because the destruction of the species was enormous, and was increasing in volume every year. But under the peculiar political circumstances of America at this moment, with a general election impending, it would, he said, be of little use, and indeed, hardly practicable to conduct any negotiation to its issue before the election had taken place. He held it, however, to be of great importance that no steps should be neglected that could be taken for the purpose of rendering the negotiation easier to conclude, or for supplying the place of it until the conclusion was obtained. He informed me, therefore, unofficially, that he had received from Mr. Bayard a private letter, from which he read to me a passage to the following effect:—"I shall advise that secret instructions be given to American cruizers not to molest British ships in Behring's Sea, at a distance from the

shore, and this on the ground that the negotiations for the establishment of a close time are going on." But, Mr. Phelps added, there is every reason that this step should not become public, as it might give encouragement to the destruction of seals that is taking place.

And then something more in regard to communicating that to Lord Lansdowne.

He also said he presumed that any Convention for exercising police in Behring's Sea must, in the case of America and Great Britain, be supported by legislation; and he would be very glad if Her Majesty's Government would try to obtain the requisite powers during the present session.

I replied that the matter should have our immediate attention.

You perceive, therefore, that when pressed for an excuse for not carrying this Convention into effect, Lord Salisbury falls back upon a remark that I have no doubt he supposed was applied to this subject, as an excuse for delay, when the very letter in which he communicates that remark to his own Minister shows that if it was made or as it was made, it was used by the Minister as a reason for greater despatch. So that the reason for delay which he set Mr. Blaine to defend himself against, as coming rather from the American side than the British, was a reason that was given on the American side for greater despatch. It shows that a mind charged with many matters is liable sometimes to forget exactly what took place in particular conversations. It is unquestionable that Lord Salisbury, as I have said, felt the embarrassment of the position in which he was placed.

You will see that this agreement was made, continued, and repeated and attempted to be carried out, as far as Great Britain could get, without the concurrence of Canada;—that nothing but the objection of Canada prevented its being carried into effect; and that the objection of Canada was founded upon a statement of fact which now is not pretended to be true; it was founded alone upon the supposition that the increase of seals was so great that all the results of pelagic sealing would not even arrest it, and that, therefore, the attempt of the United States to interfere was simply saying, while the abundance of these animals is greater than we can take, and greater than we want, we will still prohibit you from taking a small fraction out of the sea of the seals we should not and could not use.

Mr. Blaine is inaccurate in saying that the British Government abruptly terminated these negotiations. It never did terminate them; they died of inanition, and on the 12th of November is the letter of the United States Minister that has been so often referred to that I shall not read from it again, which is the last time, I believe, till the subject was referred to in 1890 by Mr. Blaine, in which this Convention figures, and which expresses the belief of the Minister, though Lord Salisbury had not said so, that Great Britain would not carry that arrangement out without the consent of Canada, that the consent of Canada could not be had, and that the United States Government might as well understand that the whole agreement was at an end. That is the purport of it.

Now, when you come (and I shall soon be through with these preliminaries, I hope) to the renewal of the negotiations with Mr. Blaine, the first communication in regard to which I read this morning,—between Sir Julian Pauncefote, the then Minister, and Lord Salisbury,—what then was the attitude of Great Britain? It was, from first to last, all the way through, exactly this:—"We deny the right of the United States Government to protect itself against this destruction of the seals, because it would be an infringement of our rights upon the high seas. We deny that you have acquired that right from Russia;

we deny that you have acquired it in any other way; but, when you come to the business of preserving the seals, we are ready to join you in any and every Regulation necessary for the purpose, without regard to any interest which it may affect". That was their position,—a position perfectly honourable to Great Britain. Whether right in its law on the question of right or not, is another question. It was perfectly honourable to Great Britain to say "We are with you in the preservation of this animal; we do not desire to countenance or to inflict upon you any serious injury; we simply assert what we conceive to be the right of the sea; but we will join you in everything that is necessary". So that the issue with Great Britain came to be, not whether pelagic sealing was right, not whether it could be justified, not whether it was sure to result in the extermination of the seals,—not that at all. It was, "Who shall protect the seal herd by such measures as may be necessary? You propose to do it for yourselves; to that we object, but we will join you in doing it."

In view of the attitude which this case has assumed, I must trouble you, not at length, with a few extracts from the correspondence to establish that position, because I think it a very important one in the threshold and outset of this case. I say that Great Britain never undertook to defend this business of pelagic sealing; she never undertook to deny that it resulted in extermination; she never undertook to say that the Canadians must be protected in it. In one letter only in all this voluminous correspondence, and if I have overlooked anything I shall be glad to be corrected, in one letter only, in the most guarded manner, something is intimated by Lord Salisbury on this point.

It will be found in the first United States Appendix, page 208, in a long letter in reply to Mr. Blaine.

With regard to the first of these arguments, namely, that the seizure of the Canadian vessels in the Behring's Sea was justified by the fact that they were engaged in a pursuit that is in itself *contra bonos mores*—a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States, it is obvious that two questions are involved; first, whether the pursuit and killing of fur-seals in certain parts of the open sea is, from the point of view of international morality, an offence *contra bonos mores;* and, secondly, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation, in time of peace, of the private vessels of a friendly nation.

Then he says,

It is an axiom of international maritime law that such action is only admissible in the case of piracy or in pursuance of special international agreement. This principle has been universally admitted by jurists, and was very distinctly laid down by President Tyler in his special message to Congress, dated the 27th February, 1843, when, after acknowledging the right to detain and search a vessel on suspicion of piracy, he goes on to say: With this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, outside the territorial jurisdiction.

Now, the pursuit of seals in the open sea, under whatever circumstances, has never hitherto been considered as piracy by any civilized state. Nor, even if the United States had gone so far as to make the killing of fur seals piracy by their municipal law, would this have justified them in punishing offences against such law, committed by any persons other than their own citizens outside the territorial jurisdiction of the United States.

In the case of the slave trade, a practice which the civilized world has agreed to look upon with abhorrence, the right of arresting the vessels of another country is exercised only by special international agreement, and no one government has been allowed that general control of morals in this respect which Mr. Blaine claims on behalf of the United States in regard to seal-hunting.

But Her Majesty's Government must question whether this pursuit can of itself be regarded as *contra bonos mores*, unless and until, for special reasons, it has been agreed by international arrangement to forbid it. Fur-seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius*

until they are caught; no person, therefore, can have property in them until he has actually reduced them into possession by capture.

It requires something more than a mere declaration that the Government or citizens of the United States, or even other countries interested in the seal trade, are losers by a certain course of proceeding to render that course an immoral one.

That is all the defence—a defence based upon a technical proposition of law—that you cannot call this *contra bonos mores*, (as my friend the Attorney General argues here) until it is agreed by nations so to classify it. My friend Mr. Coudert was kind enough to attribute to me the honour of having introduced into this discussion the Latin phrase *contra bonos mores*. I must disclaim it. Such ideas as I possess I am under the necessity of expressing, as well as I can, in the English language, with which I am more familiar. Whether the slaughter of animals in this condition, in such a manner as has been alluded to, is a breach of good manners, may be remitted to the forum of good manners to consider. I should not so class it. It is very interesting to see in the history of discussion, what is the first step that always has to be taken, and always is taken, in defending that which is indefensible; it is to find a phrase by which it can be spoken of without describing its character. Some people acquire a considerable reputation in devising ingenious circumlocutions by which they can describe a thing too objectionable to be stated in straightforward language, through the convenient cover of the Latin or the French. That is not one of my accomplishments, and I must modestly disclaim the honour which my friend has attributed to me of introducing this phrase.

Now in the latter part of this same letter there is one other sentence by Lord Salisbury. I am reading, Sir, from page 210:

The statement that it is "a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to their extinction" would admit of reply, and abundant evidence could be adduced on the other side. But as it is proposed that this part of the question should be examined by a committee to be appointed by the two Governments, it is not necessary that I should deal with it here.

Now, Sir, if I am not mistaken, in those two paragraphs in the same letter, in one of which he says (as the learned Attorney General has said here), that this business, whatever it is, cannot be technically classed as *contra bonos mores* until the nations have agreed to call it so,—and the other in which he says that this statement by Mr. Blaine that it certainly leads to extermination would admit of reply and that there is or may be evidence on the other side, is every word that can be ascribed to Great Britain from the beginning to the end of all this correspondence, which approaches the point of defending either the character or the consequences of this business that is called "pelagic sealing." Another invention, (in the English language, but derived from the Greek as far as the word "pelagic" is concerned), by which this slaughter is characterized.

I wish now to call attention on this point to some extracts from British correspondence, having pointed out that, strenuous as Great Britain was in asserting what she claimed to be the rights of the sea, the business itself never was defended except in the faint manner I have indicated. On the other hand, in April 1890, Sir Julian Pauncefote writes to Mr. Blaine—I am reading from the same United States Appendix, page 205.

It has been admitted, from the commencement, that the sole object of the negociation is the preservation of the fur-seal species for the benefit of mankind, and that no considerations of advantage to any particular nation, or of benefit to any private interest, should enter into the question.

Again under date of May 22nd 1889, pages 207 to 209 of the same book, Lord Salisbury writing to Sir Julian says:

Her Majesty's Government would deeply regret that the pursuit of fur-seals on the high seas by British vessels should involve even the slightest injury to the people of the United States. If the case be proved, they will be ready to consider what measures can be properly taken for the remedy of such injury, but they would be unable on that ground to depart from a principle on which free commerce on the high seas depends.

Sir Julian under date of June 3rd 1890, writes to Mr. Blaine at page 217 of the same book.

Her Majesty's Government are quite willing to adopt all measures which will be satisfactorily proved to be necessary for the preservation of the fur-seal species, and to enforce such measures on British subjects by proper legislation.

On June 9th 1890 at page 220 of the same volume Sir Julian writes again to Mr. Blaine:

Her Majesty's Government have always been willing, without pledging themselves to details on the questions of area and date, to carry on negociations, hoping thereby to come to some arrangement for such a close season as is necessary in order to preserve the seal species from extinction.

Then on June 20th 1890, Lord Salisbury writes to Sir Julian, at page 286 of the same book:

Her Majesty's Government always have been, and are still, anxious for the arrangement of a convention which shall provide whatever close time in whatever localities as is necessary for the preservation of the fur-seal species.

Then on the 21st of July 1891, Lord Salisbury again expresses himself thus to Sir Julian at page 290 of the same book:

Whatever importance they

(the British Government)

attach to the preservation of the fur-seal species—and they justly look on it as an object deserving the most serious solicitude—they do not conceive that it confers upon any maritime power rights over the open sea which that power could not assert on other grounds.

And on page 244 of the same volume his Lordship says in the same letter.

Her Majesty's Government have no objection to refer the general question of a close time to arbitration or to ascertain by that means how far the enactment of such a provision is necessary for the preservation of the seal species, but any such reference ought not to contain words appearing to attribute special and abnormal rights in the matter to United States.

These are but selections. There are other passages, to the same purport, showing that the position which Great Britain assumed in the second stage of this negotiation with Mr. Blaine was that the result of the negotiation ought to be that all measures that were found to be necessary for the protection of the seal, without regard to the advantage of any nation or of any interest, should be taken. Then it was proposed by Great Britain—this was all long after the views of Canada had been heard—to have these measures ascertained by a Joint Commission. The proposition for a Joint Commission, which resulted in the provision of the *modus vivendi* of this Treaty, came in the first place from Great Britain. It was in the first instance resisted by the United States. It was adhered to by Great Britain with so much pertinacity that it was finally adopted. Having reached the point of agreeing that whatever was necessary for the preservation of the race would be assented to, the question then being what is necessary—a

point on which the British Government never expressed itself—it said, "we will refer that to a Commission".

In Sir Julian's letter of April 30th 1890 in the same volume from which I have been reading at page 205 he says:

> The great divergence of views which exist as to whether any restrictions on pelagic sealing are necessary for the preservation of the fur species, and if so as to the character and extent of such restrictions, renders it impossible in my opinion to arrive at any solution which would satisfy public opinion either in Canada or Great Britain or in any country which may be invited to accede to the proposed arrangement without a full inquiry by a mixed commission of experts the result of whose labours and investigations in the region of seal fishery would probably dispose of all the points in dispute.

And in that letter is proposed the draft of a legal convention constituting such a commission.

In the note of May 23rd to Lord Salisbury, Sir Julian says in relation to an interview with Mr. Blaine in which he had been urging upon the latter the propriety of adopting Lord Salisbury's proposed convention.

> Moreover, it supplies the most complete machinery for arriving at a final decision as to what regulations should be adopted for the preservation of the seal species.

Mr. Blaine replies to Sir Julian's note in the letter of April 30, 1890, in the same book, page 204, but he fails to comment on the position and he rejects the draft convention.

I need not read this correspondence, more or less of which has been referred to before. It shows throughout what I have stated, that this proposition for a joint commission came from Great Britain in the first place, was received with disfavor by the United States Government, was pressed again and again, assumed different forms, and finally was assented to by the United States Government and found its way into the Treaty.

What, then, was the final result of all this up to the time of the commencement of this Arbitration? It was that the Convention first agreed to, and delineated on the map, having fallen through for the reasons I have stated, and the negotiation being renewed, the attitude of Great Britain was that while the question of right must remain to be decided, which they could not agree upon, the matter of regulations should be referred to a joint commission, which they were confident would settle the business. So was Mr. Blaine. So were all those who had anything to do with it. They did not have a moment's doubt that when a commission of experts were sent out upon that theory to visit the islands and examine the subject and inform themselves and decide what was necessary for the preservation of the species, both nations would at once accede to it: but in the event that they failed to agree, it was provided that the subject should then be referred to arbitration—then and not till then—a contingency not foreseen, and which ought not to have occurred. We shall see as we go on how it happened that it did occur. It was in that event only that this Tribunal, provided for by the treaty, was to be charged with the business of doing what was first assigned to the mixed commission; and if that had been satisfactorily performed, both nations would have been quite willing to waive the discussion of the abstract question of right.

What is the attitude of this case as it appears before you now? The question of right still remains, as it remained before, to be discussed and decided. The learned Attorney General was desirous to persuade you that even the question expressed in the broad and comprehensive terms of the sixth article only meant that you were to try again these old Russian questions involved in the first four. I do not think that

requires reply. It did not seem to me that the suggestion commended itself to the judgment of the Tribunal. The question of right, upon whatever ground it is asserted and upon whatever ground it is denied, remains. My learned friends were alarmed apparently at a remark that fell from Senator Morgan, that he thought there was another question in this treaty. They seemed to fear there was some point as yet unknown and undisclosed, that was liable to spring out of the recesses of this document to embarrass the Tribunal, or to subject them to some claim they had not heard of. I did not so understand the remark of the learned Arbitrator. Perhaps I misunderstood it. I understood him to mean that these questions were to be read in the light of the first article of the Treaty, and that when read in connection with the context they submitted exactly the proposition I have submitted this morning, whether the right existed to carry on this business with its necessary consequences.

Now sir, it is for those who engage in such a business with such consequences to justify it. The attempt to assume that they are engaged in a lawful business and are surprised to find that upon some uncomprehensible grounds the pursuit of that business is objected to, will not succeed. The burden of justification is on the other side. To assume that they are simply engaged in a lawful industry which the United States claims upon some ground to interrupt, is to beg the whole question.

The question in regard to regulations I shall encounter later on. I am now saying, as I have said, that when a Government presents itself, as the proprietor of such territory, with such an industry established upon it for nearly half a century, and when it is proposed by the individuals, whose description I shall have to deal with later, to destroy that industry, to exterminate the race of animals upon which it is founded, and to do it in a manner that is prohibited by all law everywhere, and which is so barbarous and inhuman that it ought to be prohibited, if it had no consequences at all of an economical character, the parties that propose to do that under the pretence of the freedom of the sea, must establish their justification. The burden is upon them.

Now, how do they propose to do it? They rest their case upon two propositions: first, that the seals are *feræ naturæ*, and are therefore open to be killed by anybody; secondly, that the high sea is free, so that conduct such as I have described, if the Tribunal find as a matter of fact that it is described correctly, is a part of the freedom of the sea, and must be submitted to by any nation, whatever may be the consequences. Those are the propositions. That is the justification. Both those propositions we deny.

But before I discuss them, I had intended to contrast the position of Great Britain on this trial with the position that I have shown that it occupied all through the correspondence. There, questioning the right, undoubtedly, of the United States Government to protect itself, generous and complete in its offer to join the United States in doing everything that was necessary without regard to any interest. Here, the whole case, aside from the discussion of the question of strict right, has degenerated into a defence of the business of pelagic sealing, from the report of the British Commissioners, with which they set out, to the end of the argument of my learned friend, Mr. Robinson, when he appealed yesterday to the Tribunal to take care of the 1,083 people who are engaged in the business of pelagic sealing, to take care of the towns that desire to enhance their prosperity by inducing people to come there to engage

in such a business as that, to remember that this was a most important industry, and that no regulations must be adopted except such as were perfectly consistent with its preservation; a resistance from beginning to end to every proposal of regulations that did not provide—not only admit, but provide—for the continuance of this business in all its substantial particulars.

Which government has changed front in the history of this business? Is it that of the United States or that of Great Britain? On the diplomatic correspondence the record of Great Britain is perfectly clean and fair. It is not open to criticism except as to the correctness of their proposition that we may not defend ourselves against this wrong—a question that admits, of course, of discussion; but as to the rest of it, as to the inhumanity, the extermination, the injury to the United States—all that is put aside. Here we encounter, from one end to the other, the most strenuous resistance to any sort of regulation of any kind that puts any real restriction upon the business of pelagic sealing.

Returning, then, in the time that remains to me this afternoon, to the question of this justification, we reply to the propositions of Great Britain, that the seal are not *feræ naturæ*, in the legal sense of that term; that they are, in the true sense of the word, the property of the United States; and what I mean by the term "property", I shall try to describe. That, in the second place, such a business as we claim pelagic sealing is, is not open to anybody, upon the open sea any more than any where else, and that any nation that is injured by it has a right to object.

My learned friend the Attorney-General informs us that this case is not to be decided upon what appears to be right, or what appears to be wrong. It is to be determined upon the principles of international law; that the object of this Tribunal, the duty of this Tribunal, is to administer the principles of international law. We agree to that. We have not proposed any other standard. We have not asked to set up any rule of conduct that is not justified by what is properly called international law. Then what is international law? He tells us it is what the nations have agreed to; that the idea that international law depends upon what is right, upon what is just, upon what is indicated by morality and fair dealing, is chimerical; that a person who asserts any such proposition goes up into the clouds of metaphysics, and occupies himself with dissertations not upon what the law is, but what it ought to be; and that this Tribunal is not convened for that purpose.

On those questions of international law in respect to which it may be admitted that nations have so far concurred that the points have become settled and established and understood, there is no question that such conclusions prevail. Nobody on our side has pretended that you were to overrule established principles of international law that have become settled and recognized, because you were brought to see or to think that you saw, that they are in some respects contrary to ethical considerations; so that if a vessel were brought before His Lordship, if he were sitting again in the court over which he so long presided with such eminent distinction—captured in war, for a breach of blockade, or for carrying contraband of war, or captured by a privateer, legitimately commissioned by one of the belligerents and brought in for condemnation in his court,—he is to be harangued upon the subject of whether the established law of the world upon those points is or is not in conformity with ethical considerations, is or is not what he would declare the law to be if in place of a judge he were a law-giver, to propound law instead of administering it. Nobody pretends that. It would be absurd.

In the first place, we contend that this case of ours, this right of property or protection, call it what you please, is as completely established by the just principles of international law as it is by the consideration of ethics and morality.

But waiving that point for the moment, which we will discuss by and by, suppose it is not. Suppose you have here presented to you for decision a question of international law, which can be said to be a new one. Such cases are of very rare occurrence. That place and those transactions in this world which the "gladsome light of jurisprudence" has not reached are very few. But suppose you encounter one here. The question confronts you as a Tribunal, and, whether it is new or old, it must be decided; and if in looking over the field of what is called authority you are unable to say that it has been provided for before, what then? Shall it be decided right, if what is right is plain and clear not only to the legal sense, but to the most common and way-faring sense in the world? "Oh no" says my learned friend; "you must not do that. The nations have not consented." But you must decide it. If you cannot decide it right, you must decide it wrong. Have the nations consented to that? Is that what the nations have agreed? You are in a position where you must go one way or the other, where you cannot fall back and say, "We do not know; it is too soon to decide this question. The nations have not agreed. It is plain how it ought to be decided, if we were at liberty to do it, but we are admonished that no considerations of that sort constitute international law, and that the sanction of the nations must first be had." Therefore, what is the alternative? Decide it wrong? If this is—what I altogether deny—such a case as that; if this is a new question; if it is one upon which you close your books, having searched them in vain for light, the alternative is to decide it right or to decide it wrong. If nations have not agreed that you may decide it right, then you must assume that they have agreed that you should decide it wrong. That is the irresistible logical conclusion. My friend does not help you out of that dilemma with his definition of International law.

What is another consequence of his proposition? It is that international law can never advance another step. The last book is written; the last addition has been made. It is like the Mosaic law, written, laid up, historic, and cannot be extended another step in the administration of human affairs. In other words it is a dead law, because any system of law perishes when it ceases to keep up with all the vicissitudes, emergencies, requirements and conditions of human affairs; when its principles cease to be elastic enough to comprehend and take in every human transaction that can possibly occur on the face of the earth, and to settle all the rights that grow out of it, it perishes, as systems of law have perished before.

How can it advance? How has it advanced? What has been the growth of International law? There is no legislature to propound it, there are no Courts competent to declare it. There can be no general convention of nations called to agree to it. If you put a provision into a Treaty, that only makes the law of a contract, that is to say a law that binds the two parties to law which all the rest of the world may disregard. That is not international law. How then has it arisen? It has advanced from its earliest rudiments by a nation asserting for itself in every new emergency, under every new condition, in every step forward that human affairs have taken, what it claims to be right.

What it claims to be right, but that does not make it so. It remains to be seen what the world says, what intelligent mankind say. And

peradventure by the general acquiescence of men, by the approval of wise men, by the endorsement of Courts of Justice—in all ways in which the sentiment of the world transpires, the claim may bye and bye come to be what we call settled—no longer to be discussed. And the history of international law is simply the history of those assertions that have been successfully made by nations in their own behalf on the basis of what they thought was right and under the pressure of what they thought to be a necessity, or at least a propriety—the assertion I say of propositions and principles which have thus been gathered by the subsequent general concurrence of men into the purview of what is called international law.

Suppose, Sir, that any proposition, that if stated now would be said to be perfectly settled, was presented to a Court for the first time. Suppose there never had been a blockade of a port in the history of the world. Suppose now for the first time in a warfare between two great maritime Powers, one of them sends a squadron and blockades the port of another and stops commerce, trade and intercourse, and gives notice that it will capture and confiscate any vessel that undertakes to violate the blockade and carry on any trade, however innocent. Another nation—a neutral, says: "We recognize no such law as that. We are not parties to this war. We are engaged in an innocent, a lawful trade. We desire to continue it. We are not to be put down by either of these belligerents; we shall go in;"—and such a vessel is captured and brought up for condemnation. What shall the Court of the nation who has made that assertion say to such a case? Why, that nations have never agreed to this. That would be quite true. It is the first case that ever occurred. It is the first vessel that ever was seized for attempting to violate the first blockade that ever was made. What are you going to do with it? You must decide it one way or another. You must confiscate the vessel or let it go. I might continue these illustrations by referring to every proposition that might be agreed by international lawyers to be among the settled propositions. Suppose it is presented now for the first time. Why, the question must be—and no other ground could be found for disposing of it—what is right under the circumstances of the case? What do the necessities of the nation that has established this blockade require? What is it that the just defence of its interests needs?

That must be the resort because there is no other; and unless there had been some first case, there would be no international law to this day. Piracy never would have become an offence against nations. How came it to be an offence against nations? How came it to be on the open seas a business that anybody could interfere with, except the vessel that was attacked. How came it to pass that if an American pirate should capture a British vessel, a French cruiser might carry the pirate in for prosecution to a French Court, if France chose to empower her Courts to deal with such cases? It came to pass because under the pressure of the necessity, the right came to be asserted. The justice of the claim and the necessity of the case were so far recognized that the world approved of it; and it is by these successive steps, and by these steps alone, that every single proposition that may to-day be successfully affirmed to belong to the domain of international law had its origin, obtained its maturity and passed under the sanction which Courts of Justice and international obligations confer.

Now what is our proposition? It is that, where questions have become settled in this way, they establish the law, and the law is not open to

be changed by purely ethical considerations, until they become, at any rate, so strong that a nation is justified in asserting them; and so gradually the law becomes changed. On the other hand, as when the first Napoleon undertook to carry the right of blockade, that I have been speaking of, a step further, and to provide that a "paper blockade", as it was called, might be established by proclamation, and that he might exclude the vessels of neutrals from ports, while no blockading force was present, by virtue of a proclamation, what said the world to that? They rejected it. There is an illustration of an assertion that did not become international law. Then if you have before you a new question, or a new question in its application, have you anything to resort to when it must be decided, except the plain principles of right and justice, if you are able to see what they are, until the opinion of the world upon it transpires? It is a proposition that can be sustained by numberless illustrations. The only question can be whether the point is new, or is covered by the application of an old and established principle. That is the meaning of the authorities that were cited in the opening argument on the part of the United States so largely. That is what authors mean when they say that international law is founded on the principles of right and justice and conscience. They do not mean to say that established law may be defeated by resort to those considerations; but they do mean to say, that is the foundation, that is the source from which it is all derived. Those are the principles on which we are to proceed—until the time arrives when it is found that the contrary has become so far established that it is necessary to respect it. I shall have to refer to some authorities on this point, but the reference will be only brief.

The PRESIDENT.—Does this contention of yours go further than what you would say for municipal law?

Mr. PHELPS.—No, Sir, the same principle is at the root of municipal law; and I shall cite to-morrow a provision from the French Code that seems to me to bear upon that. But municipal law has two resorts that are not open in international law. There is the Legislature of the Municipality, which can pass Statutes which are law *proprio vigore*. Whether right or wrong, they become the law. There are the Courts sitting constantly to extend and apply the general principles of law so as to cover the case.

The PRESIDENT.—So is Diplomacy, I might suggest. You have been a Diplomatist yourself.

Mr. PHELPS.—Yes; so is diplomacy, but without the sanction attending the decisions of the constituted Tribunals in municipal Government. Therefore, municipal law has its regulated steps of progress, either through Statutes or through the Judgments of the Courts, because both those sources are authority,—they make law. But when it comes to the point which your question, Sir, suggests, when addressing the Court and invoking the application of an established principle to a new case, there you fall back on, and every Court, consciously or unconsciously, must be guided by, the plain consideration of right or wrong, until it gets to the line which separates the domain of law from that of morality. Therefore, I might appeal to a Court of Justice for some remedy, or redress, which morally I am entitled to, and might be met with the answer, "Your claim is only a moral one. You are outside of the domain of municipal law; you have sustained a wrong that, as moralists and as just men, we might be glad to see redressed; but it is not within the domain of law to deal with your case. That domain

must be enlarged by a Statute before we can deal with it." But as long as the suitor is within what may be called the province of municipal law, as long as he is dealing with a subject that the law deals with, so long all that he has to do is to make out a just case, unless he is encountered by a Statute or adverse decisions that have settled the law otherwise. That is the only distinction, in my judgment, Sir, if I have answered your question.

The PRESIDENT.—Yes; I am much obliged.

[The Tribunal thereupon adjourned until Friday, the 23rd of June, at 11.30 o'clock.]

FORTY-FOURTH DAY, JUNE 23RD, 1893.

Mr. PHELPS.—At the adjournment yesterday, Sir, I had been considering the proposition in respect to international law which had been advanced by my learned friends on the other side, particularly by the Attorney-General, that nothing could be comprehended within that definition that had not received the sanction of the established usage of Nations; that the requirements of justice, of ethics, of sound morality between Nations were not sufficient until the further sanction had been obtained of the custom of nations. I had endeavoured to point out that the proposition involved this necessary consequence, that international law became incapable of advance; that it terminated with the present; that whenever any new question was presented, it necessarily fell without the scope, and outside of the domain of international law. And that the further consequence follows my learned friends' proposition, if it were sound; that if a new question arose within the province of international law, affecting those subjects with which international law must deal in the intercourse of nations,—if there were no established usage for deciding it right, the consequence would be that it must be decided wrong. It will be for the Tribunal to remember what I am sure they do not need to be reminded of, that the constitution of international arbitration is in itself a new feature in international law. Only on two or three occasions in the history of the world has any such thing been attempted, and those have been occasions when the issues between the disputing nations were principally, if not entirely, issues of fact, or of figures, which involved no questions of international law, and no other novelty than always attaches to the finding of facts upon evidence in disputed cases. It must be remembered, then, if such Tribunals, as I am now addressing, are to exist, and are to be useful, they must be authorized to meet every case of new impression which it becomes necessary to decide. They are not called together, they can never be called together, for the purpose of simply acknowledging their own incapacity; for the purpose of saying "You have invited us to *determine this important question which must be determined one* way or the other between these Nations, which, if it cannot be determined by arbitrament, the nation claiming the right must assert for itself. You have invited us in the interests of peace and of humanity to determine that question, but we find that we are incapable of it, because it has never arisen before." The fact that it has never arisen before is the very reason why an arbitration becomes necessary. Nations do not resort to Arbitration to determine principles of law which are already determined and understood. There is no occasion for that. No intelligent nation would undertake to dispute such a proposition. It is when they differ upon the point of what is law—when the question is so far undetermined by usage and custom that it cannot be unanswerably asserted on either side, that the answer should be one way or the other, it is then that the intervention of the Tribunal is agreed upon,

I beg that it may not be inferred from what I say upon this point, which I hope to dismiss pretty soon,—I beg that it may not be understood that I am treating this case as a new one—as one that is not covered by the established principles of law. I shall contend to the contrary with very great confidence. But I am on the point which at the threshold should be very clearly understood, of what is to take place, if I am, in the judgment of the Tribunal, wrong in my assumption; if instead of concurring in my view that the general principles of law international and municipal applicable to this case control and prescribe its decision, the Tribunal or some of its Members may be of opinion that a question more or less new is presented. Therefore it becomes important and material to clearly understand as far as possible in the first instance what is to take place in that event.

Now, Sir, if I were to turn about the proposition of my learned friend, and apply it to his own case, I fear the result would not be such as would satisfy him with the theory from which it was derived. The fallacy of the whole argument on the part of Great Britain is, that it starts by assuming that the destruction of the seal herd is the exercise by the persons engaged in it of a plain and clear right, which it is the object of the United States in some way to defeat or to restrict. That begs the whole question, and brings the case to an end as soon as it is begun; for if these people are in the exercise of a right, upon what ground can it be denied to them? On what footing can the United States complain of the consequences to them of the exercise by these people of what is a right in the view of international law? The case is at an end when that is assumed. But the question in this case is whether they have such a right, upon the facts and circumstances as they are found to exist, taking the whole case upon the evidence, and determining, first of all, what are the facts material to be considered. What is this conduct? What is its character? What are its consequences? The question is whether those who are seeking to work such consequences, and to do such things, can make out its justification.

Now, says my learned friend, international law is what the nations have agreed to regard as international law. Is there then any usage in favor of conduct of this description in the whole history of mankind, in all the intercourse of nations since the dawn of civilization, and since law began to take the place of mere violence? Is there any precedent for such a business as this is, if it is what we claim it to be, and what I expect to demonstrate it is? Did it ever take place before? Is there a treaty, is there a judgment, is there the language of any writer, is there anything in law, literature, or history, that can be cited in behalf of such a proposition?

It is for them to establish this justification, and if my learned friend's idea of international law is right, we might safely enough accept it for the purposes of this case.

This Tribunal is substituted, by the agreement of parties, for the right that the United States would have had to assert that proposition for themselves, and to enforce it, if they could, in this individual case. They have waived that; they have discharged the vessels, or some of them, that were condemned; they have stopped the arrest upon the sea of any further cruisers pending those negotiations. They have asked you to say what they would have had a right to say for themselves if your intervention had not been invoked. Is the answer to that to be, "We do not know, because it is new; because there has been no usage of Nations"? Why? Because no such outrage was ever attempted before. There is no precedent because there never has been an occasion

for a precedent. There is no usage, for nobody ever attempted any such thing before; and, therefore, while what is right is plain, while the way-faring man, though a fool, when he looks at the circumstances of the case, can see what justice calls for, what is sound policy, and the interests of mankind so far as they have an interest in this subject,—while that is all plain enough, while we can see, as my learned friend says, what the law ought to be, we are powerless to declare it. Then, Sir, when you have so decided, you have decided another thing; and that is, that no further international Arbitration will vex the general ear of mankind, except upon pure questions of fact.

If that is to be the conclusion, if that is to be the contribution of such Tribunals to the science of international law, their mission will be very speedily terminated. You are in the place, Sir, I most respectfully say it, which the Government of the United States might have occupied for itself. Instead of asserting their right and putting themselves on the general sense of mankind as every nation does in every such case, that Government has stepped aside and has said—"Say you what we should have been justified in doing; say you what you would have done if you had constituted the Cabinet that controlled the affairs of the United States Government, say you what you would have done, Sir, if you had been the President of the United States, or Secretary of State, in this emergency; tell us what you think you would have had a right to do and what it was necessary to do, and what you believe that mankind would have justified you in doing."

Another word about the assent of mankind, which is, of course, the ultimate authority, the last judgment on questions of international law. It comes to that sometime. A word about how that is to be ascertained where it has not been so far expressed by general usage that it may be regarded as established. In the first place, it may be inferred in the proper case. In the next place, it may be presumed in the proper case. It may be anticipated by inference; it may be anticipated by presumption, or by both. It may be inferred where the proposition in question has been made the municipal law, as in this case, of every civilised country. Are you to infer that, if all nations could be called together to decide upon this question, they would reject the universal rule which they all adopt at home,—the protection of animals of this kind during the breeding time that are valuable to man? That is universal law now in civilisation; and as I said, it goes even further, for there are still left some other motives in our race besides those of dollars and cents, and pounds and shillings. It goes even further; it protects those harmless animals with which the Creator has furnished this world, and which now live here without detracting in any way whatever from the use and enjoyment that mankind has to make of the world. It protects even those, and especially does it protect those which are not merely harmless, not merely contributors to what might be regarded as perhaps a sentimental enjoyment, but to those which do minister, in their place and according to their measure, to the wants and comforts, or luxuries, of mankind. That is universal law. Now when the question is whether that is to be applied to this case, what is the fair inference?

In the next place it is to be presumed, because it is to be presumed that every nation will assent to what is plainly right and just. I am making these observations upon the assumption that what we contend for here is plainly right and just. We shall consider that more fully later on. I assume that, for the purpose of what I am saying now. If there is a plain and obvious right, if there is a plain and obvious wrong in the statement of a question, and you have to presume which way

mankind will go on that subject, it is not merely the presumption of comity, the presumption of courtesy which obtains inexorably in all the intercourse of nations, whereby—(whatever they may think)—they are compelled to the external courtesy of assuming that the other nation means to do what is right. Why, Sir, in any diplomatic correspondence that ever took place, or that can take place, between nations, is there anything that would bring it to a more speedy and a more proper termination than for one party to permit itself to insinuate in its correspondence that the other side does not mean what is right? Can it be carried any further? Will any nation submit to that? If its adversary, its opponent, its brother nation, so far forgets the proprieties and amenities which are observed between nations, as to charge, even indirectly or remotely, that it is not the purpose of the nation with which it is dealing to do right—that it means to do wrong—there is the end of the discussion. Until that is withdrawn and apologised for, it can be carried no further with any self respecting nation.

No diplomatic representative would for a moment, in a question that was the subject of discussion or negotiation, permit himself to send forth a document that he had not carefully revised for that purpose alone, to see if, in the warmth of debate, in the earnestness of his conviction, he had used one word that could possibly be construed as an intimation that it was not the intention of the nation with which he was dealing to do what was right and what was just.

I have pointed out what appear to me, with much deference to my learned friends, to be the necessary results of their definition of international law. Let me now state our proposition. I have stated theirs. I believe I have stated it fairly. What is our proposition in the place of it? It is that the law of nations is in every case, and all cases of new impression, what can be seen to be just and right, what the human conscience, what the sense of right and wrong, what the general ideas of morality, ethics, and humanity, that prevail in the world, recognize as right. You may call it the law of nature if you please. It is often called so by distinguished writers. My learned friend objects to that. Then let him call it by some other name if he likes it better. I care not what it is called. That is what constitutes the law of nations in every case that can possibly arise between nations, except where the usage of nations has settled the particular point or question otherwise.

As I said yesterday, we do not contend that we are to harangue a Court of Justice or any tribunal that has to deal with such matters in opposition to established rules of international law, on the ground that they contravene justice or morality. Where they do, a gradual change will be brought about. The law will be kept abreast somehow of the general sentiments of mankind. But in addressing a tribunal in a particular case, we do not contend that we can abrogate an established rule of law by pointing out, if we were able to point out, that the true and sound morality was the other way. Therefore, I say there is nothing of international law, and there never can be anything in international law except these recognized principles of right and justice between nations, that obtain between nations as far as they are applicable, until they are met by a proposition of law that has become so far established by the usage of nations, that a tribunal is not at liberty to disregard it. Abstract principles are of no value in a case of this sort, unless they apply to the concrete case before us. It is much less important to enlighten mankind than to do justice in the case to be determined. If we are right in the facts we assert, if from those facts the character of the conduct which is attempted to be justified, is made plain and clear as opposed to justice, morality, and sound policy, then

it is against international law, unless it can be shown on the other side that a usage to the contrary has become established. I shall trouble you, sir, as this proposition has been disputed, an elementary one, as it seems to me, with the thoughts of a few writers whose authority is universally recognized in the world.

It is said by my learned friends, that my associate, Mr. Carter, has gone into the clouds, and into the region of metaphysics, and has explored the writings of those philosophers who consider what the law ought to be, and what the law will be when the millennium comes, and proposes to substitute that for the law. What we contend for in the present case we contend is the law. It may be alarming to have it shown also that it ought to be the law; but I do not think it is fatal. I do not think it is fatal to the propositions we advance that my learned friend, Mr. Carter, has demonstrated that they ought to be the law, and that it is necessary that they should be the law, if any property of this kind is to remain on the face of the earth for a longer time than it takes to destroy it. We are putting forward what we say is the law, as completely established, more completely established, by the weight of what may be called authority, than any proposition in the domain of international law, because this is the foundation that underlies it all. I shall not read I hope at any weary length, but I must trouble you with a few brief extracts that are directly to the point, not of what ought to be law, but of what is the law. And I will refer in the first place to the judgment of Sir Robert Phillimore in the case that has been referred to before, of the *Queen* v. *Keyn*, in the 2nd Exchequer. Let me say first that in that case the question was so far a new one that the Judges of England all assembled were divided as nearly as possible equally in respect of its determination. The judges not only differed as to the conclusion, but those who agreed in the conclusion differed widely in the grounds upon which they rested their judgments. It was in such a case that Sir Robert Phillimore used this language:

Too rudimental an inquiry must be avoided, but it must be remembered that the case is one of *primæ impressionis*, of the greatest importance both to England and to other states, and the character of it in some degree necessitates a reference to first principles.

Then what are these first principles?

In the memorable answer pronounced by Montesquieu to be *réponse sans réplique*, and framed by Lord Mansfield and Sir George Lee, of the British, to the Prussian Government: "The law of nations is said to be founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage."

Chancellor Kent says on the same subject. (The quotation is from the first volume of Kent's Commentaries pages 2 to 4.)

The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the nature and constitution of man, and the same sanction of divine revelation, as those from which the science of morality is deduced. There is a natural and a positive law of nations. By the former every state, in its relations with other states, is bound to conduct itself with justice, good faith, and benevolence; and this application of the law of nature has been called by Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; and it is termed by others the internal law of nations, because it is obligatory upon them in point of conscience.

Then passing a part of the extract which I will not take time to read, though it is all very pertinent—

"The law of nations" is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relations and conduct

of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce, and of a code of conventional or positive law.

This is the point which I particularly desired to reach:

In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations and the nature of moral obligation; and we have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science.

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age and upon all mankind.

I refer also to the language of Sir Travers Twiss in his Treatise on International Law, and an excellent treatise it is, as is universally known. He divides the Law of nations as follows:

The natural or necessary law of nations, in which the principles of natural justice are applied to the intercourse between states; secondly, customary law of nations which embodies those usages which the continued habit of nations has sanctioned for their mutual interest and convenience, and thirdly, the *conventional* or *diplomatic* law of nations. . . Under this last head many regulations will now be found which at first resulted from custom or a general sense of justice.

Mr. Justice Story says; in the same argument the quotation will be found:

In resting on the basis of general convenience and the enlarged sense of national duty, rules have from time to time been promulgated by jurists and supported by courts of justice by a course of judicial reasoning which has commanded almost universal confidence, respect, and obedience, without the aid either of municipal statutes or of royal ordinances, or of international treaties.

And there is further cited in the same connection and on the same page a note from Mr. Amos in his edition of Mannings International Law:

Though the customary usages of states in their mutual intercourse must always be held to afford evidence of implied assent, and to continue to be a mean basis of a structure of the law of nations, yet there are several circumstances in modern society which seem to indicate that the region of the influence will become increasingly restricted as compared with that of the influence of well-ascertained ethical principles and formal convention.

There Mr. Amos with the acuteness that usually characterises his observations, gives to the ethical considerations an increased influence in the determination of what is called International Law, even over the usage and customs which he admitted may control it.

Mr. Wheaton, the American writer, refers to this; and I read from page 14 of the United States Argument. He has this passage to the same point:

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.

Says Ortolan, and I read from the translation in the same argument; at page 21:

It is apparent that nations not having any common legislator over them have frequently no other recourse for determining their respective rights but to that reasonable sentiment of right and wrong, but to those moral truths already brought to light and to those which are still to be demonstrated. This is what is meant when it is said that natural law is the first basis of international law. This is why it is important that Governments, diplomats, and publicists that act, negotiate, or write upon such matters should have deeply (rooted) in themselves this sentiment of right and of wrong which we have just defined, as well as the knowledge of the point of certainty (point de certitude) where the human mind has been able to attain this order of truths.

Vattel is also cited on pages 22 and 23 of the same book, from the 56th page of his work:

We must, therefore, apply to nations the rules of nature, in order to discover what their obligations are, and what their rights: consequently, the *law of nations* is originally no other than the *law of nature applied* to nations.

Ferguson, page 24 of the same book, uses this language:

Investigating thus this spirit of law, we find the definition of international law to consist in *certain rules of conduct which reason, prompted by conscience, deduces as consonant to justice, with such limitations and modifications as may be established by general consent, to meet the exigencies of the present state of society as existing among nations and which modern civilized states regard as binding them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country.*

From Testa, the Portuguese writer, I will read from page 25 a few lines:

Although in the philosophical order natural law occupies the first place, yet in the practical order of external relations, when questions are to be decided or negotiations conducted, its rank is no longer the same; in these cases the obligations contracted in the name of conventional law, in virtue of existing treaties, are considered in the first place. If such treaties are lacking, the law of custom establishes the rule; and when there are neither treaties to invoke nor customs to follow, it is usual to proceed in accordance with what reason establishes as just, and with simple principles of natural law.

There are other and numerous citations. I shall not, as they are in print before you, take the trouble to pursue them further. It will be seen that Jurists, English, American, and indeed all Jurists concur, not merely in saying that the principles of justice, of morality, of right, are the foundations of the law, but that in international law, which can be no otherwise prescribed, they are the only resort, except when, in the first place, there is a Treaty between the parties which settles the question for them, or, in the second place, there is an established usage or custom that settles it generally.

But there is a passage from Vattel, which I will ask Mr. Carter kindly to read for me.

Mr. CARTER.—It is his preliminary chapter to the English translation, page 56, Mr. Chitty's edition, the North American edition of 1844.

As men are subject to the laws of nature—and as their union in civil society can not have exempted them from the obligation to observe those laws, since by that union they do not cease to be men—the entire nation whose common will is but the result of the united wills of the citizens, remains subject to the laws of nature and is bound to respect them in all her proceedings. And since right arises from obligations, and as we have just observed, the nation possesses also the same rights which nature has conferred upon men in order to enable them to perform their duties. We must therefore apply to nations the rules of the law of nature in order to discover what these obligations are and what their rights. Consequently, the law of nations is originally no other than the law of nature applied to nations. But as the application of a rule cannot be just and reasonable unless it be made in a manner suitable to the subject, we are not to imagine the law of nations is precisely and in every case the same as the law of nature, with the difference only of the subjects to which it is applied, so as to allow of our substituting nations for individuals. A state or civil society is a subject very different from an individual of the human race, from which circumstances, pursuant to the law of nature itself, there result in many cases very different obligations and rights, since the same general rule applied to two subjects cannot produce exactly the same decision when the subjects are different; and a particular rule which is perfectly just with respect to one subject is not applicable to another subject of a quite different nature. There are many cases, therefore, in which the law of nature does not decide between state and state in the same manner as it could between man and man. We must, therefore know how to accommodate the application of it to different subjects; and it is the art of thus applying it with a precision founded on right reason that renders the law of nations a distinct science. We call that the Necessary Law of Nations which consists in the application of the law of nature to nations. It is necessary, because nations are

absolutely bound to observe it. This law contains the precepts prescribed by the law of nature to states on whom that law is not less obligatory than on individuals. Since States are composed of men, their resolutions are taken by men as the law of nature. It is binding on all men under whatever relations they act. This is the law which Grotius and those who follow him call the internal law of nations, on account of its being obligatory on nations in point of conscience.

Mr. PHELPS.—Without referring to any other authorities of which many are to be found in the printed argument already submitted, I leave it with this citation, which seems to me instructive. It is from the French Code, article 4 of the Civil code.

A judge who under the pretence that a law is silent, obscure or insufficient refuses to decide a case may be prosecuted as being guilty of a denial of justice.

It is a wise provision. It answers, Sir, the question you were good enough to put to me yesterday, whether what I have asserted in respect of international law is not equally true of municipal law; that so long as you are within the domain of municipal law, dealing, for instance, with the question of property—so long as you are asking for that sort of relief the law is accustomed to give, it is enough for you to show that justice requires it, until you are encountered by either a statute or a principle of law that has been settled to the contrary. In other words, to put the proposition in another form, the only way in a Court of Justice, even in municipal law, to answer the man who demands a right that is within the province of law, and satisfies the Court that it is just, is to show that the law has been settled otherwise, upon some ground that restrains the hand of the Court from doing what it otherwise would.

Now I come back to this case. I hope the time has not been quite wasted in considering this principle, though, as will be apparent from what I have to say, it may not be necessary to invoke it. We return to the subject of the right of these people to prosecute the business that it called pelagic sealing. Of course, if they have not the right to do it, the United States have a right to protect themselves from it. Then arises the question which my learned friends, with the ingenuity that comes to able advocates with long experience, have sought to dispose of by analysis. "What does the right of the United States stand on?" They are entitled to an answer to that question. We are here on our own territory, dealing with a race of animals that is appurtenant to it; begotten there, born there, reared there, living there seven months in the year, protected from the extermination that has overtaken their species in every other spot on the globe, where they ever inhabited, and which would speedily overtake them here if we were to relax the reins of Government. One year after the United States took possession, that is to say after they acquired title and before the necessary legislation could be had and arrangements made to police these Islands, an enormous number of seals, some 260,000 were destroyed on the Islands by poachers. That fate would overtake them all immediately, if not protected.

We have built up a valuable industry; we have introduced upon those Islands a civilization, an account of which you will find in the American Case, illustrated by some comparative photographs showing the manner in which the natives used to live and the manner in which they live now,—the Schools, the Churches, the cleanliness, the order, the Christianity that has superseded the old barbarism; and some of them, as I am reminded, have property and deposits in Banks. That is what has been brought about for them, the United States deriving a large revenue, the world getting the benefit of this product, all which

must be lost, if the seal race is to be destroyed. That is our claim; and it is the claim not of individuals, as I shall have occasion to say more distinctly hereafter, but of the United States Government, whose land and industry and income this is, under whose law and under the supervision of whose officers this business is carried on. It is a possession that the law will protect; an industry, an interest, a right, that the law of the world protects, unless it is assailed by somebody who has a better right.

My learned friends go into a fine spun argument. They ask, "what is your property? Is it in the particular seal, that you may follow all over the world? Is it in the herd? Can you have a property in the herd, if you have not a property in every one? What is its exact nature,—how do you define it?"

My friends who are so adverse to going down to the foundation of things in another part of the case, are very anxious to get to the extreme foundation in this case. What is the remote analysis? There is not a claim of property in the world but to the mind shallow enough to be open to that sort of influence, can be reduced to the point of ridicule by that process of reasoning. Human rights are not dealt with in that way, I respectfully submit, in Courts of Justice, or in the estimation of wise men. Our right is derived from all the facts and circumstances of the case. They result in what is properly defined as "property". What is the meaning of the term "property?" It is a word of the widest signification—of the most general application; it applies to every interest in every thing that is capable of appropriation and is valuable, which is recognized by law. It may be corporeal; it may be incorporeal. It may be capable of manual possession; it may be incapable. It may be a right; nothing but a right. It may be an interest, nothing but an interest. The man who undertakes to define the term "property", has a long way to go, and many things to consider. I have property by the law of England, and by the law of one of the States of America—though the general law of America is different—in the light and in the air; I have a right in it, that the law will defend and protect. In the very light and air of Heaven I have a property interest; and my neighbour cannot on his own land, where he has a right to do everything that a man may do lawfully, build a wall that shuts them out. I have a right of way across my neighbour's land; perhaps limited to the right to walk over it; perhaps to use it at a particular season of the year only, or for a particular purpose only—limited in a thousand ways, or generally for all purposes. I cannot take possession of the land; I cannot set foot on it for any other purpose, but I may walk over it, or I may walk over it to a particular wood or to a particular ice-pond? Is not that property? I have a claim upon a man for damages for money under a contract. Is it not property? Now when you ask us to define with a remote analysis the precise nature in the last resort of the property interest that accrues to a nation in wild animals of this sort under just such circumstances as are disclosed in this case, from which a valuable and civilizing industry has arisen and is carried on for the benefit of the nation, and of the world at large as far as the production is valuable to human use—when my friends ask us to define for them what that property right or interest is, I have a right to say, with great respect: "Define it yourselves; that is not our business: It is our business to assert it; to show that by universal law it is recognized and protected, and that it must be recognized and protected unless such product is to perish off the face of the earth."

That is all we have to do. Pursue its analysis for yourselves; christen it for yourselves if it is necessary. It is a property interest—a property right—extending, as far as the beneficial character of it extends, receiving all the protection that it is necessary to receive. I might decline this discussion altogether, but I shall not. I am going to pursue it to some extent lest it be said that we are asserting a right that we are afraid to attempt to analyse. But I premise what I have to say upon that point by the respectful assertion that I am called upon to do no such thing; that the principles of law we contend for are established, are recognized by usage all over the world, under which every property of this sort in the world is held to day, and by the assent of all mankind has been acknowledged and protected everywhere. That is the ground upon which we stand; let those who assail it show that it is a part of the just freedom of the sea that they may come and exterminate this property.

Now, Sir, let us go a little further. Suppose we consider what this claim of property does exactly stand upon? There are some preliminary remarks that should be made about that, as it seems to me. The first is, that the rules of property extend as completely to wild animals under proper circumstances—perhaps I should say valuable wild animals not noxious—as they do to any other property in the world. Where it is said that this kind of property is qualified, it is meant that it is qualified only because it is liable to cease without the act of the owner. No right of property except in wild animals ceases without the act of the owner. Its forfeiture to the public law of the country is no exception, because that depends on the owner's act. The property in wild animals of this sort may cease by the animals regaining their wild state and forsaking their proprietor. That is what is meant, and all that is meant, when it is said that it is "qualified."

Then a right of property, my learned friend the Attorney General says, must always have its root in municipal law. That is true, in respect to individual property. No man can possibly have any property right or interest of any description that is not given to him by the municipal law under which he lives, or under which the property that he claims is controlled. If he has got it rightly, it is derived under some municipal law—the law of his domicile, the law of the situs, the law of the place of contract. But how is it with a Government? The Government creates the municipal law; it is not the subject of it, except to the limited extent in which it may deal, as an individual might, when he buys a particular piece of property; but as a general proposition Government does not derive its title from municipal law—it derives its title from assertion and possession, unless that assertion and possession controverts the rights of some other nation. A Government takes possession; it asserts that it has a title. That makes a title, unless, in making that assertion, and taking that possession, it infringes the right of another nation. It is upon that, the whole theory of discovery and occupation depends. I may not go into some sea and find an undiscovered island, and take possession of it as my property. My Government can, and all the land in the world is held by the governments that possess and control it under just that title—by occupation or discovery, or by succession to those who did occupy and discover. It is assertion and possession, I repeat, that gives a title to a Government, unless it transgresses the rights of others who alone can complain. How came we by the Pribilof islands? Russia discovered them, occupied them, kept them, and asserted the title to which they had no other claim but

prior discovery, and transferred it to the United States. We stand upon their title. The seals are appurtenant to it, and that Government had taken possession and founded this industry and set all this machinery in motion,—had sent their cruizers there to protect it, and their agents to carry it on, and to save and preserve animals that would have disappeared long before any of us were troubled with legal questions, if it had not been for that interposition.

There is another suggestion before I come to the precise consideration of this question of property. Over all wild animals—I mean all useful wild animals—every Government has the primary right of control. Not the property; it does not own that. It does in this case, but not always. The Government does not own the partridge on my land; if it is killed *it* does not belong to the Government, but the right of complete control does, so that the Government has a right to say to me, and does say everywhere to its subjects, You shall not slay the partridge on your own land that is necessary for your food, except at a certain period of the year, in a certain way, under certain restrictions, perhaps by taking out a certain license. It may go further and say, You shall not kill it for a series of years if it is deemed necessary for the general preservation of these animals, which with their capacity to go from one proprietor to another never can be made the absolute property that domestic animals are. The theory of protecting, for the benefit of mankind these animals, is carried so far that every Government assumes without dispute, the primary and prior right of control, even over the owner on whose land the bird or animal is, while it is there. And that is a proposition that is no longer open to any dispute.

Now, the claim of property, I say again, which is assailed by the pelagic sealer, is a claim by the Government of the United States; and it will be seen, I think, before I am through that that may make an important difference—that a Government has certain rights against conduct on the high seas which an individual would not have—that a Government may be entitled to protection in the ownership of such an industry as this, when if it were mine, I might not be.

Returning then to the question of property, let us first regard it in the light of the rules of the municipal law that prevails between individuals where no governmental right is involved. Where a wild animal, valuable to man, is so far restrained—brought under the custody and the control of the proprietor of the land—that it has what has been called the *animus revertendi*, which brings it constantly back wherever it goes, to the place where it receives protection and care, it becomes the property of the proprietor until the *animus revertendi* is lost. That proposition is not disputed as a general proposition. The numerous illustrations of it found in the law books are not disputed; they cannot be. All those have been gone over,—the right in the bees, in the swans, in the pigeons, in the deer, and so on—all those cases which have arisen have had the general principle particularly applied to them. There are valuable animals found on a proprietor's land, to which those principles have been held not applicable, and to which I shall allude; but the general principle and the application of it to all those animals that have been the subject of precise legal decision is not disputed. I need not go over that ground again. It need not have been gone over at all; it is very familiar of course to every member of the Court.

Then what is the dispute? Where are we at issue? You have had on that side from my learned friend Sir Richard Webster, what Courts always have from him on every question, the very best argument that

can be made. He has addressed himself to it in an exhaustive manner. He saw with perfect acuteness what the point was; and you have the satisfaction of knowing that you have heard every word that can be usefully said on that side of the case. So that in dealing with that argument we are dealing with the whole. They admit the principle. They admit every illustration which has been established by judicial decision; but they say it does not apply to the seals. To all these other animals, but not to the seals. Is there any law to the contrary? Oh, no. The question never came up as to fur-seals before. The attempted application of that rule to the fur-seal is new. There is no decision on that subject. Then you have to resort to the principle on which those decisions depend; and my friend has undertaken—and he succeeded so far as anybody can succeed, I am sure—to point out what is the distinction which would include the other animals to which this rule has been applied, and exclude the seals.

This whole case turns upon that distinction—upon that precise point, whether there are differences in the condition of the fur-seal under the circumstances of this case, and the condition of those other animals in respect to which the right of property is not denied. Let us see in the first place exactly what are the facts on which we claim that the seals are within that general rule; and then let us see on what points of difference, if any, it is claimed or may be claimed that they are not within the rule. Let us deal with the subject fairly on both sides. Fairly my learned friend has dealt with it, certainly, and fairly I shall try to deal with it.

These animals, as I have said, are begotten, born and reared on this land, and have been, since the first knowledge of mankind in respect to them. It is not merely a place to which they can go, as in the case of other animals that have the *animus revertendi*. It is probably—not certainly, but probably—the only place. Some land of this description is absolutely indispensable. They are amphibious. They cannot propagate or breed or rear their young but upon the land. The young could not be born elsewhere. They could not live if they were born elsewhere than upon the land. For seven months in the year they remain there,—I do not mean every individual of the herd, but from the time the herd begin to arrive until they get through going away is about seven months; sometimes longer, according to the testimony. They would not go away at all if the winter was mild enough. That seems to be generally agreed. It is the inclemency of the climate—the inclemency of any climate that in the summer affords qualities necessary to their existence and their propagation, that obliges them to move for the winter. There they are submitted so completely to the control of man that there is nothing that can be done to an animal that we could not do to every one of those, if it was of any use. We can shut them up; inclose them; brand them; mark them—we can do anything with them. They are completely within our control. There they derive the protection without which they would cease to exist, through the forbearance, the judicious, intelligent forbearance taught by experience. The Russians did not have it in the first place. They used to kill the seals indiscriminately; but as early as 1847—perhaps earlier than that, but certainly as early as 1847—they found out that indiscriminate killing meant extermination; that they must save the females; and then they introduced the practice of selected killing by which only the males of a certain age are taken, and only a certain restricted number; and that has continued down to the present time.

Those are the circumstances upon which we say that this animal is brought more fully within the reasons which are assigned by courts of justice for the establishment of this general rule and the application of it to other animals, than any other animal that has been the subject of judicial consideration. Here is an animal of a high degree of intelligence, an animal to whom this land, or some land which is like it, is absolutely essential. The *animus revertendi* is not only perfect, but it is constant and it is undisturbed.

Senator MORGAN.—Mr. Phelps, in speaking of some other land just like this to which the seal may resort for their summer habitat, is there any evidence in this case to show that any trace has been found elsewhere in Behring Sea than on these islands that they have ever had such a home?

Mr. PHELPS.—I was about to remark upon that, sir. It is a suggestion that comes very naturally to mind in considering this. In all the exhaustive evidence in this case, in all the discoveries of the British Commissioners—and it is pretty safe to assume that anything that can be discovered on their side they have found, there is not the shadow of a suggestion that a fur-seal in the Behring Sea ever hauled out, as the phrase is, ever went ashore on any spot except the Pribilof Islands and the Commander Islands. I do not speak of the Japan Islands, of course. We are speaking of these waters. Whether if the United States were to plant batteries on the Pribilofs, open fire upon the herd of seals when they came there in the spring, drive them off, and absolutely prevent their landing there—whether they would gather themselves together and seek fresh fields and pastures new somewhere else, is a question that nobody can answer. It is purely and only a matter of conjecture.

To begin with, there would be no young that year. The young would all perish. There would be no young the next year because no propagation could take place. Then what would become of these repelled animals not killed but driven away? No man knows. It is known that they must have some land like this, possessing its qualities, its moisture, its cloud, its particular formation. It is not for me to say that there is not in the world any other such land, except the Commander and the Kurile Islands. They have brought, (which I shall allude to in another connection,) the evidence of some conjecture by persons more or less qualified to express conjecture—some of them pretty well qualified, others less so—to show that if we did not care for these animals, if we allowed them to be disturbed, if we interfered with them too much, if they were repelled, they would go to the Commander Islands, or they would go somewhere else. Perhaps they would; for they must go somewhere or perish.

Now, what is the distinction on which it is said by my learned friends that the seals are different from all these other animals held to be the subject of property? The law never has been applied to this particular animal, under these particular circumstances. It is a new question, as far as the application is concerned. The principle is as old as Bracton, and Blackstone, and the Roman law. The application of it to this particular animal is new, simply because a case has not occurred before. What is the distinction between them? If the seals flew through the air instead of swimming; if these islands were only a peninsula and they ran as the deer do, would that make a difference? If the bees on the other hand, swam when they went abroad after honey, or the deer flew, would the law be changed? If the wild swans travelled on foot and the wild geese, would the law cease to be what it is now? Would

courts of justice say, "We protected the bees while they flew, now that they swim they have ceased to be protected. We protected the deer while it ran, now that it flies—that is the end of it." Why you cannot consider that seriously. It does not depend on those differences. Some of these animals fly; some of them run; some of them swim, some of them stay; and they are all under the protection of the principle of law.

"Well, but" says my learned friend, "there is not any case in which the animal has not been confined. You have bees; you put them in a hive. You have pigeons; you put them in a dove-cote. You have swans; you put them in an enclosed pond. You have deer; you put them in a park." Why? Because that is what the necessities of their life require. That is what is appropriate to them. Is there any difficulty in our enclosing these animals after they get there in June? Is there any difficulty in the United States running a fence around the whole, and shutting them in? Not the slightest. But you see what would become of the animals. We should have to leave the gate open for them to go out into the sea, or else that would be only another mode of destroying them. Is there any difficulty about putting every one into an enclosure? It is a mere question of expense. We could build one big enough to hold them all; or, as I said, we can brand them. Now it is very evident that this distinction will not do. You must find something better than that. If my learned friends are right in saying that the seals are outside the rule and the other animals are within it, you must find some better reason. "Oh, but" says my learned friend, Sir Richard, "did you ever find a case of an application of it to the migratory animals." There is a distinction—the migratory animals. What is a migratory animal, pray? It is an animal that goes away and comes back again, is it not? Is there any other definition to the word. Whether he goes once a week or once in three months, or once in six months; whether he stays twenty-four hours or three months or five months; does that touch the principle? If there is no case in the books of a migratory animal, it is because it has not arisen. Have you got a case where it is held that it would not apply to a migratory animal? Do you find in the learned opinions of these judges whom we have been reviewing, anything to show that they would not have applied them to the animal, if it had been migratory; anything to show that the reason of the rule, the principle, does not touch the migratory animal? When you say migratory in distinction to an animal that you would say was not migratory, the difference between the seal and the bee, you speak only of the absence being periodical, and longer continued. You do not touch either the certainty of return, the value of the industry, the husbandry on which it is founded, the care and protection that is given—you do not touch anything that affects the principle. These animals do not go as far as the carrier pigeon goes. Was it ever heard that you may have property in the tame pigeons that never go more than a mile or two from home; but the carrier pigeon that crosses the sea and goes to another continent and comes back again, you cannot have any property in him? Did any judge ever venture upon any such absurdity as that? Then if the distance does not make any difference, does the frequency of the journey make any difference, or does the period of time, so long as the *animus revertendi* remains complete? The length of absence may be very important evidence indeed on the question whether there is an *animus revertendi;* but when that is not questioned, when it cannot be

questioned; when every single fact that gives rise to this rule of law and that enables it to be applied to those animals applies to these, except the distance to which they may go or may not, or the time when they are gone, although their return is absolutely certain and periodic, can you predicate any difference in the principle? Can you say that the bees, for instance, if it was the habit of the animals to go away in November for 500 miles and come back with an unerring certainty necessary to their life to the same control the next April—do you say the rule of law that used to apply to them is gone? If I had a hive of bees, Sir, some newly discovered animal, different from former bees who made their honey in that way, who went to the southern States where the roses bloom in the winter, and came back laden with the material for their honey in April to the home that was necessary to their existence, with an absolute and unerring certainty, I ask whether the property I have in the ordinary bees in my other hives would be lost in them?

The Tribunal here adjourned for a short time.

The PRESIDENT.—Mr. Phelps we are ready to hear you.

Mr. PHELPS.—I think, Sir, I may dismiss the distinction that is sought to be drawn between the seals and the other animals in respect of which property is predicted by the Common Law, on the score of seals being migratory. Now says my learned friend, the *animus revertendi* does not create property—it only continues it; it must have another origin besides *animus revertendi*. Well, if I understand him correctly, I agree with him. I do not say with regard to wild ducks, for instance, that return by their instinct to the water adjoining my property, that *ipso facto*, and if that were all, that makes them my property.

If my friend means that there must be based upon this *animus revertendi* or in connection with it such a possession or contact with the animal as enables me to make him the foundation of a useful and valuable industry, then I agree with him. We are not at issue upon that point. But what is possession? He says the animal must be confined. What is confinement? Is it anything but the possession, the control, the confinement, which the habits of the animal admit of consistently with his life and his preservation and usefulness? Is not that possession? Many attempts have been made, as all lawyers know, to define the term "possession" as applied to property. None was ever successful. If there is a term that is difficult to define in words, it is the word "possession" as applied to property, because the nature of the possession, the character of it, and the means of it, are just as various as the kinds of property that are found in the world. Possession of real estate—what is it?—One might suppose that there you would be able to state what is possession. But the moment you undertake to define it you find that it depends upon the nature of the land. Is it a house in a city like this, or is it a wild lot upon the mountains? Both are real estate. Both are governed by precisely the same rules of law. To occupy the lot of wild land in the wilderness as I might occupy a house in the city, is impossible. What then is the possession of the wild land? It is such possession as the property admits of. Slight acts of possession—payment of taxes—recording of a survey—going upon the land sometimes—keeping up a supervision. The question that is left to the jury if the title to that land in a suit depends upon possession is: whether this claimant has, during the requisite period of time, exercised such acts of ownership as the property admitted of; very slight perhaps, but still enough to indicate it. Can such a sort of possession as that be regarded as the possession of a house in this city?

Why certainly not. When you come to personal property what is possession? Why the possession of a watch, of a diamond, of a bank note, of a coin is one thing, the possession of articles which are moveable, but which cannot be carried about the person, as the contents of a house is another; and so you go on from article to article. Possession is sometimes symbolical. The delivery of a key is the delivery of possession. The supervision of an agent may be possession. In short the only definition, that is to say the nearest approach to a definition, of the term "possession" that has ever been successfully given in any book that I ever saw, or in any Court whose judgment I ever heard or read, is that it is such occupation or control indicating ownership as the nature of the property admits of, and its usefulness requires.

I have spoken of possession of the air and light. What is my possession of running water? No interest in property is better defined than that—I do not mean navigable water, but small streams—the mill streams that approach or run along past my property—the mill rights, the water privileges as they are called. It is the right to use that water for mechanical purposes; for irrigation; for the use of animals; for any purpose for which water is valuable. The water is not mine. I cannot do anything with it that destroys the value of it to my neighbour up-stream; I cannot do anything with it that destroys the value of it to my neighbour down-stream. Their rights are as good as mine. My right to use must be consistent with their rights to use. I may use it, but I must pass it along unpolluted, so that the use of my neighbour below is as good as mine. So with my neighbour opposite. He has a mill privilege on one side; I have one on the other. I may have two-thirds of it; I may have the paramount, he the subordinate use or otherwise. It may be divided in all forms. He may or I may have the right to it for a particular mill, for a particular purpose, and no other. All that is property. When am I in possession of it? When am I in possession of the stream that is running on to the ocean, not a drop of which remains? I am in possession of it when I am employing it in any way that is consistent with its use, and of which the nature of it admits. I am in possession of it when it is turning a water-mill; I am in possession of it when it is watering my animals. Now these illustrations make it perfectly apparent that when you talk about "possession and control", you are using a term that is absolutely indefinite, and that must be defined according to the nature of the property. My learned friends cited, as authority, from Pollock and Wright's excellent treatise on Possession in the Common Law. I have the passage which they cited. They cite this passage in the printed authorities they have submitted to the Tribunal pending the discussion. I am reading now from page 231.

On the same ground trespass or theft cannot at common law be committed of living animals *feræ naturæ* unless they are tame or confined. They may be in the park or pond of a person who has the exclusive right to take them, but they are not in his possession unless they are either so confined or so powerless by reason of immaturity that they can be taken at pleasure with certainty.

That is copied. In the haste of the preparation of the case my friends omitted to read a little further.

An animal once tamed or reclaimed may continue in a man's possession although it fly or run abroad at its will, if it is in the habit of returning regularly to a place where it is under his complete control. Such habit is commonly called *animus revertendi*.

That is what the author meant. But it is not for that I took up the book at this moment—it was on the subject of possession; and perhaps

I shall be excused for reading a few words from Sir Frederick Pollock's admirable chapter on this subject, in which, through a number of pages, he illustrates, with care and accuracy of language, the difficulty of defining this word "possession" and the vast range of applications in which it is dependent upon the nature of property. It will repay any person who desires to investigate this subject, to read this whole chapter. He says, for instance, at page 6:

To prevent perpetual equivocation, it is necessary carefully to distinguish between physical and legal possession. We here refer to the former. It does not suppose any law—

I find I am mistaken in saying this is Sir Frederick Pollock's language. It is quoted by him from Sir E. Perry, who is translating Savigny on possession; and the language I am reading is not Sir Frederick Pollock's, but is quoted and adopted by him; though what I have said quite applies to what he does say in his own words.

We here refer to the former: it does not suppose any law; it existed before there were laws; it is the possession of the subject itself, whether a thing or the service of a man. Legal possession is altogether the work of the law; it is the possession of the right over a thing or over the services of man. To have physical possession of a thing is to have a certain relation with that thing, of which, if it please the legislator the existence may hold the place of an investitive event, for the purpose of giving commencement to certain rights over that thing. To have legal possession of a thing is already to have certain rights over that thing, whether by reason of physical possession or otherwise.

It would seem as if this author anticipated what would be claimed some day by eminent counsel on this subject—that possession meant physical confinement, even though it was a physical confinement that destroyed the object of possession.

I do not read the whole page, but I pass to another passage.

The idea of possession will be different according to the nature of the subject, according as it respects things or the services of man, or fictitious entities, as parentage, privilege, exemption from services, etc.

The idea will be different according as it refers to things moveable or immoveable. How many questions are necessary for determining what constitutes a building, a lodging. Must it be factitious, but a natural cavern may serve for a dwelling,—must it be immoveable? But a coach, in which one dwells in journeying, a ship, are not immoveables? But this land, this building—what is to be done that it may be possessed? Is it actual occupation? Is it the habit of possessing it? Is it facility of possessing without opposition, and in spite of opposition itself.

Again, this is Sir Frederick Pollock's own language at page 10:

It has constantly been asked: Is possession a matter of fact or of right? Bentham and others have made the want of a plain answer a reproach to the law. But in truth no simple answer can be given to such a question, for all its terms are complex and need to be analysed. Every legal relation is or may be an affair both of facts and of right: there are not two separate and incommunicable spheres, the one of fact and the other of right. Facts have no importance for the lawyer unless and until they appear to be, directly or indirectly, the conditions of legal results, of rights which can be claimed and of duties which can be enforced. Rights cannot be established or enforced unless and until the existence of the requisite facts is recognized.

Then at page 12 he says:

It appears, then, that even at the earliest stage we have many things to distinguish. *De facto* possession, or detention as it is currently named in continental writings, may be paraphrased as effective occupation or control. Now it is evident that exclusive occupation or control in the sense of a real unqualified power to exclude others, is nowhere to be found. All physical security is finite and qualified.

Then on page 13 he says:

To determine what acts will be sufficient in a particular case we must attend to the circumstances, and especially to the nature of the thing dealt with, and the

manner in which things of the same kind are habitually used and enjoyed. We must distinguish between moveable and immoveable property, between portable objects, and those which exceed the limits of portable mass or bulk. Further, we must attend to the apparent intent with which the acts in question are done. An act which is not done or believed to be done in the exercise or assertion of dominion will not cause the person doing it to be regarded as the *de facto* exerciser of the powers of use and enjoyment.

Again, on page 14 he says:

And in order to ascertain whether acts of alleged occupation, control, or use and enjoyment, are effective as regards a given thing we may have to consider.

(*a*) Of what kinds of physical control and use the thing in question is practically capable;

(*b*) With what intention the acts in question were done;

(*c*) Whether the knowledge or intention of any other person was material to their effect, and if so, what that person did know and intend.

Then on page 6 he says:

When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the world at large, we have possession in law as well as in fact.

All that, Sir, is very obvious. It is felicitously stated, but it is not new. It is not new to that class of lawyers who have been accustomed to apply law to human affairs. There are two kinds of law, I may be permitted to say: the law that is practicable and the law that is impracticable—that is visionary—that is theoretical. The one comes out of the closet of the man who has never been anywhere else; the other comes from the constant application of the principles of law to the administration of human justice, never separating law from facts, always remembering that law depends upon facts, and their changes, variations, conditions, and circumstances; and that no other rule can be stated, except that when a principle is established, it is in the light of that principle that all questions arising under it are to be considered.

What then, still having in mind my friends proposition, which as I have said is sound enough if I understand it rightly—if he did not mean to carry it further than I think he did—that there must be something besides the *animus revertendi*—there must be some possession, control, something practicable, something useful, something entitled to be protected—that annexes itself to the animal. In other words, the *animus revertendi* is in itself only an *evidence* of possession. It is evidence or an element, as you please to call it, in this complex question of fact and law, of what *is* possession. The *animus revertendi*, in the case of an animal, of this description, is one element—not enough of itself I admit—but a strong element, when it is connected with the recognized control and the recognized usefulness. Now what is that? It is, in the first place, as I have said, a possession that the nature of the property—the nature of the animal (to come to this particular case), admits of. It varies with every different animal. It is different with the Bee, with the Pigeon, with the Deer, with the Swan, and with the Seal; because what is a useful possession with one is the destruction of the other. And it varies in the next place, with the requisites of the usefulness of the industry, the husbandry, that makes it valuable.

Now in the cases cited by Mr. Carter of *Blades* v. *Higgs; Davies* v. *Powell;* and *Morgan* v. *The Earl of Abergavenny*—those three cases in respect of deer that were cited in the opening, and which are quoted very largely, if not entirely, in the Appendix, and some parts of the United States' Argument. What took place there? Everybody, that knows anything of the laws of England, knows that the deer, while *feræ naturæ*, is not in itself property. If one buys a deer forest in Scotland of 20,000 acres, the only value of it is the deer. The land is good

for nothing except for the deer. Does he own any particular deer that is on it? Not one. They are here today and gone tomorrow. He cannot say to his neighbour, "These deer were here last summer; they were probably born on the land; they come back to me, and you must not touch them". The law does not justify such a claim as that. When they go on the neighbour's property, the neighbour has the same right as he has. So far as they give value to the land, they go with the realty; and, when one buys the soil, he gets the advantage, the privilege of the deer frequenting it and the opportunity to take them for sport or profit.

But when we come to these cases, we find that deer may become property under the same law of England which I have referred to, under which they were not property. Presently we find they are distrainable for rent; that is to say, they are specific personal property which may be taken by the landlord by distress for his rent; that they go to the executor and do not go to the heir on the decease of the owner. How comes that to pass? What is the distinction upon which the same Court renders an entirely different judgment in respect of the same animal in one case from what it gives in another? Are these deer confined? In one case the range they had was 600 acres, and in the other 700 acres. They could not be caught except by hunting them, or shooting them with a rifle, at a long distance. The proprietor of the land can no more put his hand upon them than anybody else. They flee from his approach, and it is only by running them down in an open forest that he could get hold of them.

Then what did make them property? The *animus revertendi* alone, say my learned friends, would not do it. I agree to that. It would not have done it in the case of the deer forest in Scotland. Then, what did make them property? Solely and only the fact that the proprietor had established a husbandry; that they were no longer objects of sport, which assumes that they are *feræ naturæ* to begin with,—the object of hunting and shooting,—no longer that, but they were made the basis of an actual industry and husbandry, by which their produce was taken by selective killing and sent to the market. Well, but what did he do? He did not shut them up; he did not confine them. He did what the nature of the animal rendered possible, and what the necessity of the industry rendered desirable. That is what he did; and forthwith, under that same intelligent and discriminating law, the animal that was yesterday *feræ naturæ* is to-day the subject of property, and is personal property with all its incidents, going to the personal representative at death, distrainable for rent, and the subject of an action if anybody interfered with it.

Now nothing can be plainer, as I respectfully submit, to a mind accustomed not only to deal with legal principles, but to apply them to the vicissitudes and emergencies of human affairs, than that the substantial distinction which renders those wild animals property which were not property before, and may cease to be property afterwards, is that they are taken into possession in connection with the perpetuation of the *animus revertendi* that brings them back to the spot, taken into such possession as they admit of, and such possession as is necessary. There is the principle. There is no artificial distinction that depends on their means of locomotion or the character of their covering—whether it is fur or feather, whether they fly, run, or swim, whether their absences are periodic or occasional, longer or shorter, regular or irregular.

It is the operation of the principle under which they are subjected to the control which they admit of and are made the basis of a valuable

industry. And in connection with that, because that standing alone would not be enough, that is to say, would not apply when the animal was temporarily gone, we have this constant and certain *animus revertendi*. I cannot found an industry upon wild animals upon my land that would make them property if they go away according to their nature and do not come back again. My husbandry is not enough, because when the animals are gone they leave us the *animus revertendi*. On the other hand, if they merely came back by habit and I did nothing to them and made nothing out of them, that would not create a property, I must put the two together. I must combine possession and the *animus revertendi*, and combine it for a useful purpose, and combine it with all the custody that is necessary and all the habits of the animal admit of, whatever they are.

But, says my learned friend, you must create the *animus revertendi*. With great respect, what does he mean by that? Create the *animus revertendi* in an animal?—create an instinct which, so far as the word may be applied to an animal below the scale of humanity, is a mental quality? Suppose you could, how does that differ from the *animus revertendi* which you perpetuate? Can that make a difference? It may exist before your industry begins, and your industry may be based upon it, but I cannot conceive how it can be created.

We have the speculations of a number of learned gentlemen gathered together by the British Commissioners on the question which I was discussing this morning—what would become of these seals if they were turned away from the islands in which they have had their home ever since the Creator first looked upon his work? No man can answer that question. Any man can speculate about it with more or less wisdom. They assemble the speculations of several gentlemen, some of whom admit they have spoken without much thinking, that if you cease to care for the seals, which you do if you allow them to be disturbed or too much interfered with, they will go away and not come back—they will go to the Commander Islands or to the Kurile Islands, where the other seals go, or go somewhere else. As I said this morning, I do not undertake to dispute that, because I can no more dispute it than they can assert it. It is pure conjecture, and it may be true for aught I know. Assume it to be true as these learned naturalists or some of them believe. We are and have been preserving that *animus revertendi* by the care and the protection they receive there. "What do you do to them," says my learned friend the Attorney General. "You only kill them." Only kill them! Do not we preserve the whole race from extermination? The cruisers that surround the Islands, the agents and employés who are on the Islands, and the strict rules that are enforced there in so many particulars against their disturbance, and against their injury—does not that protect them? If the seals were capable of having a case stated for the opinion of my learned friend, whether in as much as they are killed there more or less every year, they had not better leave the Pribilof Islands, and find some other place, is there any doubt about the advice they would receive? Their lives are not safe anywhere; they are surrounded by all sorts of enemies, human and otherwise; to preserve all their lives is impossible. Would not they be advised that there is no other spot in the world where they would be as well preserved, where their reproduction would be kept so safe, and where so many of them would be spared as there? That a part of their life goes to the service of humanity is a proposition that is true of all created things. There is no place for any creature to go and be safe. There is no life, part of which does not go to the public service.

There is no animal on the earth that has not to contribute, after his measure and according to his place, to the requirements of mankind. That is the law of nature. It would not be for their benefit to attempt to preserve every one; but they are protected from extermination; they are protected from cruelty, from wrong, and the proof of that is found in the fact that they do come back year after year, for these hundred years, since mankind took possession of that Island, and have, from year to year, all that time taken the product of this herd. What better evidence do you want than that? They tell us they could defeat it so easily. They bring these philosophers to inform us that if we failed in these duties away would go these animals. Who then creates the *animus revertendi?* I do not say that we created it in the first place, before the footsteps of man had reached those Islands; but who has perpetuated it so that instead of forsaking the Islands, as these gentlemen tell us they could be so easily induced to do, they have stayed there from that time to this.

"But they are free-swimming animals", says Sir Charles Russell. Who invented that term, and on what authority does it stand? What does it mean? Those are questions that I think it would puzzle my learned friend to answer. He uses that as though it constituted an impregnable position. "Free-swimming!" Is there any animal that swims that is not a free swimmer? And what is the difference between a free swimming and a free flying animal and a free running animal, or a free staying animal? There are oysters, that are the subject of property, wild. There are bees; there are deer; there are swans, and there are pigeons. All but the oysters have some mode of locomotion in some element.

Then they say, you are making grouse and pheasants and partridges property. These animals, these seals, are like the pheasants and the grouse that are raised upon English estates, that is to say protected there, fed there and used. There is an analogy that it is important to observe. Well, let us see. There you have a class of animals who have, to a certain extent, the *animus revertendi*, and they are not property. No suggestion can better illustrate our proposition, which is that the property depends upon the conditions and the use.

My learned friend raises pheasants upon his land, as his neighbours do. They are hatched there; they are sheltered to some extent; they are protected, and they go away, the nature of the animal. They go away on somebody else's land, and that somebody else may shoot them; and all my learned friend gets out of raising them is the privilege of shooting them on his land at such times as the law allows them to be taken, and in such a manner as the law allows. Because there is no *animus revertendi* that is capable of apprehension, of proof, of being distinguished. All his neighbours have pheasants over the County in which he lives; they are alike; you cannot tell them apart. That some of them come back is highly probable; that many do not come back is equally certain, and that many pheasants from other estates come to him is also equally certain.

Now applying the principle of law which I have been trying to state to these animals, what is the difficulty that we encounter? The first thing is that there is no certainty and no proof of this *animus revertendi.*

The *animus revertendi* exists in his neighbour's pheasants to return to him, and in *his* to return to *them*, and they scatter about. The attempt to separate those pheasants and say that my learned friend's were his, and Mr. A's his, and Mr. B's his, all over an English County, is absolutely impossible and equally unjust and unnecessary. If his

pheasants go away others come to him. If his neighbour kills some that were hatched on his premises, he kills others that were hatched on his neighbour's premises.

Now let me state a different case. I have a friend not far from my residence who has undertaken to import into America, where the bird does not belong and is not indigenous, English pheasants. He has sent abroad and obtained the eggs of the pheasants from England and on his estate has caused them to be bred. He protects them in the winter without which protection they would perish in that climate. He feeds them and looks after them and nobody else has any English pheasants. It has an *animus revertendi* of course, because if it did not go back it would perish. Now by the law of England if those pheasants are his property when on his land, every one of them being recognizable and capable of proof, brought there by him as well as protected, if when they are on my land and with my eyes open to that fact I undertake to kill one, I should like to know by the same law of England if I am not responsible for it?

No case can be plainer. Why is the same pheasant under the same law property on that man's estate and not property on the estate of my learned friend? Simply because the conditions are changed, because in the one case he has a wild bird which without possibility of identification goes and comes as the other birds go and come.

Lord HANNEN.—As you speak of English law; I cannot admit that if you give a foreign bird its freedom in your country, you would be entitled to say it is yours wherever it flew, I cannot admit that that is English law. Take a marked example of that. Those who first introduced the Himalaya pheasant and the golden pheasant, they turned them out and gave them their freedom, they are subject to the general law applicable to wild pheasants.

Mr. PHELPS.—But if the bird, in the exercise of its own habits, goes abroad and returns again, under the circumstances, it has seemed to me—perhaps because I am more familiar with the law of Vermont than with that of England, that the Court which administered there what we suppose to be the law of England, would hold, in the case of this foreign bird that went abroad temporarily and with a constant *animus revertendi* to its owner, that there was a right of property that could be protected against wanton destruction. Take it that the estate is on the borders of Lake Champlain, which runs up to Canada, and is public water on which Canadians have a right, under the existing Treaties between the countries. Suppose they come down on Lake Champlain for the purpose of shooting those birds in the breeding time whenever they cross the owner's line, and exterminating the race, is there no protection? I must defer to His Lordship's far better knowledge of the law of England, but I may be permitted to say, under the law of Vermont they would be most certainly protected. But the illustration, of course, depends on the view that is taken of that particular case. It is but an illustration, and I do not care at all to insist upon it.

There is another difference. The law of England in respect to this game has become established. It is assumed by courts of justice as being the established law, and they would spend no time in discussing what the law would or ought to be if it was to be made over anew in a new case. But even in that case they would probably come to the same conclusion in respect to game being the subject of property that they have now, because it would stand upon the same reasons, and the same course of reasoning would conduct to the same result. You have here animals that are quite *sui generis*, animals that return

because they must return—to whom this place is necessary, who derive no protection or sustenance or advantage from anybody else in the world, who are made the subject of this natural industry and husbandry of great value, and the question is not on the right of property, but on the right of extermination—not as against the mere individual owner, but as against the Government to which they belong.

Now a word or two more and I shall be able to leave this subject. As a concluding remark on this branch of the case, dealing with it thus far upon purely municipal law, is not this the true and sound proposition; that inasmuch as there is a principle of law which includes many animals of different varieties under the term property, and as that principle of law undoubtedly does exclude other animals such as we have been already speaking of as game, which might be property, and since here is a new animal, that is to say, new in this inquiry, and the question is into which class does it fall—within the class of those animals in which property is maintained, or within those in which property is not maintained, that the criterion is to ascertain what is the principle and what are the circumstances that mark the distinction between the two classes of animals. Is not that the just criterion? These seals cannot be put in both categories. They cannot be put into the category of the bees and the deer and swans and pigeons, and at the same time be in the category of the pheasants and the partridges and the rabbits and English stags. It is the same law that includes one set of animals on the one side and excludes the other. On which side of the line do they fall? If it had ever been determined by authority you could repose upon that. It has not. Is there any other way than to see whether the facts in regard to the seals assimilate them to the animals that are property, or assimilate them to the other. It is not an extension of the law to include them. It is simply an application of the principles of the law.

In the case of the "Atalanta" in 6 Robinson's Reports, which as the Court are aware are the reports of the decisions of that great English Judge, Lord Stowell, sitting in Admiralty, there are a few useful words, as it seems to me, bearing upon this question of the operation of principles of law upon new cases.

On page 458, Lord Stowell says:

> Under the authority of that decision. . . .

he is speaking of some Admiralty case; the case itself is not material. It is his language I quote this for. The question was whether a ship was forfeited by a certain business that it had been engaged in, and it had been argued that the ship was not forfeited, only the property—

> I am warranted to hold that it is an act which will affect the vehicle without any fear of incurring the imputation which is sometimes strangely cast upon this Court that it is guilty of interpolation in the law of nations. If the Court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles ancient and recognised by just corollary, may be infinite; but so long as the continuity of the original and established principle is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law, when in fact the Court does nothing more than apply old principles to new circumstances. If, therefore, the decision the Court has to pronounce in this case stood upon principle alone, I should feel no scruples in resting it upon the just and fair application of the ancient law.

That is the language of that great Judge when he was sought to be alarmed by the idea that, in dealing with a novel question, he was extending the law. It is the business of Courts of Justice to inform

themselves of principles and to extend them to new cases where it is necessary.

The case of the "Adonis" is another decision of the same Judge. This is in Volume 5 of C. Robinson's Reports; and perhaps this decision is more directly appropriate on the point I was discussing this morning, how the law of nations is to be collected in a case where it is not established.

"This is a case," says he, "in which I have taken some short time to deliberate, being unwilling to press with any degree of unnecessary severity the effect of presumption against this class of cases; more especially because it is one in which the principles of law, though unquestionably built upon the just rights of war, must be allowed to operate with some hardship on neutral commerce and because it is a class of cases on which the Court has little authority to resort to, but has to collect the law of nations from some such sources as reason, supported in some slight degree by the practice of nations, may appear to point out."

I read from page 159.

There is a passage or two that I may read from the United States Argument, page 172, for convenience. One is quoted from Phillimore's Treatise on International Law.

Analogy has great influence in the decision of international as well as municipal tribunals; that is to say, the application of the principle of a rule which has been adopted in certain former cases, to govern others of a similar character as yet undetermined.

Then from Bowyer's Readings, page 88, is cited this line.

Analogy is the instrument of the progress and development of the law.

In determining this question there is another consideration which seems to me to be altogether conclusive, in addition to all that I have referred to, as pointing out which class of animals the seal under the circumstances belongs to. There is a reason for all intelligent law. It is founded upon the necessities of human affairs, especially in regard to property. Now, with regard to this English game is there any necessity at all? I have shown that it is impossible, that it is altogether unfair to undertake to make the specific game that arises on one estate property against everybody else, because it gets as much from other estates as it does from the one that claims it, on which it is born. There is no extermination of the race of pheasants going to take place if such is not the law, and, therefore those wise considerations of the common law of England in respect to game have been found right. How is it with the seals? If we have not the right of property the animal perishes off the earth. It is of no use to talk about treaties that we may make. That is a matter not of right, nor of law. If we have no property in this industry, this herd, this business,—call it what you will—that we are in possession of, then the animal is gone, as in every other instance his species, substantially speaking, is gone. Some small remnant on one of those southern islands has been preserved at a late date—by what? By the institution of this very claim and the maintenance of it; but with that insignificant exception they are all gone from the face of the earth. As pointed out by Mr. Carter in his opening, the only means by which they can be preserved for the use of America, for the use of any country, for the use of anybody, is by sustaining the right which we claim.

My learned friend says, Mr. Carter has dealt with the reasons. Well, as I said this morning in respect to showing that a thing was right, is it any objection to a rule of law that it is shown to be necessary to the existence of the subject of it? If there is not sufficient in and of itself as a matter of positive law to give the principle effect and efficacy, has

that consideration no weight in determining the question I have been discussing, on which side of the line these animals fall? When it is made apparent that not only their usefulness to mankind but their existence on the earth depend upon the right of the nation in possession of them to preserve them, and as they have preserved them—they and their predecessors—for one hundred years, if there is any doubt upon the plain principles of municipal law—when you come to weigh in the balance the reasons on which the law is founded, they settle the question.

Sir, suppose that the Province of Alaska was a country by itself, poor and barren, and to a certain extent desolate. Suppose instead of being a province of a great nation, which does not need it, it was a country by itself. It would be larger then than many of the independent states in the world; and suppose, what is almost true, if it is not quite true, that the seal industry is all they have, all the provision the Almighty made for the existence of the inhabitants, all the food, the raiment, the commerce, the business, the means to prevent their starving to death; would the law be any different that applied to this case then, than it is when applied to the case of the United States? Would the principle of law vary in that case? Could any intelligent man say, "why, as they have nothing else, they own these animals; but if they had gold and silver and abundant revenue they would not own them?"

Now, pressed by the difficulty which my friends who have prepared this case on the part of Great Britain felt themselves embarrassed by, they have made an effort to break in, in some small degree, upon the facts on which we base this right of possession. They say that all the seals do not come back to the Pribilof Islands. The great bulk of them do; but there are some few that travel over to the Commander Islands.

Before proceeding to demonstrate, as I can out of this evidence, that there is not one word of truth in that suggestion, nor one word of evidence to support it that does not perish when you expose it to the light—I should like to inquire what difference it would make if it was true? Suppose we were to concede that while the bulk of this army comes back with an extraordinary certainty and pertinacity, yet a few individuals scatter away and wander across the sea and may bring up on the Commander Islands, the only other place besides Japan in the Northern Pacific where any other seals have been known to exist. How far does that affect the case? I have said that our interest did not depend upon the specific ownership of every seal, whether each one came back. It depends upon the general interest in the great herd and the industry that is founded upon it.

If it were conceded that some few of these seals did wander away, and find their way to the Commander Islands, is that a distinction which prevents the application of the general principles of law? The statement of that question carries the answer to it. It is a question that does not survive a distinct statement. Why then shall I take the pains, with the permission of the Tribunal, to show that there is no foundation for it? Because we believe that it is better for the Government of the United States to be right than to succeed; because I shall not consent that any assertion that has been deliberately made by the United States in this case upon any of these questions shall turn out to be one in which the Government was wrong. This case has not only been ably prepared by my friend who has had that subject in charge.—General Foster; it has in my judgment been conscientiously prepared. There is no assertion that has been made in this case,

whether important or unimportant, that we do not claim completely to have sustained. There is no attempted contradiction of our assertion of any fact that we do not claim is completely overthrown by the evidence; and therefore I propose to look into this evidence, from which bits and scraps have been referred to here and there, as tending to show some commingling of these seals, under the idea that perhaps if that were made out the force of the case, arising from their attachment, their appurtenance to this land, would be to some small extent weakened. I may have time for the few moments before the adjournment to illustrate on the map one or two things.

There, Sir, are the Pribilof Islands (indicating on map), as you have perceived; and there are the Commander Islands (indicating), 800 miles away. Here is the route of the Alaskan seals (indicating) going from the islands in the fall, down through the Aleutian passes (indicating), across where the blue line indicates (indicating), until they come opposite to San Francisco. I do not know that there is any evidence that they go much lower down. I do not think they do. They then return gradually along in the spring, following the blue line (indicating) around until in June or July they come back again. That is the migration route, in respect to which I shall read something from some of the naturalists; the regular migration route of these animals excepting only that the old bulls, as they are called, do not make this circuit. They remain, I believe, up north as far as Sitka. The black line indicates the route of the old bulls (indicating on map). They are seldom found, as the evidence is, south of Sitka. But there is the route of the others (indicating).

From the Commander Islands, there is what is shown by the evidence, and I believe there is no dispute about it—the British Commissioners admit that—to be the migration route of the seals from the Commander Islands (indicating on map); far away from that of the American seals, and they return, I suppose, in the same general course (indicating). There is not much evidence about it. But you see from the geographical construction, that there is not an opportunity, probably, for them to go elsewhere; but at any rate, there is the migration route (indicating).

Now, what is the suggestion—and it is nothing more than a suggestion, as we shall see when we come to analyze this evidence? It is that some of the American seals get out of their migratory route, at some time or other, and find their way across here (indicating on map), for the purpose of getting mixed up with another herd. What for, upon what motive, upon what inducement that is applicable to such animals, or to any animals, nobody even suggests.

Now, here is shown upon the map, indicated between those red lines (indicating) what is called the North Pacific drift current. That sets over from the Japan coast (indicating). It is described by some witnesses, whose testimony I shall refer to, as a warmer current, full of food fish, which naturally attracts the seal, both from its temperature and especially from its food. And you see when they come down far enough to strike this current (indicating)—it is not very far below the Aleutian Islands that the current passes—they go with the current of food, and on around here (indicating) until the necessities of nature require them to go away to the north. So that in addition to the regular migratory route, which, as we shall see from the naturalists, is one that the animals never depart from, nor any animals of this class—in addition to that, they strike into the North Pacific drift current, which is the place for their food and the place which at that time of the year,

the winter, gives them the mildness which they come away to obtain, on account of the cold and the ice that surrounds these islands in the winter.

The PRESIDENT.—Does that drift current run all the year round, or only in certain seasons?

Senator MORGAN.—It runs all the year.

Mr. PHELPS.—I think, Sir, it runs all the year round.

Senator MORGAN.—It is like the Gulf Stream in the Atlantic Ocean.

Mr. CARTER.—It is as constant as the Gulf Stream in the Atlantic.

Mr. PHELPS.—Yes; I suppose it is.

Now then, the suggestion is that under those circumstances, at some time,—and I believe their evidence, so far as you may dignify it with the name of evidence tends to show that it is in the fall when they come away from here (indicating)—some of these seals find their way over here (indicating), where they would encounter the migration of the Commander seals south. It is not contended that the Commander Island migration is any later in the year than the migration from the Pribilof Islands. One would suppose it is about the same time. Whether the evidence states I do not remember. But under those circumstances, after this migration has begun in the fall, the suggestion is that they find their way over into this space here (indicating), so that they can be seen to some extent to have been mingled with the seals on the Commander Islands.

The PRESIDENT.—Perhaps the commingling would come from the other side, from the Commander Islands seals coming into this current?

Mr. PHELPS.—Yes; I was about to say that upon any evidence or pretence of evidence, it might as well come from the Commander seals as from these. That is left altogether in doubt. Now, that is the theory suggested.

Senator MORGAN.—If you will allow me to inquire, does not the evidence in this case show that this great ocean current of warm water that you speak of divides out to the southwest of the Aleutian group, one branch of it going up into the Behring Sea, and keeping that sea open, and the other passing around upon the coast of British Columbia and the United States?

Mr. PHELPS.—That suggestion, Sir, is true, and the maps show it; but the evidence in this case does not show it. Therefore I desire that it should not be put down upon this map, because it is not proved by the evidence. But it is laid down on the public maps, and I have no doubt that the division of the current that you suggest is true.

Senator MORGAN.—Are not the public maps evidence?

Mr. PHELPS.—I do not know but they are.

Lord HANNEN.—The whole course of the movements of the ocean have been laid down upon charts, and it would be very easy to find one which would show the whole course.

Mr. PHELPS.—There is an atlas that we will bring into court that does show it.

Senator MORGAN.—If you will allow me to suggest in that connection, I think it is stated in this evidence, perhaps without any dissent, that the latest arrivals at the Pribilof Islands are the pup seals.

Mr. PHELPS.—Yes.

Senator MORGAN.—Is not that accounted for by the fact that having very imperfect or short coats of hair or fur, they naturally take a longer route to the south, in order to get to a warmer climate, and therefore they cannot arrive at the seal islands at the same time that the old males, the holluschickie, or the females would: that they have a longer detour necessarily because of the demands of their nature?

Mr. PHELPS.—It is a very natural and probable conjecture. I am not aware that there is any evidence in the case that establishes it. It would seem natural that it should be so, and I do not know that there is any other reason given in the evidence why this portion of the herd are later in arriving. At the same time, I have no right to say that the evidence proves that.

And now, having indicated what the suggestion is that is to be encountered, before alluding to any of the evidence or theories that are said to support it, I will, with the permission of the Tribunal, defer entering upon that evidence at this late moment.

[The Tribunal then adjourned until Tuesday, June 27, 1893, at 11.30 o'clock A. M.]

FORTY-FIFTH DAY, JUNE 27TH, 1893.

Mr. PHELPS.—On Friday last, Sir, as the Tribunal will remember, in entering upon the assertion in respect to the commingling of the two herds of seals, belonging respectively to the Pribilof and Commander Islands, I had begun to point out on the map the routes which they followed; and, in order that what I am about to say may be intelligible, perhaps you will permit me, for a moment, to refer again to the map. (Refers to the routes and distances on the map.)

Now, what is meant by the term "intermingling"? If it means only the casual intermingling of the seals in the open sea to some small extent, then it is manifestly of no importance to the case. If the seals, on leaving the Pribilof Islands, make their circuit and return to the Pribilof Islands again, it is, of course, utterly immaterial whether a few of them do or do not in that interval pass far enough to the westward, or a few of the Commander seals pass far enough to the eastward so that they are brought together, because they separate again.

How preposterous it is, I may say in passing, because no motive,—no possible inducement can exist why they should turn about and go against the drift current, forsaking their ordinary migratory route, a long distance to the west or a long distance to the east for the mere pleasure of encountering in the water some scattered seals from the other herd, and then have to make their way back again;—but it is not worth while to stop to refute it because it is of no consequence.

If on the other hand it is meant to be asserted that any part of the Pribilof Islands seals not only go out into the western sea where they encounter seals from the other side, but go to the Commander Islands and join themselves to another herd, breed on the Commander Islands and forsake the Pribilof—or if it appeared that any portion of the Commander seals forsake the herd which they belong to, and come across and join themselves to the Pribilof Island seals, then it would be a fact the materiality of which would of course depend upon its frequency and its extent.

There is one consideration which is perfectly conclusive against that theory before you enter upon any evidence whatever, except the evidence afforded by the map. If it were true,—if it is true to-day, that these seals intermingle to any appreciable extent—then there is every reason to suppose that they have always done so. There is no reason why that should occur now any more than always. If it had always occurred, these two species would long ago have been entirely undistinguishable. The cross-breeding that would have taken place if the seals went indifferently to any extent at all to the Islands that belonged to other herds, would long ago have effaced the difference which it is still conceded exists between these seals. They would be no longer distinguishable. It would not be true as I shall have occasion to show from the evidence of the Furriers—every one of them on both sides of the case—that there is a marked and plain difference between the skins which enables an expert to distinguish them from each other.

It could not be any longer true if for centuries—or numberless centuries—we do not know how long—interbreeding had been taking place between the seals.

Let us look for a moment at this question as it stood upon the testimony, up to the time of the filing of the British Counter Case. The American Commissioners speak of this, and as I shall not read very much I may be excused for reading a few words from what they say at page 323 of the United States Case.

> 3. The fur-seals of the Pribilof Islands do not mix with those of the Commander and Kurile Islands at any time of the year. In summer the two herds remain entirely distinct, separated by a water interval of several hundred miles; and in their winter migrations those from the Pribilof Islands follow the American coast in a southeasterly direction, while those from the Commander and Kurile Islands follow the Siberian and Japan coast in a southwesterly direction, the two herds being separated in winter by a water interval of several thousand miles. This regularity in the movements of the different herds is in obedience to the well-known law that *migratory animals follow definite routes in migration and return year after year to the same places to breed.* Were it not for this law there would be no such thing as stability of species, for interbreeding and existence under diverse physiographic conditions would destroy all specific characters.
>
> The pelage of the Pribilof fur-seals differ so markedly from that of the Commander Islands fur-seals that the two are readily distinguished by experts, and have very different values, the former commanding much higher prices than the latter at the regular London sales.

Dr. Allen's report, in the first volume of the Appendix to the Case at page 406, is to the same effect. It is a very able and interesting article. He says:

> The Commander Islands herd is evidently distinct and separate from the Pribilof Islands herd. Its home is the Commander group of islands on the western side of Behring sea, and its line of migration is westward and southward along the Asiatic coast.
>
> To suppose that the two herds mingle, and that the same animal may at one time be a member of one herd, and at another time of the other, is contrary to what is known of the habits of migrating animals in general. Besides while the two herds are classified by naturalists as belonging to one and the same species, namely, the *Callorhinus ursinus*, they yet present slight physical differences, as in the shape of the body and in the character of the hair and fur, as regards both color and texture, sufficient not only to enable experts in the fur trade to recognize to which herd a given skin belongs, but sufficient to affect its commercial value. As yet, expert naturalists have been unable to make a direct comparison of the two animals, but the differences alleged by furriers, as distinguishing the representatives of the two herds, point to their being separable as subspecies, in other words, as well marked geographic phases, and thus necessarily distinct in habitat and migration.

Then we go into considerable evidence which I shall not feel justified in detaining the Tribunal to read; but we have examined six British furriers in London, twelve American scientists aside from the gentlemen from whom I read just now, and one witness, Mr. Morgan, who was a superintendent on the Islands for a long time, and a ship master in those regions for a very long time. The evidence will be found on pages 92 to 98 of the Appendix to the American Argument, in which the testimony is collated. These witnesses state the difference between the furs—the animals and the skin; and they state the differences in the price, and they all state that anybody acquainted with the trade can readily and easily distinguish them.

Now one further citation, and that is what the British Commissioners have said about it. I shall not be understood, I trust, let me say once for all, as referring to the British Commissioners Report as evidence in respect to any question of fact that is in dispute, except so far as I gather from it the admission of the other side. I refer to it as I refer to the statements of a party, and I shall have something to say about that by and by. It is enough to say now that I refer to this book as

the statement of the adverse party, and where it contains any admission that is favourable to us, I have the right to use it as such. Where it contains any other statement, I shall have an opportunity to show before I get through, or rather all the way along whenever I deal with questions of fact, just how far it is reliable as evidence. If the case had remained where it remained at the beginning of this Counter Case, nothing more would need to have been added, because the British Commissioners, as you will see, admit the whole point for which I have been contending, and coincide generally with the American claim, and with the great body of evidence.

They say at section 197 page 32:

Respecting the migration-range of the fur-seals which resort to the Commander Islands, to Robben Island, and in small numbers to several places in the Kurile Islands, as more fully noted in subsequent pages, comparatively little has been recorded; but the result of inquiries made in various directions, when brought together, are sufficient to enable its general character and the area which it covers to be outlined. The deficiency in information for the Asiatic coasts depends on the fact that pelagic sealing, as understood on the coast of America, is there practically unknown, while the people inhabiting the coast and its adjacent islands do not, like the Indians and Aleuts of the opposite side of the North Pacific, naturally venture far to sea for hunting purposes.

Now I call particular attention to this:

The facts already cited in connection with the migration of the seals on the east side of the Pacific, show that these animals enter and leave Behring Sea almost entirely by the eastern passes through the Aleutian chain, and that only under exceptional circumstances, and under stress of weather, are some young seals, while on their way south, driven as far to the west as Atka Island. No large bodies of migrating seals are known to pass near Attu Island, the westernmost of the Aleutians, and no young seals have ever within memory been seen there. These circumstances with others which it is not necessary to detail here, are sufficient to demonstrate that the main migration-routes of the seals frequenting the Commander Islands do not touch the Aleutian chain, and there is every reason to believe that although the seals become more or less commingled in Behring Sea during the summer, the migration-routes of the two sides of the North Pacific are essentially distinct.

I refer now to section 453 of this document on page 80:

The inquiries and observations now made, however, enable it to be shown that the fur-seals of the two sides of the North Pacific belong in the main to practically distinct migration-tracts, both of which the elsewhere traced out and described, and it is believed that while to a certain extent transfers of individual seals or of small groups occur, probably every year, between the Pribilof and Commander tribes, that this is exceptional rather than normal. It is not believed that any voluntary or systematic movement of fur-seals takes place from one group of breeding islands to the other, but it is probable that a continued harassing of the seals upon one group might result in a course of years in a corresponding gradual accession to the other group.

In what I have further to say on this subject, I hope, Sir, that you will bear this language in mind. I will also read 454:

There is no evidence whatever to show that any considerable branch of the seal tribe which has its winter home off the coast of British Columbia resorts in summer to the Commander Islands, whether voluntarily or led thither in pursuit of food-fishes, and inquiries along the Aleutian chain show that no regular migration route follows its direction, whether to the north or south of the islands. It is certain that the young seals in going southward from the Pribilof Islands only rarely get drifted as far to the westward as the 172nd meridian of west longitude, while Attu Island, on the 175rd meridian east, is never visited by young seals, and therefore lies between the regular autumn migration-routes of the seals going from the Pribylof and Commander Islands respectively.

If any difference between that and the proposition in regard to these seals, which is stated by the American Commissioners, by Dr. Allen, and by a considerable number of witnesses I shall allude to hereafter, can be perceived, it is a difference that is not perceptible to me. Never-

theless, and this is not the first instance, nor the last, in which different statements on the same subject and on the same point will be found in this document, there is something in section 210 that seems to bear the other way,—that it is not easy to reconcile with that which I have been reading.

In section 210 it is said:

> In order to arrive at as complete a knowledge as possible of the actual distribution of the fur-seal in Behring Sea, a circular was prepared, in which it was requested that regular seal logs should be kept on the British cruizers, and, through the kindness of the Commander-in-chief on the Pacific Station, communicated to their Commanders. The work was taken up with enthusiasm by the various officers, and maintained throughout the season. Careful observations of the same kind were also made on our own steamer, the "Danube", and subsequently, through the courtesy of the United States Commissioners, copies of the track-charts, and observations made of seals by the various United States cruizers, were supplied. Information on the same subject was also sought in various other ways, such as by inquiry from the captains and hands of sealing-vessels met in Victoria and Vancouver, and from the inhabitants of various places touched at during the summer.

Then section 212 page 35:

> The observations at command for 1891 practically cover pretty thoroughly the period of about two months during which seals are ordinarily taken by pelagic hunters in Behring Sea, extending from the middle of July to the middle of September, and they are much more complete for the eastern than for the western part of the Behring Sea.
>
> On consideration of the material to be dealt with, it was decided that it might be most advantageously divided into two periods of about a month each, the first including all dates from the 15th July to the 15th August, and the second those between the 15th August and the 15th September. All the lines cruized over in the first of these periods were plotted on one set of maps, and those in the second period on another. The parts of these tracks run over during the night, and in which seals therefore could not well be observed, were indicated on the maps in a different manner from the day tracks, as far as possible; and with the assistance of the logs, the numbers of seals seen in certain intervals were then entered along the various routes in a graphic manner. The places in which pelagic sealers had reported seals to be abundant or otherwise, as well as those in which sealing-vessels were found at work by the cruizers, and other facts obtained from various sources, were also indicated on the maps.

The result of all this is, if you will now have the kindness to turn to page 150 of the British Commissioners' Report, that three maps are set forth by these gentlemen. The first is immaterial to my present purpose. It only indicates their own cruise; in the second and third maps you will find indicated, in red colour, what they call the resorts and migration routes of the fur-seals in the North Pacific. You will see from that red colour that the resort and habitat (to use a very awkward word) of these animals extend clear across from the American to the Russian side, a considerable distance to the north and south. It is represented so that the map conveys the idea that the seals are scattered all through that body of water in such a manner that, if it was true, it would be totally impossible to assume which seal went to which Island, or whether it made any difference to any seal which Island it went to. The third map extends from July the 15th to August the 16th. The fourth map, which I omitted to refer to, gives the area frequented by fur-seals from August the 16th to September the 15th 1891.

Looking at that map and looking at nothing else, it would settle the question that there is no particular distinction and that these seals are everywhere intermingled. That is, of course, what the map was intended to convey, and what it does convey until it is refuted. You will remember the particularity with which it is stated by the British Commissioners that these maps are founded upon the logs of the British cruisers and the American cruisers. They are not conjectural; they are not hypothetical, nor suggestive; they are put before you as

the result of actual cruises and observations recorded in the logs by the naval Officers of Great Britain and America, undertaken with great enthusiasm by the British Officers, you will remember, and undertaken at all events, whether with enthusiasm or not, by the American Officers.

Now, would it be credited till a reference is had to the map that we were fortunately able to furnish on this subject, that no one of those cruisers ever was in a position to arrive at any such result, or to furnish any information whatever on the subject? That these maps with their apparently conclusive results as to the locality of these seals, stated to be founded upon observation of the very best official character by gentlemen whose qualifications are unquestionable and whose character is above dispute, had no foundation whatever? That there were no such cruises and no such observations? I shall ask your attention to Maps N°s 1, 2 and 3, in the Portfolio of the American Counter Case; N° 1 shows the cruises of the American vessels, six in number, from July the 15th to August the 15th. You will see how far to the west they went. You will see that they never entered the waters that are concerned by this enquiry. They went to no such place. They not only made no such observations and no such record as would afford a foundation for the British Commissioners' maps, but they never went where they could have made any observations or have known anything upon the subject.

If you will, now kindly look at Map N° 2 of the same Portfolio, you will find the logs of the British Vessels for the same period of time. These are the gentlemen who entered into the matter with great enthusiasm. I have no doubt they did, as far as they went; and you will see that not one of them was much west of the 174th degree of longitude, between that and 175°, from the Yakutat Pass up to St. Lawrence Island, and, of course, they could not have made any such observations as to the locality of the seals beyond that, as these maps pretend.

Then, by referring to the third Chart, you will see that the logs and cruises of the two Naval Squadrons, the American and the British, cover the second period and combine the two in one map. For the first period, they are given in separate maps; for the second period, they are given in the same map, and it gives the courses of six United States vessels and four British vessels. You will see in that chart that they run across once and back again, and on this map, are laid down the seals they saw, without attempting to discriminate between the fur and the hair seals which frequented that region. You will see, from the log, there are almost none at all. The first Chart shows that the ships never were in a place where they could have obtained evidence in support of the other map. The second shows that they did once or twice run across there, and, when they did, they did not see any seals. So that their evidence was exactly the other way.

Now this is exposed in the Counter Case of the United States; and what has the British Government to say about it? Nothing whatever. In the British Counter Case, it is said in substance that the information referred to seems not to support the map, or some words to that effect. But they neither claim, what of course, no man could claim, that their map derives any support from these charts, nor do they offer any explanation how it came to pass that they were led to construct these elaborate maps, citing no other authority for them than the observation of ships that either never were there at all, or, when they were there, their observations were directly the other way. When this was pointed out in the American Counter Case, when it was shown that the foundation for these maps in the British Commissioners Report

had utterly perished; that they were sustained up to that time by no evidence whatever, we then have given us a body of what is called evidence of a totally different kind taken in 1892, which I shall allude to in the proper order; I am speaking now of this case as it stood up to the time of the filing of the British Counter Case. After stating what is claimed by the United States, that document goes on to say:

> It is then assumed that the only data were those derived from logs of cruizers, and those of the British cruizers are reproduced in the form of Charts appended to the United States Counter-Case, together with the tracks of United States cruizers in 1892.
>
> In reply to these contentions, it may be stated the distribution of seals in Behring Sea in 1891, as shown on the British Commissioners' Maps, in so far as it relates to the part of Behring Sea surrounding the Pribilof Islands, depended chiefly upon the several cruizers. But an inspection of the tracks, as printed by the United States, will show that the cruizers in most cases confined their operations to the regions surrounding the Pribilof Islands.

Then:

> For other parts of the sea, other sources of information had to be employed. The British Commissioners refer to those other sources (including their own voyages) in a general way.

I have read the way in which the British Commissioners before referred to this subject, by saying that nothing was known in regard to it that was at all reliable, and that there was nothing to change the inference that these migratory animals followed their ordinary route; and one section that I did not read was that, if the sealers knew otherwise, they kept it to themselves because they desired to keep secret the place where the best sealing was to be found. The way in which they referred to it was to admit that there was no other authority whatever; and because there was no other authority they desired to set on foot these explorations by the ships of the British Government, which the Americans had done for themselves; and, on the strength of those observations, they base these Charts. Is there any explanation? Is there any excuse? Not one word. I have read it all.

That is the way, Sir, that this question stood when the Counter Case was filed. What is the Counter Case? It is a document by which under the interpretation of this Treaty adopted by Great Britain, and which has been the subject of observation before in the preliminary argument that you listened to on the admissibility of evidence, the whole body of evidence put in on the part of Great Britain on all questions of fact, except what is found in the British Commissioners' Report, was put in at a period too late to be met or replied to by the United States.

So that this case presents the extraordinary spectacle, unknown as it seems to me in any Court of Justice before, of a trial upon important issues of fact and very voluminous evidence of every description, including many new descriptions not known before, put in by one side, none of which the other side has any opportunity to reply to or even to read until it is too late to put in evidence in explanation, impeachment, or contradiction.

Now, in that Counter Case, they return to the charge, and bring forward a considerable body of what they regard as proof, and what is proof as far as it goes undoubtedly,—on this question of intermingling. If it had been left where it was left by the parties and the two sets of Commissioners in the first place, it would not have been open to any contradiction, except so far as the Maps of the British Commissioners attempt to introduce a contradiction, which I have shown is completely refuted. In the very extraordinary document called the Supplementary Report of the British Commissioners which has been received here

as an Argument; it is nothing else,—the Report was nothing but an Argument, and this is nothing but a Supplementary Argument,—we are told, at page 23, that,

"In our previous Report it seems to be necessary,"

—these Gentlemen begin to perceive that it is desirable at any rate, if not necessary, to meet the extraordinary state of facts about these maps by something.

Mr. Justice HARLAN.—Do you understand that report to have been presented to us as part of the argument of the British Counsel?

Mr. PHELPS.—Really, Sir, I do not. I believe there have been one or two feeble references to it, and by feeble I mean of course, brief, because I do not mean that anything which comes from my learned friends could be feeble;—General Foster reminds me that what I am about to read was read by Sir Richard Webster.

Mr. Justice HARLAN.—But I understood the part read was objected to at the time.

Mr. PHELPS.—It is not evidence. It is only a statement—it is an apology.

Mr. Justice HARLAN.—I only asked for the purpose of knowing whether we are to look into that report.

Mr. PHELPS.—Not by any means with our consent, Sir. Our position has been stated, and we do not withdraw from it. I only refer to a word or two of apology on this point, which I was about to read, which is the only reference, perhaps, I shall make to it, and it has been already read by Sir Richard Webster.

Mr. Justice HARLAN.—I repeat the enquiry that we may know whether we are to look into it. I do not understand that Counsel for the British Government have offered that report as a part of their argument, though entitled to do so.

Sir RICHARD WEBSTER.—I should like the Tribunal to understand that we most certainly have offered that report as part of our argument. There are matters in it which were not referred to—matters of subsequent depositions, which turned out to be common knowledge, but we have not withdrawn. It was originally offered and tendered as part of our argument, and we do not withdraw that now. My learned friends themselves suggested they might refer to other parts, and any part they wish to refer to is open to them, but we have tendered it as part of our argument.

Mr. Justice HARLAN.—I have not so understood.

The PRESIDENT.—It is understood that the United States do not take that supplementary Report as evidence.

Mr. PHELPS.—Of course.

I shall add one new contribution from that document.

In our previous Report, as the existence of a certain amount of intermingling has never been questioned—

Sir RICHARD WEBSTER.—It is "had" in the original.

Mr. PHELPS.—My copy is probably a misprint then. It says "has"; but I will read it "had"

"had never been questioned".

That is to say, had never been questioned when they wrote their Report. That is no doubt what they mean, whether the word is "has" or "had."

It was not considered necessary to note in detail the evidence and observations upon which the general statements were based.

Well, what was the general statement—that there was an intermingling or not? What are the observations and statements that it referred to, except the proceedings of these cruisers and a very small suggestion that they had enquired generally of sealers, followed by the paragraph I alluded to just now, pointing out that sealers were very reticent in speaking on the subject.

Now in 1891, when they were on the Commander Islands, they took the testimony of a native long employed, named Snigeroff, and John Malowanski acted as interpreter, Mr. Thomas Morgan being present. This is copied from the United States Appendix, vol. 2, page 198:

> Snigeroff testified that he had lived on the Pribilof Islands for many years and knew the distinctive characteristics of both heards, Commander and Pribilof and their habits, and that he removed from thence to Behring Island. He pointed out that the two heards have several different characteristics and stated that in his belief they do not intermingle.

That is one statement which these gentlemen have on the Islands; and then Mr. Morgan on page 201 of the same book testifies that—

> Said Commissioners asked said Snigeroff the further question, whether he believed that the Pribilof herd and the Romandorski herd ever mingled, and he replied that he did not.

We hear of no other statements to the British Commissioners whatever.

Now, my learned friends, or whoever had charge of the preparation of the Counter Case, perceiving that to sustain the proposition that these seals were such wild animals that they might be slain at pleasure on the high seas, and that the United States had no right in them, it was necessary to infringe in some way upon the great leading facts which attach the animals to the Islands, select this point, and for the first time they go into a considerable amount of testimony, from two sources; one is from some London furriers, wholesale and retail, principally retail I should think, of whom they have examined a considerable number, the other is from a body of sealers, men engaged in the business of sealing. The one refers to the difference between the skins which we had originally proved and which was not at all contradicted by the British Commissioner's Report—all the evidence that we had or they had on the subject then was that they were completely distinguishable; the other is from the men who claimed to have seen seals all over the sea from west to east, and at all times intermingling—evidence, of course, to which we had not a chance of reply.

(Mr. Phelps proceeded to review critically all the evidence on both sides bearing upon the question of the alleged intermingling of the seals of the Pribyloff Islands with those of the Commander Islands, reading many passages from it, and claimed that so far from any such intermingling being proved, the contrary was completely established.

He pointed out that the fact had never been claimed in the whole history of seal life until suggested by the British Commissioners in the contradictory passages from their report before considered. That it was denied by witnesses of the highest credit and fullest means of knowledge, both Russian and American, who had been concerned in the management of the Commander Islands, and of the Pribyloff Islands, and was supported by no witness who had ever had any such experience.

That no witness was produced who claimed ever to have seen a Commander Island seal on the Pribyloff Islands or a Pribyloff Island seal on the Commander Islands. That the only evidence brought forward to prove intermingling was from a body of men employed in the Cana-

dian sealing vessels who swore to having seen seals in various parts of the sea outside of the migration routes, and at various times.

That none of this evidence attempted to discriminate between the island or fur seals and the hair seals which were proved to frequent these waters, and which at a little distance could not be discriminated from the fur seals.

That these witnesses were swearing *ex parte* in defence of their own craft; were a class of men whose credit was not to be depended upon, and were brought forward not in the principal but in the counter case, so that the United States had no opportunity whatever to reply to their evidence by testimony.

That they divided into two classes: those who undertook in their affidavits to state the locations in which they saw the seals referred to, and those who give no locations whatever but speak of seeing them all over the sea. That those who give locations turn out in every instance to have seen the seals where they should have been, in their proper migratory route as shown on the map. That of these who give no location, not one testifies that he ever killed a seal in the outside waters he refers to, though engaged in the business of sealing and with the proper outfits.

That this class of witnesses are completely contradicted by many witnesses on both sides of unquestionable character, who made careful observations in crossing these waters at the instance of the British Commissioners or of those of the United States. That these witnesses include all the captains of the British steamship line running between Vancoover and Japan. They include also the officers of seven vessels of the United States Navy who thoroughly cruised the waters in question and made charts of their observations which we produced. These charts show the extent of the cruises and the exact number of seals seen and the localities. That the cruises of the British Commissioners themselves as well as those of the American Commissioners are to the same effect. That none of these various witnesses saw any seals outside of the regular navigation route upon any of these careful and often repeated examinations.

That the alleged intermingling is demonstrated to be untrue by the great difference that has always existed between the species from the Commander Islands and those from the Pribyloff Islands. A difference described by many dealers and master sealers examined as witnesses, and not denied by any witness, and which is still further shown by the great difference in the price in the London market between the Commander Islands and the Pribyloff Islands species which was from 20 to 30 per cent in favour of the latter. A difference which could never exist if the seals from the two islands intermingled in their reproduction. That the attempt on the British side to break the force of the evidence of the furriers by re-examining some of them entirely failed.

Of the six leading furriers in London, through whose hands pass all these skins, and who were examined on the part of the United States and testified to the facts above stated, but three have been re-examined on the part of Great Britain, though they are British subjects, quite accessible in London. To six other furriers who testify on the British side no question is put on this subject, though they must of course have full knowledge in regard to it.

One of the British witnesses of the largest experience says that the new skins are readily distinguishable, but that the process of dyeing and dressing causes the difference to disappear to a considerable extent. Four others testify that there are some skins in each catch that are indistinguishable *after* they are dressed and dyed.

Of some others who state that there are some skins that are undistinguishable every one mentions as existing some one or more of the differences stated by the witnesses who testify on the side of the United States.

No witness in the case states that he ever bought or sold or heard of there being bought or sold a skin from the Commander Islands for a skin from the Pribyloff Islands, or of any question ever arising among the trade or elsewhere as to which islands a skin belonged to. Nor does any witness deny the great and uniform difference in the prices as above stated.

Nor is any naturalist called on the part of Great Britain to contradict the strong and clear evidence given by the American Commissioners and other scientists, as well as by practical sealers, showing the difference that exists between these two species, apparent to all who are acquainted with them either scientifically or practically.)

Mr. PHELPS continued: I shall refer briefly to another question which has been made by the British Commissioners but which has not been observed upon by my learned friends on the other side, and therefore I think I have the right to infer that they do not depend upon it and that they agree with me in thinking there is nothing in it. But it has not been specifically withdrawn, the evidence is there, and it may be useful and may throw light on some other things briefly to consider it. The British Commissioners suggest in their Report another theory that is new to the world,—one of the numerous discoveries they have been able to make in this case; and that is that the seals have a kind of winter habitat, as they call it, over on the Columbian coast opposite to the British Possessions. Now, what is the importance of that suggestion? If it were true, what is the use of it? It is another proof of the pressure they felt themselves under of escaping the overwhelming facts that attach those seals to the Pribilof Islands and the American territory. That is all there is of this theory. It is that the home of the seals on the Pribilof Islands may be to some extent balanced, or offset, by showing that they are on the British coast in winter. For that theory, which is nothing but a theory and a conjecture, there is not one word of foundation. When you begin with the beginning, with its genesis, in this Report and read what they have to say in support of it, and then contrast it with the evidence in the case, it perishes so utterly that I am not surprised that my learned friends do not conceive there is anything in it, and, therefore, I can deal with it very briefly.

(Mr. Phelps proceeded to review the statements on this subject in the British Commissioners' Report, and to point out—

1. That this theory also is original with those gentlemen, finding no warrant in any facts or belief that had ever been known before.

2. That in the fullest extent to which it is attempted to be stated, the facts would be of no consequence, because it is not pretended that any seal was ever known to go ashore or to reproduce in British Columbia or anywhere else except upon the islands.

3. That no evidence or proof of any sort is cited in support of it except the reports of vague statements which are not given, and whose authors in most instances are not named, not amounting to the dignity of hearsay, because what is said is not stated, nor by whom nor to whom; that the principal source of them is a witness who is shown by his own testimony and by various evidence in the case to be utterly ignorant on the subject of seal life, and to have advanced and maintained with equal positiveness several other theories in respect to it

which are now conceded to be entirely without foundation; that he is also shown to be an extreme partisan of the sealers, employed in their behalf; as a writer for the newspapers and general advocate; that his statements show him to be very reckless of what he says; and that finally, when examined as a witness by the United States, he substantially takes back what he has said on the subject and admits that his observations and information had no just foundation.

4. That the theory thus suggested is opposed to all the known facts in seal life in regard to their course of migration, and is entirely disproved by the evidence.)

Mr. PHELPS continued: There is only one other question of fact which I have to allude to, quite briefly. I have dealt with two particulars in which it was attempted by the British Commissioners to qualify to some extent the great facts we have claimed to be true, and I think I may say, proved to be true, in respect of the resort of the seals to the Pribilof Islands.

The first was the commingling; the second was the winter habitat. There is another attempt upon which a good deal of testimony has been expended, that is to say, a considerable number of witnesses have been examined, but upon which nothing has been said by my learned friends, though they allude to it as a fact in the Case, and evidently rely upon this evidence, and that is, that impregnation of the seals has taken place to some small extent, or rather may have taken place to some small extent in the water.

To save time and to avoid going through evidence of that sort, I have put some observations upon it, with references to testimony, upon paper, which, with your permission, I will hand up, and I have given copies to my learned friends. It embodies nothing except what I should say if it was a subject that I cared to discuss at length. There is nothing in it except references to evidence and the heads of suggestions that I should have intended to make.

Sir CHARLES RUSSELL.—Looking at its subject matter and my learned friend having been good enough to show us a copy of this, we do not object to its being handed in.

The PRESIDENT.—We quite appreciate the propriety of that measure.

Mr. PHELPS.—I will make only one or two general observations, and leave the rest to the contents of the printed paper. In the first place that theory is completely disproved, in my apprehension, by the fact that it contravenes the great dominating fact of this animal's life, which distinguishes it from all other animals that ever were known; and which has been so clearly explained in the evidence that it is not the subject of any dispute. This theory is entirely opposed to that fact, and would render it an absurdity and an impossibility.

In the next place, the theory is completely disproved by the period of the year in which the young of this animal are produced, and about which there is absolutely no conflict in the evidence. The period of gestation is stated by all witnesses on both sides to be about 12 months,—undoubtedly lunar months, which I believe is usual with such animals. The time when the young are produced and born on the Islands is not the subject of dispute. Consequently it is made apparent that impregnation must occur on the Islands. Then when we come to analyse the testimony to the contrary, it absolutely disappears into thin air; there is really nothing of it.

Now, Sir, that brings me to the end of one principal topic in this case. I have thus far endeavored to consider the title we should have to these sales under the general principles of municipal law, if instead of the United States Government we were merely a Corporation, which had

become the proprietors of these islands, and stood in the same situation that the United States Government now do. I shall proceed on the next hearing to take a larger view of that subject. Thus far I have confined myself to the principles of municipal law, and I have tried to point out that upon the great facts, undisputed except so far as the three minor particulars I have discussed to day are concerned, and not disputed successfully I think I am warranted in saying in those particulars, we have a right of property in this herd of animals where they are situated, and as they are situated; in view of the husbandry and industry established in respect of them; in view of the control under which they were brought; and of the *animus revertendi*, which causes them constantly to return voluntarily to our control.

My friends enquire: "What have you done?" They say: "You have done nothing except to kill the animals—you select them for killing". We have, in the first place, by Act of Congress, appropriated this territory and reserved it, which, otherwise, the Government might occupy for other purposes or might make subject to entry and sale as the lands of the Government of the United States are made, except when reserved for special purposes. By special Act of Congress these islands are consecrated to the use of these animals. Under the Statutes of the United States, and by the superintendents of the United States, appointed by the Government, and paid by the Government, they are watched over and protected from the extermination that would otherwise certainly come to them. The cruisers of the United States surround the islands; and thus we have founded this valuable husbandry. If we have not confined the seals more closely it is not because we could not do so if we desired, but because it would have been not merely useless, but prejudicial to the animal.

Here are two classes of animals—wild animals—valuable animals—to one class of which the law annexes property so long as the *animus* continues, which returns the animal to the possession. The *animus revertendi* is nothing but an element of possession—it takes the place which, in domestic animals, entire confinement takes. It is a mere element. It takes the place of the fence or the wall that would restrain animals who, if so restrained, would perish and lose their usefulness. There are other animals, and the distinction was pointed out the other day, under which the law of England—probably the law of other countries—applies a different rule because the conditions are entirely different.

Now to which class do these seals belong? What is the distinguishing fact on which this legal principle attaches? That is the question. We have seen that the animals are as diverse as they can be. They belong to every species. We have seen that the confinement is as different as the animals themselves. What is the principle? It will be found in the English cases that were cited by my associate Mr. Carter in the opening. It is the establishment of the husbandry—the industry—which means, in the first place, care, pains, protection, expenditure of money, on the part of the proprietor, which obtains the product for himself, and for the world, without which the animal would perish. There is the criterion. That the *animus revertendi* so largely enters into it is because it is so commonly the case that without the *animus revertendi* it is not subject to any custody that would make it useful—that if you shut it up in the yard or in the building you have destroyed it. It is the husbandry—the industry.

That is the great leading fact that distinguishes those from the wild deer of Scotland or the wild deer of America. It was the husbandry that was founded and maintained by taking such possession as the nature of the animal admitted of; and I respectfully say that there is

no case in the range of the law where those facts have not operated in municipal law, to give a title. There is no such case where a right of property has not been deduced and protected by the law; and when you find on the other hand the cases of the wild game that are put in the other class, you find animals which are the subject of sport, where the animal returning cannot be identified, where when he goes on to the neighbour's land, he gets from that neighbour exactly what he gets at home, so that the pheasant or partridge that goes from my estate to the estate of my friend owes nothing more to me than he owes to him.

Now when you come to apply those considerations to the case of the fur-seal, it will be found that in every respect and particular the case is much stronger than that of any wild animal to which a property was ever attached in any system of law. You see their great intelligence. You see that this soil is not merely a casual place which they could exchange for another to-morrow, but is necessary for their existence. You see that this *animus revertendi* which constitutes a part, and but a part of our possession, is continued and virtually created by the care and protection that they receive; and you see the husbandry which the proprietors—it is the Government in this case—have built up and maintained, without which there would be no such animal for them or for the world.

If it is convenient for you to stop here, Sir, I will continue my argument to-morrow.

[The Tribunal thereupon adjourned until Wednesday, the 28th June, 1893, at 11.30 a. m.]

FORTY-SIXTH DAY, JUNE 28TH, 1893.

Mr. PHELPS.—I have thus far, Sir, as the Tribunal will have perceived, dealt with the question of right in this case as it would have arisen if these islands had been the property not of a Government but of an individual or a corporation. I come now to take a different view, a larger view perhaps, of the question, upon principles that have become a part of international law, in the first place because they are right, in the next place because they are necessary, and finally because they have been adopted by the usage and custom and practice of nations in all parts of the world in respect to all the varieties of property of this class. And still at the risk of unnecessary repetition, let me recur again to the observation I made in the outset, which I desire to keep constantly in view, and subject to which I hope everything I say upon this subject will be understood. That is, that it is not for the United States to make out a property or a right; it is for those who propose to continue such conduct as we complain of, to establish the justification for it; and in establishing that justification, the theoretical analysis is for them, if any is necessary, and not for us.

On this branch of the case my proposition is this: That where any marine or semi-marine animal, valuable and not inexhaustible, is attached, and becomes appurtenant to, a marine territory, is there made the basis of a valuable industry by the nation to which that territory belongs, is protected by its laws and by its care from the extermination that would otherwise overtake it, so as to give to commerce, and to the world, its product, as well as the profits of the industry to the nation or its subjects, it becomes the property of such nation within the definition of the term "property" which I have once attempted to give, even though its habitat (as it is called) may extend outside of what is known as the three-mile or cannon shot limit, partially, entirely, or temporarily, provided, always that if it is temporary it is accompanied by such an *animus revertendi* as ensures its return. We claim that this rule is established in the first place on authority, so far as the words of writers of acknowledged authority can be regarded as such. That it is established by principle for the sound reason that it is necessary to the continued existence of any such property; that under its protection all property of that sort that remains in the world has been saved and is held to day; and that wherever it has been omitted to be asserted, such product has perished.

In the United States Argument, page 134, there are one or two citations which as they are brief, and express my idea better than I can express it, perhaps you will pardon me for reading. Puffendorf, in his law of Nature and Nations, has this language:

As for fishing, though it hath much more abundant subject in the sea than in lakes or rivers, yet 'tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country,

that country must be very much prejudiced in this respect; especially since 'tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borders should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.

It is very apparent that this language refers to that portion of the sea which is outside of the territorial line, because inside of that line it has never been questioned that the exclusive right of pursuing any kind of property to be found in the sea, belongs to the nation. That is not questioned here by my learned friends. This language applies to those adjacent seas washing the shores of the nation in which a product of that kind is found, which would be destroyed if it were thrown open to the world without protection, and a title to which may well be asserted by the nation to which it properly belongs.

Another citation is from Vattel, and perhaps there is no other among the many great authors on the subject of international law whom the world has the benefit of, that is more generally recognized as sound authority. His work, written at a comparatively early date, before most of those now extant, still retains its original authority, and is still quoted, and this very passage is cited by my learned friends in the printed argument on their side.

The various uses of the sea near the coast render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc.; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coast belongs may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though, where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery of a profitable nature, and of which they may become masters, shall not they be permitted to appropriate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive, in case there be a sufficient abundance of fish to furnish the neighbouring nations?

Then citing from another section of the same author, not reading it continuously:

A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right.

That passage will be found more frequently quoted by writers on the subject of international law, by jurists and in diplomatic correspondence, than any passage that can be found in any other writer, quoted with approbation and never questioned; and what is the purport of it?

Here again the author is not speaking of the cannon shot limit, the three-mile limit—there is no question about that at all; he is speaking of that sort of marine property extending even to fish, in which specifically nobody ever claimed a property—an animal that has no *animus revertendi*, not capable of being shut up until after it is caught, when it dies, which is absolutely free, and carrying the proposition much further than we have any occasion to carry it here.

The PRESIDENT.—Do not you think he means fishery rather than the fish.

Mr. PHELPS.—Quite so, Sir, I was about to mention that; the right of fishing, not the individual fish.

The PRESIDENT.—A distinct right of property.

Lord HANNEN.—I must beg your pardon, Mr. Phelps, but I confess I have read and understood that passage to refer only to the three-mile limit, because he says:

> A nation may appropriate to herself these things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which Governments extend their dominion over the sea along their coasts as far as they are able to protect their right.

I understand that to be a reference to the theory that it is as far as a cannon shot would go.

Mr. PHELPS.—I do not so understand it.

Marquis VENOSTA.—I remember that Vattel, after expressing the consideration you have cited, concludes by adopting the well-known maxim of Bynkershock—*terræ dominium finitur ubi finitur armorum vis*, or, in other words, the rule of the cannon shot. Do you not think that the citation you have read is in connection with that conclusion? It is an elucidation I ask you for. You do not think that these considerations have a direct reference to that conclusion. It is the same as the sentiment that Lord Hannen has expressed.

Mr. PHELPS.—I do not, Sir, with great submission, and I think I can show immediately that it is not so. The very illustration Vattel employs in this passage in respect of the pearl fisheries which extend twenty miles into the sea, shows what he is thinking of, and the context of the book shows that he is not merely affirming there the truism of the line of sea over which a nation is authorized for many purposes to extend its territorial dominion: it requires very few words to affirm that and no reasoning to support it. He is referring to the product, to the article of the industry, not to the precise limit of the sea in which it is contained, and I understand his proposition to be that where such a marine product as he refers to, not only the pearl fishery, but fisheries in general, where it is in the adjacent waters, where it appertains to the territory, where it is not inexhaustible and would perish if it were not protected, the property is in the industry, in the fishery, not in the specific animal. By which he does not mean that he could follow that animal off into a distant sea and assert the property over him that he would over a domestic animal—over his horse or his ox, but the property in the industry.

Sir CHARLES RUSSELL.—May I interpose, if it is not inconvenient to my learned friend?

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—I have the book here, and it will be found, with reference to the book, he is dealing with the question of the circumstances under which dominion may be extended.

There is no question of property; but dominion may be extended, and he justifies that with relation to the line of defence. He goes on in the very next passage following to show how far this possession may extend; and then he proceeds to justify the extra territorial limit of a certain margin of the sea.

Mr. Justice HARLAN.—But when he refers to the Fisheries of Ceylon, do you think he means to say that property only within the territorial water, but no property in the fishery outside?

Sir CHARLES RUSSELL.—No; he is then dealing with a different matter altogether, that you may acquire by possession; and the case he puts is dominion in that spot, in that place,—it is clear from the context. The passages are not together, and they are not in the same connection.

Mr. PHELPS.—They are succeeding sections.

Sir CHARLES RUSSELL.—He is showing how far this possession may extend; and then he proceeds to discuss the limits referring to the old ideas of extended jurisdiction. In that paragraph 289, he refers to the limitation of cannon shot.

Senator MORGAN.—Sir Charles, as to the property outside the three-mile limit, I understand you to insist that the author refers to the doctrine of acquisition by prescription?

Sir CHARLES RUSSELL.—Partly that, I do not say wholly that, but possession.

Mr. PHELPS.—I am very much obliged to my learned friend for reminding me of what had escaped me for the moment. There is another passage from this author to be cited in another part of my argument which shows that my construction of his language is right. It does not depend merely on the illustration he employs, which shows very plainly that he is not proceeding on the ground of a three-mile limit. Within the three-mile line, anything that can be taken out of the water belongs exclusively to the nation; nobody denies that.

Sir CHARLES RUSSELL.—Well, we do not admit that in that sense at all. We say that there is the exclusive right to take it, not that the property belongs to the nation.

Mr. PHELPS.—The exclusive right, if my learned friend likes that expression better, and it is, perhaps, the more correct expression, within the three mile limit of a nation to take out of the sea anything that is worth taking, no matter what it is, is just as complete as its exclusive right to take similar property on its soil. I take it there is no question about that. What, then, is the necessity for this eminent author going further than that in the assertion he makes about these rights? When he has said that within the territorial limit the right is exclusive, he has said everything. He does not say that at all. He says that nations may challenge to themselves the right to appropriate property of this kind which, as he says, appertains (if I give his words correctly), and that their right becomes as extensive as the necessities of the husbandry of this marine or semi-marine product; and, as I shall show, that is the usage that has obtained everywhere, without it, this would be nonsense.

If you write in to what Vattel has said there, the limitation "provided always that this product or fishery, or whatever it may be, can be availed of within three miles of the coast," he has only affirmed in all this language what nobody at all denies, and what might be stated, if he had occasion to state it, in a single line.

Sir CHARLES RUSSELL.—He is writing at the end of the last century, in 1797.

Mr. PHELPS.—We were aware of the date of Vattel's writing, and I presume the Tribunal were. If my learned friend means to assert that Vattel does not support my view, that is one thing. If he asserts that Vattel is not authority, that is another thing.

Sir CHARLES RUSSELL.—No, I referred to the date, because the limitation of the territorial jurisdiction was not then fixed as it is now.

Mr. PHELPS.—It was fixed and there was the same limitation that now prevails.

Senator MORGAN.—And it is not fixed now.

Mr. PHELPS.—No as I shall show presently by the English decisions, but we must take one thing at a time.

If it be said that Vattel wrote too early to be authority, that will dispose of this citation; that is a point on which I have nothing to say.

If it be that he, in using this language, meant only to assert that the exclusive right to take property out of the sea, within the limit assigned to the territorial jurisdiction, was enjoyed, then I say, with very great respect, his language is completely misunderstood. Another section, which will be found on page 148 of the United States Argument, shows that plainly enough. That is section 289 which is the section immediately following the two from which I have read. Those I have read are sections 287, a part of 288, and this is 289, or an extract from it.

It is not easy to determine to what distance the nation may extend its rights over the sea by which it is surrounded. . . . Each state may on this head make what regulation it pleases so far as respects the transactions of the citizens with each other, or their concerns with the sovereign; but, between nation and nation, all that can reasonably be said is that in general the dominion of the state over the neighbouring seas extends as far as her safety renders it necessary, and her power is able to assert it.

And in that connection I should like to read what Chancellor Kent says.

Sir CHARLES RUSSELL.—But then Vattel goes on to say in the same passage that he refers to the cannon-shot.

Mr. PHELPS.—If you will give me the book I will read it.

Sir CHARLES RUSSELL.—No, I beg your pardon for interrupting you.

Mr. PHELPS.—It is no embarrassment, and I will read anything that is desired.

Sir CHARLES RUSSELL.—No, I do not wish that.

Mr. PHELPS.—I regret that I read these citations from copies, without bringing in the volume, as I might have done, but if there is anything further I will recur to this subject again.

Chancellor Kent says in his First Commentaries, at page 29.

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

It is pretty clear that Chancellor Kent is not talking about the three-mile limit there, because the very question he is discussing is, how far beyond the territorial dominion may a nation extend its powers; and he answers that question by saying, ove rthe contiguous sea, the sea that washes its coast, as far as is requisite for its safety and for some lawful end.

And he says in another connexion on page 31:

And states may exercise a more qualified jurisdiction over the seas near their coast for more than the three (or five) mile limit for fiscal and defensive purposes. Both Great Britain and the United States have prohibited the transhipment within four leagues of their coast of foreign goods without payment of duties.

I shall come to that subject later on. I only refer to it here in connexion with what Vattel has said; and I respectfully insist that both these authors, Puffendorf and Vattel intend to assert and do assert the right of the nation to extend its dominion over property of that sort attached to its territory, which is made the basis of an important industry, just as far into the contiguous sea as is necessary to protect it; and whether that falls outside of the three-mile line, whether indeed, as in the case of the pearl fishery, it all falls outside of the three-mile line or whether it is property that is part of the time within the three-mile

line and part of the time without, it all comes in under the general principle, the necessary principle, without which I have said there would be no such property to quarrel over. As my friend suggests to me, both writers make a cardinal condition of the exhaustibility of this product, distinguishing such a product as this from those general fisheries that are, as far as we know, practically inexhaustible.

Then there is a passage from Valin, a French writer, which is cited at page 188, which may usefully enough be referred to in this connection, though it is quoted for another purpose. When we come to discuss the question of the Newfoundland Fisheries that have been spoken of before in this argument, it will be seen that this passage from Vattel was quoted in that discussion as giving to Great Britain the exclusive control over those fisheries, extending very, very far out into the ocean in all directions from the coast. It is in that connection that this from Valin is quoted.

As to the right of fishing upon the bank of Newfoundland, as that island which is as it were the seat of this fishery then belonged to France, it was so held by the French that other nations could naturally fish there only by virtue of the treaties.

How far out that was we shall see when I come to deal with the subject.

This has since changed by means of the cession of the island of Newfoundland made to the English by the treaty of Utrecht; but Louis XIV, at the time of that cession, made an express reservation of the right of fishing upon the bank of Newfoundland, in favor of the French as before.

It will be seen, as the context, I think, is read from this book, from the construction that has been put upon this many times when it has been cited in similar controversies, that Vattel never has been understood as merely assuming that the nation had a certain territorial jurisdiction outside of the land, which nobody denies, but he asserts that irrespective of that it may exercise a control over this sort of product under those conditions and under those circumstances.

Now is there any authority the other way? Have my learned friends in the exhaustive and very able argument of this case, both in writing and orally, which the Tribunal have had the advantage of hearing, produced anything on the other side? Is there some writer on international law who has declared somewhere, that this right does not exist? Is there any writer or any Court to be found to assert that in property situate like this to which Vattel refers, the right of protection terminates at three miles or at a cannon shot or at any other specified distance? Why yes, there are jurists who have had the high honour of being cited by the distinguished counsel of a great nation; there is a man who writes for a newspaper in America, who is brought forward as a jurist, who has been a steadfast volunteer champion to the extent of his capacity, of the British side of the case from the beginning, on every single point that has been discussed. He is an authority for my learned friends, not only on this important point of international law, but on every other question that has been proposed in the course of this dispute. What his motives are may be conjectured. I do not know anything about them, and I do not know anything about him. He is not a lawyer, and who and what he is, and whether his name is a *nom de plume* or not, I do not know.

There was a very celebrated English Judge who, in one of his judgments, declared that reading and writing came by nature; if he had lived a little later he might have added international law to the cate-

gory. That is a subject on which a great many people are able to enlighten the world, without having had the advantage of any previous education. Problems that occasion grave difficulties to great lawyers and judges, they are able to dispose of in a very short time. Then there is another young gentleman who has written an argument and printed it to the same effect. I have not the pleasure of knowing him. These productions are about as much authority, I was going to say, though they are really far less authority than the arguments of my learned friends; the difference being that the arguments of my learned friends come from gentlemen eminently qualified to make them, instead of from those who are not qualified at all.

Then it is said that my friend, President Angell, of the University of Michigan, a gentleman of very high standing, in a magazine article has said that we have no such right. President Angell is not a lawyer, and has had no opportunity to see the United States Case, or to know on what ground we put it, or what the facts are. I should be very willing, with those additional advantages, to submit this Case to his judgment. He would frankly say probably, if he were enquired of, that this was a casual, superficial expression upon a subject he had not examined, with which he was not familiar, and in which he had assumed as true what had been so largely claimed on the part of Canada at least, if not of Great Britain. If we were going into pamphlet literature on this subject, I would rather commend an Article that has more recently appeared from Mr. Tracy, a very eminent lawyer, in the "North American Review", which I have seen since I came here; and an Article by Mr. Slater, one of the most eminent of British Naturalists, in the "Nineteenth Century", which came out pending my learned friends' argument on the other side. If these are the sources to which we are to go, I think the weight of the magazine literature will be found to be as much against my learned friends as authorities of a higher character. With those exceptions, if we have misread Vattel and Puffendorf, no other writer is produced to show it; no writer who has put a different construction on those passages; no writer who has affirmed the rule of law to be different from what we affirm it to be here. It is to such sources as that that my learned friends have to go for what is called authority.

Now, it cannot be, at this age of the world, that in respect of property of this kind contained in many seas, on many shores, the question of the legal right of the nation to which it appertains to enjoy and protect it can be new. It may be new as applied to the seals, or it may not. It cannot be new in the sense in which Vattel and Puffendorf discussed it. It can be found out one way or the other, and if we are wrong, certainly the learning and diligence of my learned friends must be able to show it.

As I remarked the other day, the title of a nation comes by possession and assertion, where that possession and assertion does not controvert a right of another nation, or any established principle of international law that is founded upon the rights of another nation. It is possession, and assertion, in every case, as will be seen when we refer again to the cases presented to you in the opening, that the title of the nation stands on. They required no conveyance from anybody. They made no treaty with anybody. In every case they stretched out the hand of the national power and took possession of the adjacent product, and proceeded to husband it and improve it, and to give the world as well as themselves the benefit of it. If any nation had a

better right, that step on the part of the nation that appropriated it would have been open to question, and would have been made the subject of controversy. If they had appropriated what belonged to somebody else, their appropriation would have been open to challenge, and would have been challenged. If, on the other hand, they had appropriated only that which was the common property of all mankind, still more would their appropriation have been successfully resisted and challenged by those who had an interest in doing it, who desired to avail themselves of their right to participate. When the United States, therefore, in appropriating this territory to the protection of the seals and in founding this industry upon it, have so taken possession of it and asserted the title on which the existence of this herd depends, the question is, what right of mankind have they invaded? It can only be the right of mankind to exterminate that race of animals, because they cannot participate in it on the sea without doing so. If it were possible for the rest of the world to come and avail themselves of what is called pelagic sealing of this herd and not exterminate it, then the argument of the other side would have the advantage of being placed not upon the right of extermination, but upon a right of participation in what they say is open to all the world. But that is impossible, as I shall show more clearly when I come to deal with the evidence.

When the United States stretches out its arm and takes possession of this property, this herd or this interest—which appertains to their territory, is produced there and would perish there—takes care of it and protects it and founds this industry upon it, and asserts its title, then when the individuals who challenge that come forward and say we are assuming a title to what belongs to the world, and are shutting them out from a participation in what as a part of the freedom of the sea belongs to all mankind; I say, "What is it you propose to do?—what do you want to do? We want to take these seals, indiscriminately in the water. Can you distinguish between sexes? No. Do you attempt to distinguish? No, because it would be of no use." What is the result of that? The result would be that before five years the seals would have perished off the earth. Now upon the proposition of my learned friend, international law is on that side. International law provides by a principle founded upon wrong and not upon right, enunciated nowhere, by no writer, applied in no other instance that we hear of in the history of the world—international law, this subtle essence that only exists for mischief and can be traced to no foundation of right, steps in now and says we cannot assert our right to this property on the part of the United States Government. It is the right of mankind to exterminate it, and therefore, if there is a little knot of adventurers anywhere, who desire to embark in that business, the Government must retire and extermination must take place.

I say that stands upon no authority; it is justified by no writing in any book that would receive a moment's attention by lawyer or judge. It is justified by no practice that ever prevailed; but is contradicted by all practice that ever was known; it rests upon nothing,—upon no reason that can be stated. My learned friend criticised my associate, Mr. Carter, for saying that the right of the Government to avail itself of this industry depends upon the fact that they could so administer it as to preserve it for mankind, at the same time giving mankind and themselves the benefit of the product. That surprised my learned friends. Their capacity for surprise is large; and I have noticed sometimes that their surprise at propositions advanced, was in the direct

ratio of their inability to answer them. When a proposition is stated that cannot be answered, my learned friends say, "Are we to regard that as serious? Do you mean to persist in it after you have been informed in the British Counter Case that it is wrong?" Well, when they are apprised that we should venture to persist in it till we heard the answer to it, that occasions reiterated and additional surprise. Now, if you do not like my brother Carter's reason, if that is not sufficient, what is the reason on which this case must be determined? On what ground does your proposition stand? Here are two propositions that are directly opposed to each other; one of them must stand to the exclusion of the other.

The proposition on our side is that the nation to which such a property appertains, where it belongs, and is produced, which can alone administer it, and which has at labour and expense and through a long period of time established that industry, has a right to it by the principles of international law.—Their proposition is that it belongs to such portions of mankind,—1083 people, I believe my brother Robinson says constitute mankind in this case,—that it belongs to such portion of mankind as want to use this property in a way that is certain extermination.

Now, there is where we are at issue exactly. When we ask our learned friends: has this been established by authority, so that we are too late in setting forth our proposition? We are referred only to one or two newspaper writers. When we ask for the practice and usage, which, in another part of this case, we are told by my learned friend constitute international law and is indispensable to it, you find the practice of the whole world is the other way. In every case, when we get down to fundamental principles and ask for the right on which it stands, what have they to say? Sir, I respectfully say, as I said in the outset, the statement of this proposition either to a legal mind or to a mind possessed of any sense of justice, is its argument;—there is nothing to add to its statement; the answer to it may be demanded, and until that answer is forthcoming surely there is nothing more to be said.

I do not propose in the review I am about to make, somewhat rapidly, of the various instances,—all the instances in the history of the world that we know anything about property similarly situated,—to spend a great deal of time, because this has been presented by my associate in the opening, and it certainly is not necessary for me to repeat what has been already said at the risk of not repeating it as well; but I want to review them in order to give point to what I have said in respect to the argument on the other side, and in respect to the practical application to these principles.

The first one is that of the Ceylon Pearl Fisheries. They extend from 6 to 21 miles from the shore, outside entirely of any jurisdictional line. There is not an oyster, as far as I understand, within 6 miles of the shore. By various Statutes, and most just and proper Statutes, throughout a very long period of time (I will not undertake to say how long,) but it is said in the British Argument "from time immemorial," and I presume that expression is correct, these Fisheries have been regulated and protected, and exclusively enjoyed under the British Government or its Colonies. Not a pearl-oyster was ever taken there, so far as we have any reason to believe, by any man, except subject to those Regulations,—and not an instance has been produced of any ship or any individual ever attempting to interfere with them.

Now let me suppose that some sharp American should fit out a fishing fleet, and go there in pursuance of the rights of mankind, and begin taking up those oysters in defiance of the regulations by which alone they are protected from extermination—in defiance of laws which prevent British subjects at least from interfering with them in a manner that is not consistent with their protection. The commander of this expedition is asked: "What are you proposing to do here"? "We are proposing to take up pearl oysters and we have come out to make a profit". Take them up—how? "Why as we get them". "At any particular time"? "No, at any time". "In any particular way"? "No, in any way we can get them". "Are you aware that that would result in the speedy destruction of the whole product"? "Well we do not care anything about that. Let the ladies go without their pearls. What consequence is it if they are exterminated? It is a small matter. And any how, I am here on the part of mankind: you have no control over the high sea; we are exercising the right of fishing on the high seas free to all mankind".

What does anybody suppose would take place?—That Great Britain would stand back and bow in deference to those rights of mankind and permit that fishery to be exterminated? Will any man say that a Government ought to do so? Does anybody suppose that it would do so? Why the question answers itself.

What is the answer in the British argument to this? It is said in the printed argument by my friends: "The right to these pearl fisheries out in the sea has been recognized from time immemorial by every body". That is precisely what we say. It belonged to you from time immemorial, and it has been well recognized, and all the nations of the earth have agreed to recognize it so far as can be shown by their abstaining from interference. You have had—you have been permitted to have—by the acquiescence of all nations, this property: you bring yourself—(in fact this illustration is given by Vattel)—exactly within the principle—you bring yourselves within analogous usages, when you inform this fleet of *quasi* pirates that come there for the purpose of destroying this industry with its means of livelihood for those engaged, with its profits to the Government. Suppose that the case in this Arbitration between Great Britain and the United States was, that the United States claimed that the British Government should pay for fishing vessels fitted out by the United States to go and prey upon this pearl fishery at the risk of exterminating it; and suppose Great Britain had done what she certainly would, and ought to have done when those people announced the purpose of their presence there—had taken the ship, carried it in and confiscated it under the provision of the laws made there and in force for that purpose, and the United States calls upon Great Britain (as they call upon us in this case), to pay for vessels seized in such fishing; suppose that to be the question addressed to this Tribunal, and we to become the advocates of the rights of mankind in the open sea and ask an award that vessels there for that avowed purpose and with that certain result and seized by the British Government in pursuance of statutes long in force, and well known to all the world should be paid for, I should like to know what decision would be expected from this Tribunal in that case? I should like to know what member of this Tribunal would entertain that proposition for one single moment; and yet it stands upon everything that can be invoked in favour of the propositions of my learned friends in respect of the seal. That is to

say, it would stand upon a general dissertation on the freedom of the sea, and the right of fishing as a part of the freedom of the sea, and upon this favourite proposition of my learned friends that they recur to with so much pleasure—(because it seems more grateful to them than discussing some other propositions in the case)—that you cannot give an extra-territorial effect to municipal statutes. That is all very true as a general proposition, but not true as applied to this class of cases. It is as true in this case, as it is in the other cases of the Atlantic: it is true that the sea is free: it is true that fishing, as a general rule, is one of the rights of the freedom of the sea: it is true that as a general rule statutes do not extend in their effect beyond the territorial jurisdiction of the nation that enacts it. We should have the advantage in our claim for payment for the schooners that were destroying the pearl fisheries, of those propositions. Should we succeed? and if we should not, upon what principle is one rule to be appealed to in that case, and another in this?

Now, sir, if it were true that those Pearl Oysters had to go ashore seven months of the year in order to continue their species, and went ashore upon the British territory for that purpose, would the case be any weaker? Should we be able to say under those circumstances "you could successfully maintain your right to the oysters, if they had stayed in the sea all the time outside your jurisdiction, but if they went on land and propagated there you could not"?

Senator MORGAN.—Does the British Government get any revenue from these fisheries?

Mr. PHELPS.—I do not know. I suppose they do. I take it for granted that they do, or they would not regulate them by public enactment.

Sir CHARLES RUSSELL.—I do not speak with certainty, but I believe not. If you think it material we can enquire.

Mr. PHELPS.—I do not speak with certainty. I supposed they did, but I do not really know.

Senator MORGAN.—The American government, of course, get a revenue from the product of the fur-seals, and they are made the instrument of profit there to that extent.

Mr. PHELPS.—That is a view of the case I am coming to pretty soon. I had supposed that the British Government derived a revenue. I may be mistaken. My friends would know a great deal better than I should, but it is not material to my argument.

If you maintain the unquestioned right of Great Britain in the pearl fisheries (which they contend for in their argument very properly), I ask upon what ground you are expected to discriminate the case of the seals from that? because when you come to look into the condition of the animal, these animals who have come on shore to live, to propagate, to continue to exist, are ten times as much attached to the coasts as the fish. If there is any discrimination between the two cases the case of the seals is ten times stronger than that of the oyster.

Then it is said by whichever of my friends is responsible for the printed argument (and I believe it is said in the oral argument). "The oysters are on the bottom of the sea; the seals are on the top. That makes a difference". In the first place, what authority does that stand on. When they set up a distinction that has no reason for it, and no sense in it, why, if it exists, it exists as a technical rule that is established by authority, and, therefore, must be regarded. Is there any authority for it? Is there a line from anybody who wrote before this

argument, to explain to us why it is that there is a difference between a product of that sort on the bottom of the sea, and on the surface? Suppose seals propagated on the bottom of the sea instead of going ashore, would they concede that we should be any better off? Suppose, in the nature of these animals, when they came in they went to the bottom within three miles and their young were born, nurtured and raised there, would that make a case in our favour that we have not now? Or suppose on the other hand, as I said just now, that oysters went ashore for this purpose. Why, it is very apparent that it is not a difference that could touch the principle? That is not a difference that there is any sense in. It is not a difference that was ever heard of before, as far as we may infer from the absence of any authority being cited in favor of it.

In answering Senator Morgan's question Mr. Foster puts into my hands one of the Acts with regard to the Pearl Banks of Ceylon. It is called Regulation No. 3, of 1811.

Mr. Justice HARLAN.—Where are you reading from?

Mr. PHELPS.—Page 461 of the first volume of the United States Appendix. The Regulation is in these words:

Whereas there is reason to suspect that depredations are committed in the Pearl Banks of this Island by boats and other vessels frequenting those places in the calm season, without any necessity or lawful cause for being in that situation.

For the protection of His Majesty's property *and revenue*, His Excellency the Governor in Council is pleased hereby to exact and declare:

Then follows the Regulation.

That if any boat or other vessel shall hereafter, between the 10th of January and the end of April, or between the 1st of October and the end of November in any year be found within the limits of the pearl banks, as described in the schedule hereunto annexed, anchoring or hovering and not proceeding to her proper destination as wind and weather may permit, it shall be lawful for any person or persons holding a commission or warrant from his excellency the Governor, for the purpose of this Regulation to enter and seize such boat or other vessel, and carry the same to some convenient port or place in this island for prosecution. And every such boat or other vessel is hereby declared liable to forfeiture by sentence of any court having revenue jurisdiction of sufficient amount, and shall be condemned accordingly; two-thirds thereof to the use of his Majesty and one third to the person seizing or prosecuting, unless such boat or other vessel shall have been forced into the situation aforesaid by accident or other necessary cause, the proof whereof to be on the party alleging such defence.

Senator MORGAN.—That is a sort of prize jurisdiction.

Mr. PHELPS.—Yes that is what would happen to the vessel of another nation that went in there in the prohibited time, and intended to make a temporary profit out of the pearl oysters, that would destroy the animal itself, and the industry.

Are we to understand that the meaning of that statute is that if any British subject violates it his vessel shall be forfeited, but it is a nullity to all the rest of the world; and therefore if a British subject will go and register his vessel under the laws of some other nation, that will give him that privilege; that he may come there with impunity, just as these renegade Americans are doing, under the protection of the British flag in the destruction of these seals, to commit what would be an indictable offence if it were not under that protection. Is that the meaning of that statute? Is that what my learned friends desire us to infer from this technical argument as to the general applicability of statutes, that the real reading of that statute is that if any person, under the British flag, should depredate upon these oysters within the prohibited time, his vessel is liable to seizure and confiscation; but if

he came there under any other flag in the world that he could get the use of, whether it is his own or not, then he may exterminate them at pleasure.

Senator MORGAN.—It could not be meant as a hovering provision.

Mr. PHELPS.—One would think not. The language is broad enough. I shall have occasion pretty soon, in another connection, to consider exactly, what is the meaning of such a statute. I am now upon the general subject. Have they shown us that in this case, or in any other of those that have been referred to, and that I shall refer to again,—have they shown us that in *any* case, either that an individual has been permitted with impunity to violate any statute made for the protection of any such product, or that any nation in the world in diplomatic correspondence, or in any other way, has challenged the right, or asserted the right of its citizens to go and participate in it. It is the usage and custom of nations that my friend says makes international law; and it undoubtedly does when such usage and custom have been sufficiently expressed, and it can only be expressed by acquiescence. Undoubtedly, on a point where the usage and custom of nations can be regarded as established, he is quite right in saying that makes International law, and may make it to such an extent that you can not countervail it, even upon strong moral considerations. We are not now engaged in the discussion of the general principles of the extent and applicability of particular statutes, whether they are or are not sometimes defensive regulations, whether they may or may not be extended beyond the three mile line. That is not the point. What is the usage and custom of nations in practice, in point of fact, in regard to property of this kind under similar conditions—weaker always—but similar? Now I repeat the question:

Instead of this argument on the general propositions that nobody denies, and that is perfectly foreign to anything we have before us, have they shown us the case in any of these countries who have asserted such rights in which any individual belonging to another country has been permitted to transgress it, or any nation has challenged their right to forbid it? I go further: have they shown that in addition to all these instances, which, as I said, comprehended every case of such property that we know of, now existing in this world, have they been able to say "in another country that you have not mentioned, in respect of another class of similar property which you have not brought forward, a nation which has undertaken to protect it and build up an industry upon it, has found itself incapable of enforcing its rights, and has permitted foreigners to come there and invade it to the extent of destruction, or to any extent at all. Have they found such an instance? Not one. Starting with my learned friend's proposition, that it is the usage of nations, just or unjust, right or wrong—that makes international law—*that it is of no use to talk about the principles of justice, of right,* of the fundamental ideas that underlie the law, the necessity of mankind, the policy, the comity of nations—the point is what the usage of nations has been, we undertake to show (and there is no contradiction in the evidence in this respect) what the usage of nations has been in every similar case that we know of. Do they produce any other case establishing a different precedent? Not one. But they say: "statutes do not operate beyond the jurisdiction of the country that enacts them". Does the power of the country (call it by what name you please), operate to the extent of protecting this industry whether it is inside of the three-mile line or not? That is the question. Now

what is the technical effect of a statute. What has been the actual effect of such statutes, for the one hundred years or more that they have prevailed in all parts of the earth. My learned friend who just now was so clear that the passage from Vattel, that I began by reading this morning, applied only to the three-mile limit, forgot for the moment that they have cited that very passage in the printed argument in support of their right to protect those Pearl Fisheries 20 miles out at sea. My friend cites the same passage that I have read as showing that their right to the Pearl Fisheries is unquestionable. But this morning he informs us that Vattel is very clearly applying it only to the three-mile limit.

Sir CHARLES RUSSELL.—I was not referring to that passage in the observation I made.

Mr. PHELPS.—That passage was the only subject of discussion at the time.

Sir CHARLES RUSSELL.—They are not in the same section at all—not in the same connection.

Mr. PHELPS.—I am referring to the passage that I read from the United States Argument this morning, being one section and a part of the next section, and the question arose—it was suggested by his Lordship, that perhaps that Vattel meant to say that the right was exclusive within 3 miles. That was the point, and my friend says that is what it means, and that the context shows it; and yet in the British Argument, at page 51, you will find this very passage referred to in support of the claim they there make that their right to the Pearl Fisheries which they have had from time immemorial, is unquestioned; and they give there the very meaning and the correct meaning to the passage from Vattel that I gave it this morning.

Now my friends may have this one way or the other. It does not so much stand upon what Vattel says, eminent as he is; it is a good starting point to find the proposition so felicitously stated by so great a writer. Cast that aside: what is the usage of mankind in regard to these various kinds of property? They say: there is no analogy between oysters and seals. Well, what is the reason that there is not? And, if there is a difference, which way does the difference make? Both are marine products to a certain extent—the oysters exclusively so. They never come ashore—never touch the British territory: the seals do come ashore, and they must. They are produced there and they remain there a considerable part of the time. Now what is the reason that there is not an analogy? and, so far as the analogy fails, in which is the case the strongest for the right of protection if there is a difference between the two cases?

There is the case of the Mexican Pearl Fisheries. I will not read those Statutes again. They have been read once, and they are in print before you. We know what their effect is, but I will briefly refer to the map. If you will have the kindness, Sir, to glance at the map, it is at page 486 of the first volume of the United States Appendix. You will see there laid out—(and it has not been questioned in the British Counter Case that it is laid out correctly)—the extent of the Fisheries that are there protected. Those red and blue concessions—(that is the space in which these oysters are found)—are each 5 kilomètres in width. The technical operation of these Statutes I will consider by and bye; what has *taken place* with regard to those Fisheries? Have they ever been permitted to be invaded by the Government of Mexico? Is there proof that somebody has gone there sailing under

the flag of mankind and claimed to take a hand in those Fisheries in the sea outside of the three mile limit, and that the Mexican Government have permitted him to do it; or that any nation has asserted any such right? Those laws apply in terms to foreigners, but I lay no stress upon that. You cannot extend the jurisdiction of a statute, by the words of the statute itself, beyond the power which the nation has to pass such a statute. If a Statute does not operate beyond the jurisdiction of the country that enacts it, it cannot be made to operate by passing another Statute in that country that it shall. I lay no stress (except for a purpose I shall come to by and bye), upon the fact that many of these statutes—both British and Foreign—are general in their terms, and manifestly apply, so far as the language goes, to foreigners. I am upon the question of what has taken place under such statutes. International law is not made by any nation passing a statute—it is the acquiescence of mankind in the assertion of a right that makes International law.

Now take the matter of the Coral Reefs. The French law protecting that product will be found in Volume I of the United States Appendix page 469. You will find opposite page 469 on the map, the area of the Coral fisheries on the coast of Algeria which are protected by the French law. The second article from the Decree of the 10th May 1862 is quoted in French at page 469; and the translation is this:

> Upon the request of the expert fishermen of their representatives, or, for the want of them, of the syndicates (organizations) of seafaring men, certain fisheries may be temporarily forbidden over an extent of sea situated beyond three miles from the shore, if such measure is required in the interest of the preservation of the bed of the sea or of a fishery composed of migratory fishes.

You will see on the map the extent to which that runs out, which is considerable. I do not know that the exact figures are given—7 miles I am told is the extent.

The Australian Pearl Fisheries will be seen indicated in a previous map opposite to page 468. You will see how very extensive they are—much beyond any limit of territorial jurisdiction, and that statute is by its terms restricted to British subjects and boats. It has been remarked upon by my friends on the other side. But there again whatever the effect of the statute may be, the same question occurs: what has taken place? Is that a business that is open to mankind at large? Has it ever been attempted?

The Italian Coral Beds have been referred to. The Coral beds of Sardinia and Sicily, the former from 3 to 15 miles from the land; the latter 14 to 32 miles from the land. The maps relative to those will be found opposite pages 470 and 472 showing the extent of these "fisheries", if that is a correct term. One map is of the coral beds of Sardinia and the other of the coral beds of Sicily. You will see to what distance they extend. And those statutes are general in their terms so that by the language of the statutes they would apply to foreigners. It was observed by the Marquis Venosta when that was under discussion before—I believe when my associate was speaking—that he did not understand those Statutes to apply to foreigners, but that foreigners did not go there. Well that is the point upon which I am now. Has Sicily, or has it not, from the beginning, up to now, successfully asserted its protection over this property? Has any writer challenged it? Has any nation challenged it?

Passing from the subject of coral—we have considered the pearl oysters and the coral—I believe I have named all that there are—passing to oyster beds, the British Fisheries Act of 1868 (which will be

found on page 457 of the 1st volume of the United States Appendix), you will see, without my stopping to read it, is very explicit, and is bounded by lines which are shown on the map which take in a very great area of the sea. They are 20 miles out in breadth, and for a long distance—some degrees of latitude, along the coast of Dublin, Wicklow, and Wexford Counties; and it is provided there after giving these boundary lines from the eastern point of Lambay Island to Carnsore point on the Coast of Ireland within a distance of 20 miles from there measured from a straight line drawn as shown on the map, that all such Bye laws should apply equally to all boats and persons on whom they may be binding. Then it proceeds in conclusion to say this:

It shall be lawful for Her Majesty by Order in Council to do all or any of the following things namely.

(a) To direct that such Byelaws shall be observed.

(b) To impose penalties not exceeding twenty pounds for the breach of such Byelaws.

(c) To apply to the breach of such Byelaws such if any of the enactments in force respecting the breach of Regulations respecting Irish Oyster Fisheries within the exclusive fishery limits of the British Islands and with such modifications and alterations as may be found desirable.

(d) To revoke or alter any Order so made, provided that the length of close time prescribed by any such Order shall not be shorter than that prescribed for the time being by the Irish Fishery Commissioners in respect of beds or banks within the exclusive fishery limits of the British Islands. Every such Order shall be binding on all British Sea Fishing Boats and on any other Sea fishing boats in that behalf specified in the Order, and on the crews of such boats.

There we have in explicit terms that the statute authorises the Orders in Council to extend to everything. Well, says my friend, they have not extended them. I do not know whether they have or not. If he says that, I take his statement.

Lord HANNEN.—That requires a little explanation. It is only giving the power to the Crown by the advice of the Privy Council to do certain things in certain events.

Mr. PHELPS.—I am quite aware of that.

Lord HANNEN.—It is a common mode. It is only to give the power of exercise; but of course it has no effect.

Mr. PHELPS.—I am quite aware of it. It is a statute that gives power to issue Orders in Council.

Now if England has not that power, how can that statute confer it by Orders in Council?

Sir CHARLES RUSSELL.—That is explained in the Argument at page 50.

Lord HANNEN.—It is to enable the crown to enter into Conventions, and other things, without the trouble of going to Parliament.

Mr. PHELPS.—I should have said if the remark had not come from your Lordship but from the argument on the other side—that that was a far-fetched construction.

Lord HANNEN.—I am only telling you the fact; deal with it as you think fit.

Mr. PHELPS.—The statute contains no such reference. The statute is:

Every such Order shall be binding on all British Sea Fishing Boats and on any other Sea Fishing Boats in that behalf specified in the Order.

Senator MORGAN.—Has the statute been repealed.

Mr. PHELPS.—No not that I know of. I believe it is not claimed to have been repealed.

If as is said by my learned friends this is the reason of that statute, with the extreme particularity with which English statutes are usually

drawn, I suppose it would have said so; it would have said that it shall apply to any fishing boats in respect to which any convention or Treaty may be entered into; but we are still short of the practical question; what has become of the fisheries? While we may be discussing the technical operation of a Statute that authorises Orders in Council—while we may be considering whether in fact any such Order in Council has ever been issued—and if my friends say it has not I of course take their statement because they know very well—while we are discussing that, what has become of the fish—the oysters? There again is it shown, in this exhaustive preparation, that notwithstanding the language of this Statute the beds have been open to all the world up to the extent of the three mile limit? Has any instance of any infringement been shown, or does the same conclusion come as in every other one of these cases? The Government take the business in hand as they ought to do—as they are bound to do in justice to their subjects and themselves—they take the business in hand by making a revenue and making an industry, and they pass a statute that on the face of it says to the world: "Stand off; you cannot come here within 20 miles and take these fish".

My friend says that that statute would not do any good if the world came. Did they ever come?

Has any body attempted it? Has any nation asserted it, or has it resulted in a complete protection of that industry? And what would have happened if they had come?

The PRESIDENT.—War. It has perhaps not been challenged, but it is a challenge.

Mr. PHELPS.—Yes, if it can be dignified with the name of "war"; but it is unquestionable that if any foreign vessel had undertaken to come there and destroy the fish, that vessel would have been taken and prevented from going on in the business. If that is war, then call it so. But what nation would have backed up its citizens in any such attempt? What nation, I repeat, ever made such an assertion? It is the practical result of those acts by the exclusive acquiescence of nations that I am dealing with.

The Scotch Herring Fishery Act is a provision of a very similar kind. The map will be found opposite page 458 of the 1st volume of the United States Appendix, showing the extent of the sea. It is a very large one and covers a very large tract of sea, extending some thirty miles from land. It applies in its terms to "any person". My friend says "any person" means any person within the jurisdiction of Great Britain and, for certain purposes, when that language is used in an Act, they are undoubtedly right. But here again comes the same question as to the practical result that has taken place. I do not know, Sir, that, aside from these Herring Fisheries, Oyster Beds, Pearl Oysters, and Coral, there is any other description of property now known in the world that comes within the purview of this principle, except it be the seals.

Now what about the seals? What is the protection that has been extended to them? And before entering upon that branch of the subject, as it is within two or three minutes of the time of adjournment, perhaps it would be convenient for you to hear me afterwards.

The PRESIDENT.—Quite so.

The Tribunal then adjourned for a short time.

Mr. PHELPS.—I hope, Sir, I shall not be found tedious in pursuing this line of illustration, or rather of historic precedent, over which I shall pass as fast as I can. I now come to the particular point of the pro-

tection that has been afforded to the seal in the various countries,—all the countries I believe in which it is now to be found, and the consequence of the want of it in those countries in which it formerly existed and from which it is now gone.

The first instances I shall allude to are under the Imperial Government of Great Britain, but in force in its Colonies. In the 1st United States Appendix, at pages 436 and 437 will be found the Act for the protection of seals in New Zealand—an abstract running through pages 438, 439 and 440, and a Map. It is said by my learned friends in regard to the map, and I think they are right in this criticism, that as drawn it carries an erroneous impression of the effect of the Act fixing the boundary of the Province of New Zealand; that while the map is correct in giving the limits of latitude and longitude which are described as constituting the Colony, that it was not the intention of the Act to assert such a jurisdiction over all the intermediate sea, but only to make that a boundary so as to include within it all the land and islands with the usual territorial limits. Certainly that was not the intention of the gentleman who prepared this map; but I think the observation of my friend is well founded. Neither is it in the least material to our purpose, because as I believe I remarked this morning, nothing can be clearer than that the jurisdiction upon the high seas of a country cannot be arbitrarily extended to geographical limits, aside from any special necessity that would justify it, by a Statute of that country. So that if it were true that the Legislature of New Zealand had undertaken to assert that several thousand miles of sea, irrespective of any particular purpose, should be regarded as the territory of New Zealand, that would no more make it so than it would have followed if they had passed no such act whatever. But the point is the close protection, the very special protection given by these acts, and under which, on the face of the act, any vessel, boat or crew are made liable if found within the waters where the seals are. That is the point to which we have intended to invite attention by reference to these Statutes and the construction of the map.

Section 4 of the act of 1887 provides:

> If any person shall be found in the possession of any seal, or the unmanufactured product of any seal, during the close season, such possession shall, for the purposes of the said act and this act, be deemed to be, in the absence of satisfactory evidence to the contrary, sufficient proof, and so on.

Then section 5 is:

> Any vessel or boat the crew of which, or any part of the crew of which, shall be engaged in illegally taking seals, and any vessel or boat on board of which any seals so illegally taken, or the skin oil, blubber, or other product of a seal so illegally taken, shall be found, shall, together with the boats, furniture, and appurtenances of such vessel or boat be forfeited to Her Majesty, and shall be disposed of as the Commissioner may think fit.

There are other very stringent provisions. There is one in section 7 that provides in effect that any officer of that Government shall have power to enter upon and search any vessel within the jurisdiction of the Government of the Colony of New Zealand for any seal or the product of any seal. I need not go through with the details of this protection; it is enough to say that they are such measures as are very properly and intelligently adopted by that Government for the protection of the seal, and whether they are greater or less, or right or wrong, in themselves, does not affect the principle.

Here again the same observation which I have had occasion to make before is applicable. During all this period and through all these Acts,

if the practical operation of them during many years has been only to control British subjects and British ships, and if it be true that the seal fisheries of New Zealand have been open to the world during this time or any part of it, or if such an assertion has ever been made, evidence of it would have been forthcoming, because my learned friends, of course, and those who instruct them are quite in possession of all the records, and all the information and knowledge that is to be furnished by the Government of New Zealand, on this subject.

Look at it for a single moment. Is there a single spot in the world where the fur seal is known ever to have been that it has not been made the subject of pursuit from the very profitable results of such pursuit? Is there a place? We have seen in the progress of this case that on almost every spot in the world except these Islands in Behring Sea, the seal has not been only pursued, but exterminated. In two or three localities, under the influence of such protection as has been adopted at a comparatively late day, when attention was called to the value of it—in two or three localities like the Lobos Islands, and such places, there is a remnant of the seal. Now if the New Zealand seals had been open during all this time to general pursuit as my learned friends contend the Behring Sea seals should be and are, how happens it that that place alone has been free from the attacks of the vessels that have gone to the utmost parts of the earth, as the evidence shows, for the purpose of depopulating and exterminating the seal Islands. This then appears, that under these Statutes which on the face of them apply to everybody—under the effect of those Statutes in the districts shown by the map, the seal has been protected, and the world—that is, such portion of the world as could have any interest in trespassing upon it—has acquiesced in that.

The Falkland Islands is another place, where at a later period—as late as 1881—measures were adopted for this purpose. It was an Ordinance to provide for the establishment of a close time in the seal fishery of the Falkland Islands and their dependencies, and the seas adjacent thereto; and the preamble is:

> Whereas the seal fishery of these islands which was at one time a source of profit and advantage to the colonists has been exhausted by indiscriminate and wasteful fishing, and it is desirable to revive and protect this industry by the establishment of a close time, during which it shall be unlawful to kill or capture seals within the limits of this colony and its dependencies,

Be it therefore enacted, and so forth. That is the reason and the first reason why no person shall kill or attempt to capture, and without stopping to read the various provisions, they will be seen to apply in their terms to any person, any ship, any master or sailor, and to every description of seal including some varieties that are not strictly of the family of the fur seal.

Sir CHARLES RUSSELL.—Within the limits of the Colony.

Mr. PHELPS.—Within the limits of the colony and its dependencies, yes. It does not appear there.—I think the contrary does appear—that the sealing is not pelagic. I do not know whether it does or not appear that this sealing is principally, I believe, on the Island.

Mr. Justice HARLAN.—At any rate, that state went as far as the country thought it could go for the protection of the seal.

Mr. PHELPS.—It went as far as it was necessary to go and only limits it by the limits of the Colony.

I may say in passing what I might better have said at the beginning of this afternoon, that this protection of the seal, shown to be universal now as far as there are any seals left, will be a very important consideration when we come to discuss the extent of the freedom of the

sea. It will be seen, as I pass over these instances, that in every spot where there are any seals now, even in places where they have been so nearly exterminated, that it is almost questionable whether it is worth while to try to restore them, like these very Falkland Islands and some other places, wherever there are seals enough to afford any prospect of usefulness in attempting to protect them, there they are protected. So that if the right exists to come here and exterminate this race upon the high seas, then it follows that you may do on the high seas what the inhabitants of this country are prohibited by their own laws from doing within their jurisdiction,—what is prohibited by the laws of every country where the same animal is still to be found.

It is said by my learned friend, Sir Richard Webster, that in the case of the "Harriet", which was a vessel belonging to the United States that was captured at the Falkland Islands, the correspondence contains some language tending to show that the Government of the United States did not recognize any right to interfere with them upon the high seas, but asserted the contrary. My learned friend is wrong in the inference he draws from that case, except to the very limited extent that I shall point out. The correspondence will be found in the Counter Case of the United States at page 184. The American vessel, the "Harriet", which was seized there, was seized for taking seals on the Falkland Islands; and, of course, there can be no question about the illegality of that, or the propriety of the seizure; but the case fell for discussion into the hands of some gentleman not named, who was a United States *Chargé d'Affaires*, that is to say, he was the Secretary of the Legation at Buenos Ayres, which is not a very great Legation, and had the good fortune to be able to deal with this subject in the absence of his principal. Those who have paid much attention to diplomacy have become aware that the ablest diplomatists are those who consume the least ink in dispatches that have to be printed. But there is another class of diplomatist, if you can dignify them by such a name, of less distinction, and of whose labours the results are generally wanting, who lose no opportunity to enlighten the world by the discussion of those abstract propositions that wise nations and wise statesmen avoid the discussion of just as far as they can. I do not know who this young gentleman was, his name has not survived; but young or old, I should judge from his style he was not past the period of imagination.

Sir CHARLES RUSSELL.—He says he is stating the views of his Government.

Mr. PHELPS.—Undoubtedly he is stating the views of his Government, as expressed by himself. A *Chargé d'Affaires* always does express the views of his Government in what he says officially; but whether he had received instructions from his Government to discuss a question that was not raised, is not shown; from my knowledge of the statesmen who had control of the Government of the United States at the date of this correspondence, I should think it very doubtful if he had. I think if he had received any instructions from his Department, it would have been to confine his discussion to the point in dispute, and not to anticipate evil by discussing some question that was not up. He does set forth what fulminations would have been launched by the United States Government against anybody that had seized a hypothetical vessel on the high sea, on the pretence that it was doing something that could be imagined; and what he says on that subject may go for what it is worth, as far as it is authority. But *the case* presents nothing except the right of the authorities to capture that vessel for

going on to the Falkland Islands and killing the seals. That is all there is of it. What he says on the general subject is not of one tenth part the consequence of what either of my learned friends say, because they are so much more competent to discuss it than he is.

The deposition of Captain Budington is to be found in the 2nd volume of the United States Appendix at page 593, and throws a little light upon this vexed question of how far these Statutes and Regulations and provisions are actually in force. He was a master mariner, and a sealer in the Antarctic, who had made, as he says, several voyages to the Southern hemisphere for the purpose of seal hunting, and was thoroughly acquainted with the islands and coasts. He speaks of various localities in which the Seals had been found, which he had visited and helped to exterminate them. One is Patagonia. There, he says.

Great quantities have been taken from the Eastern Coast, but at present there are no seals there.

Then.

Terra del Fuego and the islands in the vicinity. These islands were at one time very abundant in seals and were considered among the best rookeries. I visited them in 1879-1880 and took 5,000 skins. On my last voyage in 1891-1892 I took only 900 and the majority of these came from another portion of the coast which had not been worked for twelve or fifteen years. Thousands of skins had formerly been taken from these islands but the animals are practically extinct there today.

But what I was coming at is this:

Falkland Islands. At one time these islands were very abundant in seal life, but excessive and indiscriminate killing has nearly annihilated them; this fact was recognized by the government of the Islands, which passed an ordinance in 1881 establishing a close season from October to April. It will be recollected, being in the Antarctic, this is the opposite period of the year, for the islands and the seas adjacent thereto. My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands. It certainly would not have been allowed to take seals between the Falklands and Beauchene Island 28 miles distant, which is considered part of the group. I understood this ordinance was passed on the ground that the seal resorting to these islands was the property of the Government, and therefore it had a right to protect them everywhere. The Government, however, gave licenses to certain parties at from *l.* 80 to *l.* 100 a year to take seals during the close season. On account of these licenses I think the effect of the ordinance is nullified, although the islands are well guarded, and seals have increased very little if at all, because of allowing hunting to take place under these licenses.

Now it is said by my learned friends, and said truly, this is the understanding of that man. Who is he? A sealer whose business has been going through that part of the world and capturing the seals indiscriminately, who had visited the Falkland Islands, who while there were seals enough there to make it an object to have pursued them refrains, because he understood as the fact undoubtedly was, that if he meddled with them in defiance of the existing regulations, his vessel would have been seized. It is the best evidence we can get in such a case, unless indeed some one had been hardy enough to attack the seals and had been seized in point of fact. The next best evidence is that of persons who had been engaged in that destruction, and had such an understanding in respect of the manner in which these statutes were enforced, that they were induced to refrain and did refrain, and it is most likely that their understanding was correct.

In Newfoundland there is protection extended to a different variety of the seals, but still seals. They are hair seals. The Act of 1879 and the Act of March 1883, and the Act of 1882 are three Acts that are quoted in the 1st vo. of the United States Appendix at pages 442 and following, and were enacted and very properly enacted for the protection

of those animals, being found necessary to their protection if they were to be saved. The terms of the Act show what the distance is. It provides that no steamer shall leave port for the seal fishery before 6 o'clock in the forenoon on the 10th day of March in any year, and no sailing vessel shall leave port for the seal fishery before the hour of 6 o'clock in the forenoon on the 1st day of March in any year. It provides that no steamer shall make a second trip in any one year, from any port of this colony or its dependencies; that no official of Her Majesty's customs in this colony shall clear any steamer for a sealing voyage before the 9th day of March, or any sailing vessel for a sealing voyage before the last day of February. All that shows, without the aid of any map, that it is a voyage for which a vessel requires a clearance, and the time of sailing for which is material; and only one voyage is permitted during the year. All that shows that this is something outside the three mile limit, and the nature of the animal, as we have heard from the evidence in this case, is such that it must be sought principally in the open sea, beyond that line, some hundreds of miles—I am told by General Foster, but far enough to answer the purpose of this discussion, because quite outside of any territorial jurisdiction.

There is a deposition on this subject as well.

Senator MORGAN.—Is there any evidence to show those hair seals have any summer home on land anywhere, at any particular place?

Mr. PHELPS.—I do not think there is. I think that they do not breed or propagate on land as the fur-seals do. They propagate on the ice, I am informed. I do not understand that they come to the land for any such purpose or such period of time as the fur-seal do.

Senator MORGAN.—The reason of my question was that I supposed that was the occasion for the enactment of laws by governments interested in the hair-seal fishery on hunting that were several hundred miles distant. No particular country had jurisdiction over the land upon which that species of seal was propagated.

Mr. PHELPS.—I suppose that is true. I suppose that there is no analogous case, in respect to their attachment to the soil, to that of the fur-seal to be found in the hair-seal; but, nevertheless, under circumstances much weaker on behalf of protection than that of the fur-seal, this protection is extended, and as I insist it is properly extended.

The PRESIDENT.—I believe they are less migratory in their habits.

Mr. PHELPS.—They are less migratory, so that in one respect they remain nearer, but in the other particulars I think they do not go on the shore. There is evidence to which I shall have to refer so as to answer that.

Senator MORGAN.—As I understand, several European Governments have by convention arranged for the protection of these seals by a close season and otherwise, and I state the proposition with a view of having information upon it, if it can be obtained. I suppose that this joint arrangement between the nations is really predicated on the fact that no one of them had a particular jurisdiction over the animal, because they landed or were in the habit of landing at a particular territory.

Mr. PHELPS.—That applies to some of the fisheries that I shall refer to. This one is an Act by Canada, or Newfoundland I should say, in which no other nation, as far as I am aware, participates, and in respect of which there is no convention.

Senator MORGAN.—It protects the hair-seal within certain degrees of latitude and longitude in the open sea.

Sir CHARLES RUSSELL.—It is Newfoundland.

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—It has regulations about preventing sealing from a particular day in the year.

Senator MORGAN.—To a certain place in the ocean.

Sir CHARLES RUSSELL.—There is no question about any place in the ocean.

Senator MORGAN.—It seems to me it must be.

Mr. PHELPS.—I will refer again to the act, which will be found on page 442 and 444 of the United States Case.

Sir CHARLES RUSSELL.—This is the Jan Mayen Convention.

Mr. PHELPS.—That is the other side of the Atlantic, but in this one the legislation is confined to Newfoundland; and I will read a few of these sections and then you will see how far it goes. The Act of 1892, on page 444, I will refer to.

> No steamer shall leave any port of Newfoundland or its dependencies for the prosecution of the Seal Fishery before the hour of six o'clock in the fore noon of the twelfth day of March in any year under a penalty of five thousand dollars, to be recovered from the master, owners, or other person on whose account such steamer shall have been sent to such fishery; provided.

And so forth.

Then

> No seals shall be killed by any crew of any steamer, or by any member thereof before the fourteenth day of March or after the twentieth day of April in any year, nor shall seals so killed be brought into any port of this colony or its dependencies, as aforesaid, in any year under penalty of four thousand dollars.

and so forth.

Senator MORGAN.—Now if you will allow me to ask, all that relates, as I understand it to pelagic hunting of hair seals.

Mr. PHELPS.—Yes.

Senator MORGAN.—The question I was asking was, whether there was upon the coast of Newfoundland, or any other place where these seals assemble, a rookery or place of resort or habitat.

Mr. PHELPS.—I understand not. I understand that they breed in the open sea or upon the ice in the open sea, that they do not come ashore, that in that respect they are entirely different from the fur-seal.

Senator MORGAN.—That is what I wanted to know.

Mr. PHELPS.—You will remember, although in the evidence in this case as to the Behring Sea, it is shown the hair seals frequent more or less and are seen in the water, there is no proof they come up at the Pribilof Islands or the Commander Islands or anywhere else.

Senator MORGAN.—So that the Statute you have just read relates entirely to pelagic hunting.

Mr. PHELPS.—Entirely.

Sir CHARLES RUSSELL.—There is a statement by Professor Allen on the subject which would seem to be rather contrary to my learned friend's view.

Mr. PHELPS.—I may not be quite accurate in what I say about the natural place of these animals. I confess it has not attracted my attention.

Sir CHARLES RUSSELL.—There is a reference in it to Professor Allen, and there is this reference from Professor Flower, page 185 of the British Commissioners Report. He says:

> In habits all the *Otariidæ*, whether hair-seals or fur-seals, appear to be much alike. As might be inferred from their power of walking on all fours, they are better capable of locomotion on shore, and range inland to greater distances than the true seals at the breeding season, though even then they are always obliged to return to the water to seek their food, and the rest of the year is mainly spent in the open sea far away from land.

Mr. PHELPS.—I will be ready in the morning to answer the question definitely, but I am not at this moment. It is not in my mind, and what I have said is upon my general understanding of the subject and may be somewhat inaccurate. My general understanding is that they are not much on shore, and certainly do not breed on shore, but that they may come on shore at certain times may be true, as my learned friend says, and is true if Professor Allen says so, as he is an authority on the subject; but in all this mass of evidence I recall no statement by any witness about any hair seal being ashore in Behring Sea—certainly not on the Commander or Pribilof Islands with the fur seals, and I do not think there is a statement by anybody as to having seen one ashore anywhere else.

The propriety of those provisions is shown by the affidavits of a couple of masters of sealing vessels which will be found at page 591 of the 2nd United States Appendix. One of them says he has:

Been twenty four years prosecuting the seal fishery on the coast of Newfoundland, Labrador, and Gulf of St. Lawrence, nine years of which I have commanded a steamer.

I am opposed to second trips to the seal fishery, as I consider they are calculated to destroy the species, as all the seals killed on such trips are old and mature seals, and at least 75 per cent of them are female seals.

I am now speaking of harpseals; they are principally shot on the ice, but when the ice packs they are killed with bats. When shot on open or floating ice a large number of them escape into the water and die from bleeding.

I should say that for every seal shot and captured three escape wounded to die in the water.

That is when they are shot on the ice where, of course, it is easier to hit them than when shooting at the head of animal that is swimming in the water.

I have seen ten seals on one pan shot and wounded and all escaped. To kill and capture the seal the bullet must lodge in the head; if it strikes any part of the body, the seal will manage to get to the edge of the pan and escape into the water. I know from my own knowledge that the number of seals brought in on second trips is yearly decreasing, and that the fishery is being depleted by the prosecution of this trip. Apart from the number of old mature and female seals destroyed, the hunting necessary for their capture prevent the male and female coming together.

Richard Pike testifies to the same effect.

I cannot speak of the percentage of seals taken on a second trip, nor of the sex. Nearly all the seals taken are bedlamers and old harps. The second trip generally covers the month of April. Nearly all the seals taken on the second trip are shot on open and floating ice. Very few are shot in the water, for if hit there is very little chance of their capture as they sink immediately. They are seldom or never fired at in the water for unless they are very close there is very little chance of their being recovered. Fully one third of the seals shot on the ice are lost, for when wounded they manage to crawl to the edge of the pan and into the water and when once in the water they sink or die from their wounds.

Seals shot in the water in the month of March can be recovered, as they are fat and in good condition, and float, but in the latter part of April when shot they sink immediately. I am strongly against second trips, as in my opinion they are causing a rapid decline in the industry, likely to lead to the extermination of the species by the killing of old and mature seals and the destruction caused by the use of fire arms.

I refer to that to show what the point is of this statute enactment against going out to the fishery before a certain period of the year and against second trips. They are simply measures necessary for the preservation of the seal.

The Greenland Fisheries, to which Senator Morgan referred, will be found stated in the United States Case at page 227. I have a reference to the State Papers on that subject, but the book accidentally has been

left out, and I may have to recur to that again to-morrow. I will only point out now what the character of this Legislation is.

This region in the open sea is embraced in the area lying between the parallels of 67° and 75° north latitude and the meridians of 5° east and 17° west longitude from Greenwich. These fisheries were made the subject of legislative regulation, applicable to their own subjects, by the Governments of Great Britain, Sweden and Norway, Russia, Germany, and Holland, by a series of statutes passed by these several countries during the years 1875, 1876, 1877, and 1878. The 3rd of April is established as the earliest date each year on which the seals could be legally captured, and penalties are fixed for a violation of the prohibition.

That shows the protection it has been found necessary by those Governments to extend over a portion of the sea, so very large that no one Government could undertake to assume it, because the water washed equally the shores of others; and for Great Britain to have said, "We will protect the seals clear across the north, up to the coast of Norway", would be asserting to itself a right that Norway at least might as well assert. The same with Holland; the same with Russia; the same with Belgium; the same with Germany. The consequence is that those Nations, wisely enough, entered into an Agreement by which they should all pass Statutes; but when they have all passed Statutes, how far have they reached an American, for instance?

America has adopted no such Statute; France has adopted no such Statute as far as I know.

Suppose an American or a French vessel sails up into these Seas and says "We will capture these seals, in a close time even, although it amounts to an extermination; we care nothing for your Statutes. Half a dozen nations can no more adopt a Statute that shall reach our citizens than one nation can"; and that is quite true. The Statutes derive no force, as against any other nation, by the participation of various countries in passing them, excepting only that each country which adopts such a Statute excludes its citizens by agreement from participating in the Fisheries. But suppose, I repeat, an American vessel is fitted out and starts for these Jan Mayen Fisheries in defiance of all this, on the high seas, is there any power of defense, or must all these nations stand back? If somebody from Nantucket in Massachusetts thinks proper to fit out a poaching expedition to go and destroy those seals in the breeding time,—is there any redress? Would that be permitted? What would be the usage and custom of nations in regard to this?

Senator MORGAN.—I may say the point I was trying to settle in my own mind was, I did not know how it was; whether either of these nations that entered into this Convention had any piece of land or piece of territory within the area of latitude and longitude which had been covered by the Convention upon which these seals were in the habit of resorting and have made a home, or was it simply the open sea?

Mr. PHELPS.—There is no such place to my knowledge. It is the open sea that they cover. Where these seals have their rookeries, that is to say if they have rookeries, I do not know, and I am not aware of any evidence in the case that discloses it.

Senator MORGAN.—It is the floating ice, I understand.

Sir CHARLES RUSSELL.—Yes; in the North Atlantic, if not exclusively, at all events chiefly,—apparently on the floating ice.

Mr. PHELPS.—I assumed so, because the area comprised by this latitude and longitude is only Ocean, and as far as I am aware embraces no land at all.

Senator MORGAN.—It was an exercise of jurisdiction by Convention over a part of the sea where there was no land at all?

Mr. PHELPS.—Yes, and where either nation has no right to legislate except against its own subjects. And when various nations concur, they do not make the case any stronger against a non-concurring nation than it would be if only one nation legislated. What I am upon is, what is the usage and custom of mankind? And if you have, in the pursuance of the duty you have undertaken of deciding these questions, to ascertain whether the freedom of the sea extends to this business, and what is the general sense and sentiment and opinion of mankind in reference to it, this is among the instances from which you derive the sense of mankind. There is the action of these nations over a part of the high sea, expressing what? Their belief that protection of this sort is necessary in the free open sea, even of those animals which do not attach to any territory, have no home and no resort, and which no nation is making a husbandry of on its own territory at all.

Now I was about to remark as to a question put by me before the recess, as to what would take place in these waters outside of the three-mile limit covered and protected, or where the Government had covered and protected, as far as they could, the animal life—the fish or oysters, whatever it may be—what would take place if a vessel of some other nation, notwithstanding that, sails into this area and says "I am on the high sea—I will take these fish and care nothing for your Statute or Regulations, and care nothing about what the consequence is." What would take place?

"War" says the learned President, and in answering that question in that way he touched the very point of this whole subject. What will take place? The force of that nation will repel that aggression—that nation will put a stop to that infringement of its rights and of those instructions. Then if the nation to which this invading ship belongs chooses to take the matter up, why it may or may not result in war. There are such things as just causes of war recognized in international law. If any nation should rise up and say if a predatory schooner of one of our subjects goes up on to your coast in defiance of your Laws and Regulations to exterminate there a fishery industry and you repel it by force we will go to war, then it would stand in the judgment of mankind how far it could maintain that proposition. It would be force in the place of war. I would use the word "force".

Well now when the United States put aside the right which in my judgment it ought to have exercised, and refers it to this Tribunal, what is the question that is referred? Is it not what would the United States have been justified in doing for itself. The Award of this Tribunal should give to the United States all they would have if they exercised this right for themselves. That perhaps comes under a little later branch of my Argument which more strictly deals with the subject of self-defence than this does on the question of a property interest with which I am now dealing.

The PRESIDENT.—It is a very interesting and ingenious exposition of your views, but that is not quite an answer to another question on which I should like to hear you, and which you put a few minutes ago: what would happen in the case of the Jan Mayen Convention if an American boat was fitted out and was to interfere? You put the question, but did not give us an answer. I would like to know your view, whether the American government, not being a party to this Convention, would stand exactly by the same obligations and have the same rights as those other Governments which have been parties to the Convention. You understand my meaning?

Mr. PHELPS.—Certainly, Sir, and while the answer will come in appropriately a little later I am very glad to have the question put now; I can answer it as well now as at any time.

There the case arises where these Governments are entitled to protect themselves against an aggression which is destructive to their valuable industry, and which is without any warrant except the profit that can be made out of it—except the profit to be made out of it by the invading individual. That is a subject I shall deal with by and by.

Lord HANNEN.—And would have equal force if only two made such a convention.

Mr. PHELPS.—If only two or only one, provided always that the one which makes it has a specific right growing out of its territorial interest, to make it.

I do not mean to say that one nation or half a dozen can control the open sea without any other cause than its interest in the open sea which every body else has alike. I do not mean to say that. I mean to say when the interest is attached to the territory and is in the territory—the source of a valuable husbandry, an interest by which a valuable animal is preserved coming within the purview of the case that I have been discussing, there the Government has a perfect right to repel by force, as it would, as it ought and as it always has, any invasion of it.

Then applying that to this larger area where several nations have to combine to protect this interest, although perhaps it does not attach itself to the shore of either of them, I should say that the nations united would have the same right of protection they would have if standing alone, if the husbandry was peculiar and the interest was particular to its own country; but it is not necessary for us in this case to go so far. The question involves the discussion of rights further out at sea, and separated from the particular territory of the nation.

I am not prepared at this moment to say as a matter of fact how far the hair seal fishery is protected by this legislation under the convention of various countries. Here is an interest like the whale fishery, which is pursued exclusively in the open sea, which attaches itself to no territory, and is the basis of no industry, of no protection. It is a right that all mankind share in common. Then, when you come to interfere with that in the open sea, by the concurrence of several nations, it may well follow that only the subjects of nations so concurring are bound by that. Why? Because no one of them has a greater right of protection than anybody else has; but the moment, instead of being a pursuit that is in the open sea, it attaches itself to the territory and becomes appurtenant to it, and is there made the foundation of a husbandry, and there protected, and is there preserved from extermination, and there statutes of that sort are applied, then it comes within the doctrine of self-defence, that I shall allude to by and by, of the nation itself, whether it is made the subject of concurrent regulations and statutes of various nations, or whether it stands alone. As if, for instance, Russia had joined with the United States, as it would have joined if Great Britain had, when the settlement of this question was first made in England in 1887; suppose Russia and Great Britain and the United States, the three countries principally interested, owning all the territory that approximated to these waters—all the shores that are washed by these waters—suppose they had joined together. Technically, you may say the case is no stronger than it would have been on behalf of each nation protecting its own industry, as if each

had separately legislated on the subject. But in another view of the case it might have been regarded as proper.—

Senator MORGAN.—In asking the question I did, and which was for information, I did not have in my mind the running out of these principles into the serious results which have been discussed, and which are not within our purview or even within the purview of our contemplation.

I was looking at the question as to the value of these arrangements between these Great European Powers as a precedent on the subject of regulations that might be adopted by this Tribunal, affecting the rights of Great Britain and the United States on the Pacific Ocean.

Mr. PHELPS.—It undoubtedly has an important bearing on that branch of the case. But aside from the question of regulations, there is no doubt at all that it has an important bearing, on the other question, of the character of the conduct which is sought to be justified here, whether it comes within the legitimate freedom of the sea or not, as shewing what the sense of mankind is upon that subject. It is principally in those two connections that we have cited it, not because it is in other respects at all analogous to the case that we have in hand.

The Uruguay protection provisions will be found on page 449 of the Book I have been reading from, the 1st United States Appendix, and includes the Lobos Islands, where there are still, as we learn from the testimony of the furriers, seals enough to afford a small annual profit, not large commercially, but still appreciable. This comes from the custodian of the Archives at Montevideo:

> I have to inform you in compliance with the foregoing decree, that the taking of seals on the islands called Lobos, Polonio, Castillos Grandes, and Coronilla, on the coasts of the Rio de la Plata, and in that part of the Ocean adjacent to the department of Maldonado and Rocha is done by contractors who obtain their contract for periods of ten years each paying annually into the public treasury seven thousand dollars in gold, and also the departmental duty of twenty cents on each seal-skin and four cents on each arroba of oil.

A very similar arrangement to that which the Government of the United States asks.

> This duty was established (and provision made for the object to which it was to be applied) by the Act of July 23rd 1857, and that of June 28th 1858, (Caraira, volume I, pages 440 and 448, Digest of Laws). The State guarantees to the contractors that they shall carry on their industry without molestation. It does not permit vessels of any kind to anchor off any of the said islands, and does not allow any works to be constructed that might frighten the seals away. The catch begins June 1st and ends October 15th (Decree of May 17th 1876, page 1480 of Laws now in Force, by Goyena). This is all that the undersigned has to communicate. God guard you many years.

It is under that provision that the few seals left on the Lobos Islands, (and some of the witnesses tell you what has become of the race that was there in great numbers formerly,) are preserved. Anyone who supposes that an individual can fit out a ship, to go down there and destroy those seals out of the three mile line to the extent of extermination, would probably find out his mistake. Nobody has attempted it. Lobos Island used to be free plunder for seals till the seal was almost exterminated, and since then the extermination has almost stopped? Why is that? The sealers belong to other nations, not to Uruguay. The sealers come from America largely. What has put a stop to it? Why, the knowledge that it is forbidden and would not be tolerated; and it would not be safe for anybody to take them.

The PRESIDENT.—There is nothing here against Pelagic Sealing.

Mr. PHELPS.—I am aware of it. I do not know how far the sealing was pelagic at the Lobos Islands; but it is such protection as the case requires; in the anchoring of vessels off there the three mile limit is not observed, and it is very apparent under the effect of the Statute which the Chief Clerk furnishes (he does not send the full Act)—no act would be permitted to be done by foreigners which would tend to exterminate those seals, whatever it was;—it might be pelagic sealing; and it would be no answer to say if a vessel were to go and anchor outside the three mile line and take any measures that would tend to destroy the seal,—it would be no answer to the Government to say they were outside the line; nor is there a geographical limit to the Act in question.

The case of Chile and the Argentine Republic Statutes will be found on page 229 of our Case:

The Lobos Island rookeries have for over 60 years been protected by the Government of Uruguay.

And the return comes, as the Furriers testify, into the London market.

The Governments of Chile and the Argentine Republic have also recently given protection to the fur-seals resorting to their coasts in the hope of restoring their almost exterminated rookeries.

In the second United States Appendix is a deposition on that point from a sealer I believe at page 597.

Sir CHARLES RUSSELL.—The Chilian law is expressly stated to be territorial.

Mr. PHELPS.—This is the deposition of George Cower. He is a resident of East Haddam Connecticut, and has been engaged in sealing in the southern hemisphere for a number of years and has visited all these places, and speaks of visiting these islands. He says:

About 1850 this island was visited by an American who practically cleaned off the seals. The captain I shipped with Joseph Fuller visited the island in 1880 and took 3,600 seals practically all there were; and this was their increase for the 30 years from 1850. While I was at Cape Town I saw a gang start out for sealing on that coast; the rookery I understood to be about 25 miles from Cape Town.

They are in the possession or control of a Company, as I was then informed, which has the exclusive right to take seals there. We did not dare go to those rookeries because sealing was prohibited and we would not have been allowed to take them in the waters adjacent thereto. Argentina also claimed possession of Staten Land at Cape Town and since about 1882 or 1883 we have not been allowed to take seals at that point or in the waters near there, although the citizens of Argentina themselves have taken seals there every year as I understand and believe.

That is all on that subject. It is simply to show the extent of this protection.

The enactments of Japan are in the first United States Appendix, page 449, and it is a prohibition entirely for the present, is general in its terms, and simply shows the necessity for the protection in the judgment of that government, and the protection that it received.

Now I come to the ground taken by Russia in the possession and protection of these Commander Island Fisheries, in respect of which a good deal has been said by my friends on the other side—I do not mean the ancient protection—I mean the present protection—the recent protection of the Commander Islands.

Senator MORGAN.—Do they differ—the ancient and the present?

Mr. PHELPS.—They do not differ, but I mean I will deal with the circumstances of the recent protection. I hope to show that they do not differ from what has always been enforced by the Russian Government. Now in reply to what is said in the printed Argument of the United States in reference to what is called there "the firm and resolute action

of the Russian Government in seizing several vessels".—Canadian vessels I believe—perhaps one of them was an American—which were engaged in sealing, my friend Sir Charles Russell refers to a correspondence with Secretary Frelinghuysen in 1882, and Secretary Bayard in 1887. That would not at first sight be particularly apposite to the seizures that took place in 1892, especially as those seizures were principally of British vessels, and this correspondence appears to have been with a former Secretary of State of the United States. No man is so fertile in that special recourse of advocacy which transfers the discussion of a question to a different subject, as my learned friend Sir Charles Russell. He answers what is said about 1892 by a reference to a controversy on an entirely different subject several years before; and it is not difficult to make such an answer quite successful, because you get rid of the exact conditions under which the question arises in the case in hand; and therefore if the case presents any difficulty it can sometimes be successfully met by discussing another case that stands upon a different footing.

Now what was this correspondence in 1883 and 1887? It had nothing to do with the taking of seals. It was in reference to the whale and cod fishing and the trade in arms and liquors with the natives on the Russian Coast. Now I respectfully ask: What has that to do with the seizure of Sealing vessels in 1892? The San Francisco firm which made the complaint upon which Secretary Frelinghuysen's representation to the Russian Government was presented, state explicitly that they have nothing to do with the taking or purchase of furs, in their complaint of the action of the Russian Government—they take care to clear themselves from the embarrassment of having it supposed that they are interfering with the sealing. Then all that was said on that subject had reference to an entirely different controversy. Lynde and Hough's note to Mr. Folger who was the Secretary of the Treasury, is the foundation of that controversy, which I shall pursue just far enough to show that it has nothing whatever to do with any question in this case. I read now from page 18 of Part 3 of Volume II of the Appendix to the British Case. This letter is dated San Francisco, February 15th 1882:

SIR: You will please pardon us for this seeming intrusion, but the matter in which we now seek your aid and kind assistance is of great importance to us.

We now are and have been extensively engaged in the Pacific Coast Cod fisheries, and, in fact, are among the very few who fifteen years ago started in a small way, believing with energy and fair dealing we could work up an enterprise that would be a benefit to the coast. Our ideas were correct. We have been yearly sending vessels to the coast of Kamtchatka (Sea of Okhotsk) for fish.

We never have been molested in Russian waters from catching cod-fish or procuring bait, which are small salmon in the rivers, or filling fresh water for the use of ship, but it appears now there is a law which has never been enforced against foreigners, the same we have recently noted, and which we have been apprised of, and the substance is that foreign vessels must receive an order from the Governor of Siberia, besides must pay a duty of 10 dollars per ton on all fish caught in Russian waters. This decree, if sustained, is ruinous to one of the best and rising industries of the coast, and as we fit our vessels to sail about the 1st May, leaves us but little chance to arrange matters this season save with your kind assistance in the matter. Our business is fishing entirely. We do no trade with natives, having nothing to do with the taking or purchasing of furs. At this time we are placed in a very bad predicament. Trusting that you can relieve us from this embarrassment, and receive an early reply on the subject, we are, etc.

(*Signed.*) LYNDE AND HOUGH.

P. S.—Our vessels fish from 10 to 55 miles from shore.

L. AND H.

That is the foundation. The correspondence with Mr. Hoffman from St. Petersburgh (who I believe was Chargé d'Affaires at that time), is based upon this letter. I need not read through this correspondence. It follows here in the British Case. There are several letters and finally there is one (on page 19 of the 3rd Part of Volume II of the Appendix to the British Case), from M. de Giers to Mr. Hoffman dated May 8 (20), 1882, in which he says:

> This measure

that is, the measure that was complained of by the merchants or shippers that I read from just now—

> this measure refers only to prohibited industries and to the trade in contraband; the restrictions which it establishes extend strictly to the territorial waters of Russia only. It was required by the numerous abuses proved in late years and which fell with all their weight on the population of our sea-shore and of our islands, whose only means of support is by fishing and hunting. These abuses inflicted also a marked injury on the interests of the Company, to which the Imperial Government had conceded the monopoly of fishing and hunting ("exportation") in islands called the "Commodore" and the "Seals".

Now passing that for the present (with the privilege of referring to it again tomorrow morning), you will find the view of the Russian Government as to pelagic sealing—(we are going back to the case of 1892)—in the United States Appendix, Volume I, page 192—in a letter enclosed by Mr. Lothrop the Minister at St. Petersburgh to Mr. Bayard, secretary of State, on the 8th December 1887, which I read to the Tribunal on the first day I was addressing you.

Now until 1892 the sealing industry on the Commander Islands, maintained by the Government of Russia, was not attacked. Up to that time there had been no pelagic sealing, I infer, that was particularly mischievous to the Russian Government; and the British Commissioners at page 167 of their Report remark, referring to the Russian seal herd in its migrations to the Russian seal islands:

> It is a matter of some surprise that no attempt is made to take them in the open sea, as is done on such a large scale in the case of the seals resorting to the breeding grounds of the eastern portion of Behring Sea.

Sir RICHARD WEBSTER.—That is not the British Commissioners Report.

The PRESIDENT.—Is that the right reference?

Mr. PHELPS. It is published in their report. It is a report—I was wrong in saying it was the British Commissioners' Report.

Sir RICHARD WEBSTER.—It is in answer to enquiries that were asked for.

Mr. PHELPS.—It is a Report made by the British Secretary of Legation in Japan at the request of the British Commissioners dated Tôkiô, November 19th 1891.

Lord HANNEN.—Where is it to be found.

Mr. PHELPS.—At page 167 of the British Commissioners Report, or of the Appendix or Addendum to the British Commissioners Report. It is the Report, I repeat, of the British Secretary of Legation in Japan in reply to the British Commissioners and published by the Commissioners. It is not their own language but it answers sufficiently to show the fact.

Then when the *modus vivendi* in 1892 was in force to a greater or less extent, a great number of vessels resorted for the first time to the vicinity of the Commander Islands, and then took place the seizures by Russia of those vessels—seizures which they had never had occasion to make before because they had never been attacked, and which

were made then, and have been the subject of so much observation—very properly—by my learned friends in their Argument. And as I have something to say upon that point that it would be quite impossible to conclude at this late hour, with the permission of the Tribunal I will defer it until tomorrow morning.

The PRESIDENT.—If you please; It is a very interesting subject. We will hear the rest tomorrow.

[The Tribunal thereupon adjourned until Thursday the 29th of June 1893 at 11.30 a. m.]

FORTY-SEVENTH DAY, JUNE 29TH, 1893.

In pursuance of Senator Morgan's enquiry of yesterday, I read a few words on the subject of the hair-seals from the 1st Volume of the United States Appendix to the Case, page 367. It is a part of Dr. Allen's Article on the natural history of these animals, which has been frequently alluded to.

The great tribe of Pinnipeds is divisible into three quite distinct minor groups termed families, namely, the walruses (family *Odobenidæ*), the eared-seals (family *Otariidæ*), and the common or earless seals (family *Phocidæ*). These groups differ notably from each other in many points of structure.

Then passing over to page 381 of the same book:

The seals proper, or the hair-seals——

This writer classes the hair-seals as the seal proper——

Have no external ears, are short-necked, rather thick-bodied, and have the hind limbs permanently directed backward and useless for terrestrial locomotion. They vary greatly in size, and so forth.

The seals (that is to say, this variety of seals, those that he calls "seals proper"), unlike the walruses and eared seals, are of almost worldwide distribution, being found on the coasts of nearly all countries, except within the tropics; they also ascend many of the larger rivers for long distances, and occur in some of the inland seas, as the Caspian and others in Asia.

Then further down:

Seals, as a rule, are not polygamous, "(referring, of course, to the *Phocidæ*, these hair-seals)", and resort to the land or ice fields to bring forth their young, according to the species. They are also more or less migratory.

Then in respect to the Harp-seal (on page 382 of the same Article) which is a different species, classed as the *Phoca groenlandica*, by this writer.

Habitat: North Atlantic, from the Gulf of St. Lawrence and the North Sea northward to the Arctic Sea; also Behring Sea.

The harp-seal, known also as the saddle-back, white-coat (when young), Greenland seal, etc., is by far the most important commercially of all the true seals, being the principal basis of the Newfoundland and Jan Mayen seal fisheries.

It is preeminently gregarious, migratory, and pelagic. It is nowhere a permanent resident, and annually traverses a wide breadth of latitude. Although often met with far out at sea, it generally keeps near the edges of drifting ice. It appears never to resort to the land, and is seldom found on firm ice.

About the beginning of March, they assemble at their favorite breeding stations, selecting for this purpose immense ice fields far from land. Their best known breeding grounds are the ice packs off the eastern coast of Newfoundland and about the island of Jan Mayen. Off the Newfoundland coast the young are chiefly born between the 5th and 10th of March; at the Jan Mayen breeding grounds between the 23rd of March and the 5th of April.

The females take up their stations on the ice very near each other, the young being thus sometimes born not more than 3 feet apart. The males accompany the females to the breeding stations and remain in the vicinity, congregating mostly in the open pools between the ice floes. The mothers leave their young on the ice to fish in the neighborhood for their own subsistence, but they frequently return to their young to suckle them. The young grow very rapidly, and when three weeks old are said to be nearly half as large as the old ones.

The young are said not to voluntarily enter the water until at least twelve days old, and that they require four or five days practice before they acquire sufficient strength and proficiency in swimming to enable them to care for themselves.

There is much more information in this article if anyone cares to peruse it; but I will not take time to read further.

On yesterday, in commenting upon what had been said by my learned friends on the other side in regard to the attitude of Russia, I found myself destitute at the moment of the reference I desired to make showing that the seizures of American vessels referred to by my learned friend Sir Charles Russell, the "Eliza" and "Henrietta", were the subject of a correspondence between the Russian Government and the United States Government, and had nothing at all to do with the business of seal hunting. And I will now read, as it is not long, Mr. Lothrop's letter, the Minister of the United States at St. Petersburg, written in 1887 to the Secretary of State, in which he gives concisely the whole facts in regard to those vessels and shows very clearly that it had nothing to do at all with the subject on which we are engaged. This is page 22 of volume 2, part 2, of the Appendix to the British Case:

I have the honor to transmit to you a translation of a communication received from the Imperial Foreign Office on the 1st February instant, relative to the seizure of the schooner "Eliza." The Russian Government claims that she was seized and condemned under the provisions of an Order or Regulation, which took effect at the beginning of 1882, and which absolutely prohibited every kind of trading hunting and fishing on the Russian Pacific coast without a special licence from the Governor-General.

It is not claimed that the "Eliza" was engaged in seal fishing, but that she was found engaged in trading with the contraband articles of arms and strong liquors.

She was condemned by a commission sitting on the Imperial corvette "Rasbolnik" composed of the officers thereof. In this respect the case is precisely like that of the "Henrietta" mentioned in my last preceding despatch No. 95 and of this date.

It will be noticed that Mr. Spooner, the owner of the Eliza, in his statement of his claim, declares that the "Eliza" was "on a trading voyage, engaged in bartering with the natives, and catching walrus, and as such did not come under the Notice of the Russian Government, which was directed against the capture of seals on Copper Robben and Behring Islands".

It will be seen that Mr. Spooner either refers to an Order of the Russian Government different from the one mentioned by the Imperial Foreign Office, or he understood the latter in a very different sense.

I may add that the Russian Code of Prize Law of 1862, Article 2, and now in force, limits the jurisdictional waters of Russia to 3 miles from the shore.

As stated in my previous despatch, I have asked for a copy of the Order or Regulation under which the "Henrietta" and "Eliza" were seized and condemned.

It is seen therefore by the statement of the American Minister in regard to the claim of his own country, that the grounds on which these vessels were seized were, that they were violating the Order against trading with the natives, especially in fire-arms and spirituous liquors, and the seizure by the Russian Government was submitted to therefore, by the United States Government, and the claims for compensation if made were not insisted upon.

Now I come, as I am nearly through with what I may call the historic instances of the protection of property of this description, to the recent transactions, so recent that they have come before you by papers submitted by my learned friends since the argument was finished on their side, or nearly so; at any rate at a late stage in the argument. They have submitted two Parliamentary papers, Russia No. 1, 1893, and Russia, No. 3, 1893, on this subject, printed after being laid before Parliament; and my learned friends seem to be of opinion that what we had said in the argument in respect of the firm and resolute action of Russia on this subject is refuted to some extent by the correspondence that is shown to have taken place between the Governments in reference to that action. On the contrary, in my judgment the position taken in the argument is exactly confirmed by the correspondence, as I shall try to point out, reading from the Parliamentary paper, No. 1, in the first place,

page 11, the letter of Mr. Chichkine. I read from the translation of it. The correspondence contains the letter in French and the translation as well. It is addressed to the British Ambassador, and is dated the 12th February, 1893. Of course, I shall not read all these letters but only such extracts as bear on the points I am concerned with.

While thanking you, Mr. l'Ambassadeur, for this action, of which the Imperial Government takes note, I hasten to inform you that the question of the measures to be adopted to prevent the destruction of the seal species has been under consideration for some time past, and that I have been obliged to await the preliminary results of this investigation before replying to the note which you were so good as to address to me.

In approaching, on the present occasion, the question of the seal fisheries, I must first of all point out to your Excellency that the insufficiency of the strict application to this matter of the general rules of international law respecting territorial waters has been proved by the mere fact that negotiations were commenced in 1887 between the three Powers principally, with the object of agreeing upon special and exceptional measures.

That was, as you will readily perceive, with reference to the negotiation initiated by Mr. Bayard.

The necessity for such measures has been more lately confirmed by the Anglo-American agreement of 1891.

That is the *modus vivendi*.

Her Majesty's Government, by taking part in these negotiations and in this Agreement, have themselves admitted the propriety of a possible departure from the general rules of international law.

That is, as I understand it, the rule he has just referred to respecting territorial waters, the 3 mile limit.

A further point to which it would seem important to call the special attention of Her Majesty's Government is the absolutely abnormal and exceptional position in which Russian interests are placed by the stipulations of the Anglo-American Agreement. The prohibition of sealing within the limits agreed upon in the *modus vivendi* of 1891 has, in fact, caused such an increase in the destruction of seals on the Russian Coast, that the complete disappearance of these animals would be only a question of a short time unless efficacious measures for their protection were taken without delay.

Then.

The number of seals to be killed annually is fixed by the Administration in proportion to the total number of seals. In the years 1889 and 1890, before the establishment of the Anglo-American *modus vivendi*, the catch amounted to 55,915 and 56,833, while for the years 1891 and 1892 (after the above-mentioned Agreement) the figures fell to 30,689 and 31,315.

And in another and very different connection, the importance of this experience will come to be seen. I do not pause to remark upon it now.

On the other hand, according to the statistical information which the Imperial Government has been able to obtain, the quantity of seal-skins of Russian origin delivered by the sealers to the London market, increased during those two years in an infinitely greater proportion.

That is to say that under the operation of the *modus vivendi* which precluded the pelagic sealers from the American part of Behring Sea, while the supply of Russian skins increased in London, it so decreased on the Islands that they had to fall from 50,000 to 30,000.

According to the observations made by the local Administration, the number of vessels engaged in sealing and seen in the neighbourhood of the Commander Islands and Tulénew (Robben) Island has also increased considerably. The barbarous and illicit proceedings of these sealers are also proved by the fact, established by seizures, that more than 90 per cent. of the seal-skins carried away by them are those of female seals, who are hardly, if ever, found far from the shore during the sealing season, and whose destruction entails that of all the young which they are suckling.

The destructive character of the fishery is also shown by the number of seals wounded or abandoned on the shore or within territorial waters, and afterwards found by the local authorities.

It will be seen from this that the moment a check to a greater or less extent under the *modus vivendi* was put on the pelagic sealers on the American side, Russia was put precisely in the position in which we stand to day; instantly the number of seals they were able to take on their Islands fell off, though the Russian skins in market increased. Immediately it became apparent that part of this catch was females, and when taken away, their young perished, and of those shot near shore the greater part was probably lost or abandoned.

This is the passage we come to:

Under these circumstances, we think ourselves justified, M. l'Ambassadeur, in expressing our entire confidence that Her Majesty's Government will admit the urgent necessity of restrictive measures pending the establishment of international sealing regulations between the Powers principally concerned.

The Imperial Government on their side do not hesitate to recognize the fact that protection cannot be carried out in a really satisfactory manner unless it is preceded by some such agreement. Accordingly, they are disposed to enter into negotiations at once with the Governments of Great Britain and of the United States of America; but they recognize at the same time the absolute necessity of immediate provisional measures, both on account of the near approach of the sealing season and in order to be in a position to reply in good time to the question contained in your Excellency's note of the 11th (23d) January.

With this object, and after thorough investigation, the Imperial Government has thought it necessary to decide on the following measures to be in force during the year 1893:

They do not say: "We ask the consent of Great Britain" or "we propose this measure;" they say after pointing out the necessity:

The Imperial Government has thought it necessary to decide on the following measures.

1. No ship unprovided with a special authorization shall be permitted to hunt for seals within a distance of 10 miles along all the coast belonging to Russia.

2. This prohibited zone shall be 30 miles wide around the Commander Islands and Tulénew (Robben) Island according to the Russian official maps, which implies that the passage between the Commander Islands will be closed to vessels engaged in sealing.

With regard to the 10-mile zone along the coast, these measures will be justified by the fact that vessels engaged in the seal fishery generally take up positions at a distance of from 7 to 9 miles from the coast, while their boats and crews engage in sealing both on the coast itself and in territorial waters. As soon as a cruizer is sighted, the ships take to the open sea and try to recall their boats from territorial waters.

With regard to the 30-mile zone around the islands, this measure is taken with a view to protect the banks, known by the sealers as "sealing grounds," which extend round the islands, and are not shown with sufficient accuracy on maps. These banks are frequented during certain seasons by the female seals, the killing of which is particularly destructive to the seal species at the time of year when the females are suckling their young, or go to seek food on the banks known as "sealing grounds."

While requesting you, M. l'Ambassadeur, to bring the foregoing considerations to the knowledge of Her Majesty's Government, I think it important to insist on the essentially provisional character of the above measures adopted under pressure of exceptional circumstances which may be regarded as a case of *force majeure*, and analogous to cases of legitimate self-defence.

It does not, of course, enter at all into the intention of the Imperial Government to dispute the generally recognized rules with respect to territorial waters. In their opinion, far from attacking these general principles of international law, the measures which they think necessary to take must be regarded as confirming them, as the exception proves the rule.

Here you have stated over again on the part of Russia the American case:

The force of the arguments set forth above will certainly not escape the enlightened appreciation of Her Majesty's Government, and I am firmly convinced that they

will not refuse to take steps with regard to the English sealing-vessels, in accordance with the measures which the Imperial Government propose to take for the year 1893.

On their side, the Imperial Government will not fail to give to these measures, in good time, the publicity which they require.

Besides this, and in order to prevent as far as possible any misunderstandings and disputes in case of infraction of the above provisional measures, as well as of the general rules of international law, the cruizers of the Imperial Government and also the local authorities will receive precise instructions, clearly laying down the cases in which the right of pursuit, of search, and of seizure of offending vessels should be exercised.

As it is affirmed that the sealing-vessels, while themselves remaining outside territorial waters and sometimes more than 10 miles from shore, dispatch a portion of their crews and their boats to the coast, and within, or very nearly within, territorial waters, the above-mentioned instructions will prescribe the pursuit and search of all vessels whose boats or crews shall have been observed or seized while sealing on the coast, or within the zone prohibited by the provisional measures for 1893.

As a strong presumption results from the mere fact of the presence of boats near the coast or within the prohibited zone, even when it has been impossible at first to decide whether these boats were engaged in sealing or not, it shall be permissible to pursue and search the vessels to which such boats belong.

The seizure, on board vessels thus searched, of special implements employed in sealing on shore, as well as of seal-skins the greater part of which are those of females, will constitute sufficient grounds for the seizure of the vessel, in view of the fact that the female seals, during the season of suckling their young, rarely, if ever, depart further than 10 miles from the shore, excepting on the banks around the islands.

When informing the captains of English sealing-vessels of the provisional measures drawn up for the year 1893, Her Majesty's Government will perhaps think it advisable to communicate to them likewise a summary of the instructions which will be given to the Russian cruizers, and to add that the right of surveillance will also be given to vessels belonging to the coast on the mainmast of which the Governor of the Commander Islands hoists the Russian Custom-house flag when he is on board in the discharge of his duties.

When I wrote those lines which my learned friends criticise, in which I referred to the firm and resolute action of Russia, these words had not been written. They completely confirm what I said, not by the strength of what she has said, but by the strength of what she has done, which was more emphatic. When Russia finds herself, for the first time in her history, in the position in which the United States are now in respect of this business of pelagic sealing, excepting that her interest is much smaller than that of the United States, what does she do? Invite Great Britain to enter into some *modus vivendi* by which the depredations may be suspended? Far from it. She says "We are ready and anxious to enter into the Triple convention between the three nations concerned, proposed in 1887. We agree in the propriety of such a Convention,—we are most desirous for it; but in the meantime directions will be issued to the cruisers of the Russian Government and to all vessels hoisting the Custom House flag, to seize every vessel that is found within 30 miles of the Islands or 10 miles of the shore, and to search and examine any vessel, or the boats of any vessel, which hovering round there, gives reasonable grounds for suspicion as to the business they are engaged in." That is the position of Russia; and, if that had been the position of the United States I repeat, this Arbitration never would have taken place. There is the difference. We had invited the Convention and, as I pointed out to you, it had been conceded and agreed upon and then was arrested by the objections of Canada. They had participated in 1887, as the correspondence shows you, in the same negociations and manifested the same willingness; but when that fell through on account of the objection of Canada, Russia said: "in the meantime this infamous business is not to go on." That was their position; and what is the consequence. The consequence is

that while we are here at this late period begging of this Arbitration some measure of protection that may preserve this herd of seals, they obtained from the British Government instantly all that they claimed. I refer you to Lord Rosebery's letter in reply. I say they obtained it as a temporary measure; but see what follows? The Earl of Rosebery, with the diplomatic skill for which he is so justly distinguished, writes this sentence; and, if literature of this kind were ever amusing, one might be excused for indulging in a smile on reading this.

The Earl of Rosebery to Sir R. Monier, that is the British Minister at St. Petersburgh:

SIR: Her Majesty's Government have given their most careful consideration to the note of M. Chichkine of the 12th (24th) ultimo inclosed in your Excellency's despatch of the following day and stating the measures which the Russian Government deem necessary for the protection of their sealing interests in the North Pacific during the approaching fishery season and which are submitted to Her Majesty's Government with a view to their acceptance.

Then he repeats the measures I have just read.

Her Majesty's Government take note of the statements made in M. Chichkine's note, that the Russian Government have no intention of disputing the generally recognized rules of international law as to territorial waters, that these measures, of an exceptional and provisional nature, are designed to meet a pressing emergency, and that Russia is desirous of entering at once upon discussions with the Governments of Great Britain and the United States with a view to an agreement between the Powers principally interested for the proper control of the sealing industry.

While Her Majesty's government have not committed themselves to a decided opinion as to the absolute necessity of any particular class of regulation for the preservation of the seal species, they have more than once expressed their willingness to take part in the framing of a general scheme for the protection of the seals which shall have due regard to the various interests concerned.

They quite recognize that the provisions of the *modus vivendi* agreed upon between Great Britain and the United States tends to drive the sealing-vessels of both those nations, which have been accustomed to resort to the eastern part of Behring Sea, to the waters adjacent to the Russian coasts.

And so on. I need not read all that unless it is particularly desired.

Sir CHARLES RUSSELL.—The next sentence I should be glad if you would read.

Mr. PHELPS.—I will read anything that is desired certainly.

Her Majesty's Government could not admit that Russia has therefore the right to extend her jurisdiction over British vessels outside the usual territorial limits, but they are anxious to afford all reasonable and legitimate assistance to Russia in the existing circumstances. They are ready to enter at once into an agreement with the Imperial Government for the enforcement of the protective zones proposed in M. Chichkine's note on conditions similar to those of their *modus vivendi* with the United States, which it will be observed are of a reciprocal character.

That reads a little like accepting an invitation that has not been issued. I find nothing in the note of Mr. Chichkine that invites from Great Britain consent to these Regulations. I find a courteous and respectful notification that they will be propounded and insisted upon and carried into effect, with the expression of a confidence that Her Majesty's Government will see the necessity and the propriety of them.

The result of the correspondence then, for I must not take up too much time with this unless my learned friend desires me to read something more of it, is that the measures Russia propounded are agreed to, with the single addition that they will on the Islands refrain from taking more than 30,000 seals. It had already appeared that for the last two years they had only been able to get a little more than 30,000, and that proposal of Great Britain they accept. But Mr. Chichkine appeared to take the view that I do of this invitation; and he replies

to Lord Rosebery most courteously to the effect that the acceptance of the invitation is extremely pleasant, though he must point out to him that it had not been given.

I cannot discuss the subject, Mr. l'Ambassadeur, without calling your attention in the first instance to this fact, viz., that the object of my note of the (12th) of February was to warn the British Government of certain legitimate measures of defence necessitated for the moment by exceptional circumstances, and not to lay down the basis of a regular *modus vivendi*, that is to say, of a bi-lateral arrangement, which might be prolonged until the question was definitively settled.

The only idea was to provide a minimum of protective measures, intended to prevent the disappearance of the subject of the dispute, even before the negotiations with regard to it were commenced. In view of the near approach of the fishing season.....

If it had been intended to lay down basis of a *modus vivendi* of this kind, the Imperial Government would not have failed to claim that a restriction of territorial rights, that is to say, the engagement to limit the number of seals to be killed on land, should in equity carry with it the corollary of a complete suspension of pelagic sealing in the open sea.

He informs Lord Rosebery that, if the purpose of his communication had been to enter into negotiations, he should have demanded very different terms. The object of it was to inform the British Government of the minimum of protective measures which they would accept.

They would have especially regarded it as indispensable to make their reservations as regards the definitive settlement of the seal question, in order to retain their entire freedom of view as to the measures to be agreed upon for the preservation of the seal species, whether by the prohibition or regulation of sealing in the open sea, or by the extension of special rights of protection of that species beyond the various distances commonly designated as the limits of territorial waters.

Yet, after making these observations, I am authorized, Mr. l'Ambassadeur, to inform your Excellency that the Imperial Government, being anxious to meet half way any conciliatory offer on the part of the British Government, are ready to accept the proposal made in Lord Rosebery's despatch, with the exception of some modifications on the first point.

That is, the limit of killing on the Islands; and a British agent is to be allowed to visit the Islands to see that that is complied with.

The arrangement agreed upon would have no retrospective force, because the different cases of seizures effected last year have been already examined by a special Commission on the basis of the general principles of international law.

Finally, in regard to the first point of the proposal contained in Lord Rosebery's despatch,

that is that any vessel seized should not be carried into a Russian Port, but should be handed over to a English cruiser,

The Imperial Government are of opinion that it would be quite impossible to apply it as it stands, at any rate under the circumstances existing for the present fishing season, especially as to the engagement *to hand over to the English cruizers or to the nearest British authority* the English vessels caught trespassing outside territorial waters within the forbidden zones of 30 and 10 miles.

It may be that means may hereafter be found by common consent to remedy the practical difficulties in the way of such an undertaking; but for the moment, there is no doubt that it would completely paralyze the action of the cruizers of the Imperial navy, and render illusory the supervision which they should exercise along the coast and round the islands.

In practice, any Russian cruizer which had captured an English vessel would have to choose between the alternatives of searching for an English cruizer, which might take a long time, considering the extent of the coast, or else of undertaking a voyage of 3,000 miles to conduct the captured vessel to the nearest port, that of Victoria in Columbia.

The Russian cruizers would thus be exclusively occupied in looking for the English cruizers, or in making voyages to Port Victoria and back throughout the fishing season; and the "co-operation" of the cruizers of two nations could, therefore, only be a nominal one.

Under these circumstances, and without insisting for the moment on another essential point—that of the absolute absence of reciprocity in the British proposal, as there are not, nor can there be, any vessels under the Russian flag engaged in sealing—the Imperial Government consider that for the current year it would be

more simple and practical to submit the new prohibited zones, as is the case as regards territorial waters, to the exclusive supervision of the cruizers of the Imperial navy, who would continue to conduct to Petropaulovsk all vessels caught trespassing until the conclusion of an ulterior agreement.

The correspondence proceeds; and that is the *modus* agreed upon for one year only, reserving all rights to the Russian Government, treating this purely as an intermediate provision, the least, as they say, which they could accept for their protection.

The PRESIDENT.—The enactment is not for quite a full year; it is to the 31st of December.

Mr. PHELPS.—You are quite right. It is not quite a full year. I speak of it in general terms.

Then on pages 27 and 28, the last I have to read from this document, is another letter from Mr. Chichkine, and he says they preferred to leave this subject on the basis of an exchange of notes, and not to draw it up in the form of an agreement.

Because the too concise wording of the above-mentioned draft would leave room for certain misunderstandings, and perhaps even for complications, which it would be desirable to avoid;

Because the Imperial Government could not agree to the draft in question without some reservations designed to safeguard their freedom of judgment in the future.

It is understood that the agreement to be arrived at between our two Governments will leave intact all the rights of Russia in her territorial waters.

As to our reservations, they refer to the points mentioned below:

1. In consenting to hand over to the British authorities the English ships engaged in sealing within the prohibited zones, we do not wish to prejudice, generally, the question of the rights of a riverain Power to extend her territorial jurisdiction in certain special cases beyond waters properly called territorial.

2. The Imperial Government desire to preserve complete liberty of action as to choosing in the future between the two systems of protecting seals, either by the method of a prohibited zone, or by the method of entirely prohibiting pelagic sealing, or regulating it in the open sea.

3. The present arrangement cannot in any manner be considered as a precedent, and will be looked upon by us as of an essentially provisional nature, intended to meet present circumstances.

With these reservations, we accept the British proposal in the following terms:

These are then repeated, which I need not take up your time by reading again except the second and third (as they have been the subject of some discussion) as they finally found expression:

English vessels engaged in hunting within the aforesaid zones.

That is, ten miles from that shore and thirty miles from the island:

Beyond Russian territorial waters may be seized by Russian cruizers, to be handed over to English cruizers or to the nearest British authorities. In case of impediment or difficulty, the Commander of the Russian cruizer may confine himself to seizing the papers of the afore-mentioned vessels, in order to deliver them to a British cruizer, or to transmit them to the nearest English authorities, on the first opportunity.

3. Her Majesty's Government engage to bring to trial before the ordinary Tribunals, offering all necessary guarantees, the English vessels which may be seized as having been engaged in sealing within the prohibited zones beyond Russian territorial waters.

And that is agreed to.

Sir CHARLES RUSSELL.—There is the final passage in Lord Rosebery's note:—"With regard to the reservation", on the same page.

Mr. PHELPS.—This is from Lord Rosebery to Mr. Howard who, I suppose, was the Chargé.

Sir CHARLES RUSSELL.—Yes.

Mr. PHELPS.—

With regard to the reservations made in Mr. Chichkine's Note, you will state that Her Majesty's Government has taken note of them, but does not at present propose to discuss them.

There is nothing to discuss. No discussion had been invited. They had been stated by the Russian Government as the measures to which they proposed to resort.

> That on the other hand they must adhere to the reservation previously made by them and contained in your Note of the 12th of this month, and that it is understood that the rights and position of either Power are in no way affected by the conclusion of this provisional arrangement;

which is just what Russia had said very emphatically.

Now I repeat, Sir, with great respect, was I right or not in forecasting this correspondence which, as I have said, did not then exist, based upon the action of Russia, in characterizing her action as firm and resolute, and in saying that in consequence of that firm and resolute action, pelagic sealing had come to an end in the vicinity of these Islands to any extent that was regarded as detrimental? Was I right in calling attention to the different positions which these two great nations occupy today on that subject? The United States deprived of the benefit of a convention that had once been really agreed on, and left to prosecute this claim before an Arbitration; Russia instantly accorded, not what they asked, but what they notified Great Britain they should insist upon, giving the reasons and grounds of the demand. If my learned friend says the Russian Government, (as he did say in the course of his observations) has the advantage of the advice of a gentleman of large reputation in international law, I agree with him that there could be no better evidence of it than this correspondence and its result afford, that the Russian Government knew in this matter precisely what they were about, what they had a right to claim, and what it was necessary for them to assert if they meant to defend or protect their interests.

Now we come to this No. 3. I shall not apologize for the time I am taking upon this point, because it is important it should be understood.

The PRESIDENT.—Might we, Mr. Phelps, infer from your last words that the agreement entered upon between England and Russia would in your eyes be considered sufficient for the protection of fur seals.

Mr. PHELPS.—No, that is a very different question, to which, in a later stage of the argument, I will address myself. They got what they demanded, the 30 mile zone and the 10 mile zone. They got what they thought was sufficient. I mean for the temporary period. Whether it was sufficient or not, that is to say, whether they were mistaken or not in the geographical limits in which they bounded their right, is another question.

I come now to this last correspondence, the purport of which is—and I need hardly read anything from it—that on the Report of this Commission Russia made compensation to Great Britain or agreed to make it, and I, of course, suppose will make compensation for two out of six or eight vessels.

Sir RICHARD WEBSTER.—Five.

Mr. PHELPS.—Well, out of five vessels that were seized, she has agreed to make compensation for two, and it has been, if not directly urged, left to be inferred that that amounted to a concession on the part of Russia that she had no right to defend herself against these aggressions outside the territorial limit, which, as you observe from one passage in one of these letters I have been reading, is fixed as three miles. It concedes nothing of the sort. Strong as my views are on this question, I am free to say that if I had been upon the Commission to determine as between Russia and Great Britain whether those two vessels or rather the owners of them must be compensated, I should have decided as the majority of the Committee to which it was referred

by Russia decided. It is stated that the majority of the Committee thought they should be paid. I should have been with the majority, and why? Pelagic sealing never had been practised, as you see, prior to 1892. On these Islands no statute existed on the subject which would be notice to the world. No regulations had been promulgated. No notice had been given. These vessels came across in the pursuit of the business of pelagic sealing which they had been accustomed to conduct with impunity on the other side, without any notice or warning or statute, and without crossing the territorial limits; these two vessels that are paid for did not by themselves or their boats cross the territorial line of three miles. That was not all. When they were captured by the Russian vessels, it does not appear that they were engaged in pelagic sealing—they had been, but it nowhere appears that they were caught *flagrante delicto*. But on examination it was found by the contents of the vessels that they had been so engaged. I make no account of the earlier correspondence given in the United States Counter Case—the earlier claims on the part of the sealing captains that were captured of ill treatment by the Russian officials, and the confiscation of their personal property and the indignity that had been put upon them. It is published in the Victoria News, reading from page 201 of the Counter Case Appendix, the head lines being:

RUSSIAN PIRACY.—SEALERS TAKEN IN THE OPEN SEA.—THREE VICTORIA CRAFT SEIZED AND THEIR CREWS THREATENED WITH SIBERIA.—A FRISCO VICTIM ALSO.

Startling story of outrage, insult and pillage.—The captured crews turned heartlessly adrift.

That proves nothing. I take no account of that, because the correspondence and the Report of the Committee, as far as it appears, does not justify it. How much that entered into the case or how little I do not know. The Report of the Committee is not here; the evidence is not here; nothing is here except the result. The results of the Report are stated in the letter of Mr. Chichkine to which I will allude in a moment, in No. 3. General Foster reminds me that they had the affidavit in the Counter Case Appendix as to the locality where these vessels were seized far out at sea, 30 or 40 miles. Now, even divesting it of all these charges of special injury and unauthorized conduct, of which we do not know whether they entered into the account or not, I say upon the grounds that do appear, and this will become more clear, I am sure, in what I shall have occasion to say hereafter, the payment for the vessels was right.

Such regulations must first be necessary. Without that postulate, you do not advance a step towards justification. No nation can stretch out its hand on the high sea, at its own caprice, for its own convenience, and lay hands upon the vessel of another nation sailing under its own flag. Before that can be done, the measure must be shown to be necessary; just as self-defence by an individual, which may go to the extent perhaps of taking the life of the assailant in the public highway where the assailant has a right to be, must be shown to be necessary, and the man who assumes to assert it takes the risk of being able to show it. In the next place, when it is necessary, the means by which it is enforced must be reasonable. These vessels, as I have said, are seized without warning, either actual or constructive, engaged in a business which their Government asserts they have a right to engage in; engaged in a business which they have practised with impunity elsewhere, and the loss falls upon them, not upon the Government to which they belong.

Why, what is the rule in the case of blockade? The perfectly well established rule is, that any vessel may be captured that undertakes to run a blockade; but it must have notice, actual or constructive, such as amounts to presumptive notice, and the innocent vessel not aware that a blockade has been established, going in on a business that it has a right to suppose is lawful, cannot be captured,—it can only be turned off. The blockade must be declared in such a way that the world is bound to take notice of it.

Now, under the circumstances, is it not perfectly plain that on the question for compensation to the owners of these Canadian schooners there is something else to be considered besides the right of self-defence of Russia? Mr. Blaine did the same thing; that is to say, he substantially agreed to do the same thing, as I have pointed out to the Tribunal in the discussion of the preliminary question, when Sir Julian Pauncefote first approached the American Government with the proposal to renew the negotiation that had been commenced by Mr. Bayard in 1887. One prominent feature put forward by Sir Julian was the demand of the British Government for satisfaction for the vessels that had been seized in 1886 and 1887. What was the reply of Mr. Blaine to that? I will not detain you by reading the correspondence; it has been read and is before you. Why, said Mr. Blaine, strong and resolute as he was, and I need not say that in this correspondence he goes clear up to the line of diplomatic reserve and courtesy in his very strong assertion of the rights of the United States to protect itself, even he, at the very threshold, meets it with language which is substantially this:

Why, that is a small matter, the whole amount is not large. It falls upon men who perhaps thought they were doing what they had a right to do. We will pay that, if we can arrange for the future. It is not worthy of a moment's dispute between two great nations. Whether the sealing owners shall be indemnified or not, is not the question between the Governments. We are concerned with the future; let us make an arrangement for the future preservation of the seals. We shall not debate with you over the value of two or three schooners under the circumstances.

And it is perfectly plain that if they had been fortunate enough to have disposed of the main subject of dispute at that time, the question about compensation for these seizures, which is now in a very indirect way before you, would have disappeared. It would have been the proper acknowledgment, the proper confirmation of a friendly agreement on an important subject, to make such a payment, and to forego any dispute on the subject. So that the payment for these vessels, under the circumstances, proves, in my judgment, nothing at all.

General Foster puts into my hands a summary of the report of these Commissioners. There were nine vessels seized.

Two were released soon after they examined the facts; two the Commissioners recommended should receive compensation for seizure, and in five the condemnation was confirmed; and it is only right to say that in respect of those five, it was asserted by the committee not that they had been within the line, but that they found that their boats had crossed the three-mile line. I leave that subject, and I claim that out of the correspondence which has taken place, some of it since we have been sitting here and all of it while we were on our way, the ground that we have taken in respect to Russia is completely confirmed, and the ground that we take here in our own behalf is completely sustained by the conduct of Russia and the claims of Russia so far as they constitute any authority or precedent worthy of consideration.

Now a word upon one more of these instances of protection of marine property, which is the last in the somewhat long list with which I wearied you yesterday, and which is afforded to whales by Norway in the fiords of that country—those broad arms of the sea that run up into the country. A whale, in the classification of Natural History, not strictly a fish, is to all intents and purposes a fish. Its home is in the open sea. It breeds there—it is attached to no shore; nevertheless, in Norway, it appears that these animals find their way up to the fiords where they become the basis of an important husbandry, industry, and means of subsistence.

Now surely it would be impossible to name in the way of illustration, any animal that would be further away from the lines upon which these rules of law proceed, than the whale. It may be well said that the whale is with the mackerel, the salmon and the cod; he belongs in the sea always; he is appurtenant to no territory; he has no *animus revertendi;* he is brought under no confinement or restriction; there is no time that you can put your hand upon him except as you can put your hand upon any fish in the sea; and yet in the statement that Mr. Gram was kind enough to furnish the Tribunal with, the ground taken by Norway is pointed out. Even that animal, under those circumstances, is brought into the category of those to which we claim the seals belong; and perhaps as it is stated so much more clearly than I can state it, as well as being so much better authority than any view of mine can be, I may be excused for reading a few words of this statement, and that will be all I have to say upon this point.

The peculiarity of the Norwegian law quoted by Counsel for the United States, consists in its providing for a close season for the whaling. As to its stipulations about inner and territorial waters, such stipulations are simply applications to a special case of the general principles laid down in the Norwegian legislation concerning the gulfs and the waters washing the coasts. A glance on the map will be sufficient to show the great number of gulfs or fiords, and their importance for the inhabitants of Norway. Some of these fiords have a considerable development, stretching themselves far into the country and being at their mouth very wide. Nevertheless they have been from time immemorial considered as inner waters, and this principle has always been maintained, even as against foreign subjects.

More than twenty years ago, a foreign Government once complained that a vessel of their nationality had been prevented from fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing carried on in that neighbourhood during the first four months of every year, is of extraordinary importance to the country, some 20,000 people gathering there from South and North, in order to earn their living. A Government inspection controls the fishing going on in the waters of the fiord, sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing,—

(not to destroy the fishing *for ever*—)

was an unheard of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded in immemorial practice.

Besides Norway and Sweden have never recognized the three miles limit as the confines of their territorial waters. They have neither concluded nor acceded to any treaty consecrating that rule. By their municipal laws the limit has generally been fixed at one geographical mile, or one-fifteenth part of a degree of latitude, or four marine miles; no narrower limit having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the United kingdoms, the said limits have in many instances been found to be even too narrow. As to this question and others therewith connected, I beg to refer to the communications presented by the Norwegian and Swedish members in the sittings in the *Institut de Droit International* in 1891 and 1892. I wish also to refer, concerning the subject which I have now very briefly treated, to the proceedings of the Conference of Hague, in 1877 (Martens. *Nouveau recueil général*, IIe série volume IX), containing the reasons why Sweden and Norway have not adhered to the Treaty of Hague.

Not a word could be added to that. Put in the place of the whale, which, as I have said, in no way attaches itself to or becomes appurtenant to any particular property—the seals, if they found in the fiords of Norway precisely the home that they find in the Pribilof Islands and there became the basis of the same important industry as the whales are, I should like to know what would be the course of the Government of Norway? What ought it to be—what would it be, beyond question?

Would not that case be a great deal stronger than the one we are concerned with?

Mr. GRAM.—I beg only to observe that that fishery which I have been stating there, which gave use to Diplomatic Correspondence is Cod fish—not whales.

Mr. PHELPS.—I beg your pardon, Sir, I did not understand it correctly.

Sir CHARLES RUSSELL.—It applies to all fishing I understand.

Mr. GRAM.—It applies to all fishing; but that instance which I quoted, which was mentioned in the Diplomatic Correspondence, was Cod fishing.

Mr. PHELPS.—That is a fact which I did not understand. I had not read that, perhaps, as attentively as I should; and indeed, being so ignorant of the surroundings, I might readily fall into an error of that kind. That fact strengthens what I was saying—it carries the principle further than if it had been limited, as I supposed, from reading the memorandum of Mr. Gram, it was limited, namely, to the case of whales.

Lord HANNEN.—As I understand, it is based on this view, that those fiords are territorial waters.

Sir CHARLES RUSSELL.—Quite. That is the real point—just as the large bays in America are claimed.

Senator MORGAN.—There are no territorial waters four miles out, are there?

Mr. PHELPS.—What is the authority for that?

Sir CHARLES RUSSELL.—The statement.

The PRESIDENT.—That may be a case for discussion between nations. It is the assertion of the Norwegian Government.

Mr. PHELPS.—That is exactly what it is.

Lord HANNEN.—I only meant to point out they did not base it upon an industry, but they say that it is within their territorial waters.

Mr. PHELPS.—With great submission, My Lord, I respectfully insist that it is exactly the *industry* upon which they base it. That is all there is of it. What Mr. Gram says is, that they have never adopted the three mile limit. He says some of these fiords, as the map shows, are very wide. I do not find anything in this memorandum, or in the statute, or anywhere else, and I have been commended to nothing by my friend's argument, to indicate that they should maintain that, or would undertake to maintain it upon the mere territorial limit which the world generally has adopted of three miles wide. It is because those fisheries are made the subject, as is said here, of a great and valuable industry, that they decline to discuss the question whether they are exactly within, or exactly without, a limit which is not for Norway alone to fix. It is not in the power of any one country to fix, in the face of the world, what the territorial limit must be—that must come by the consent of nations. If Norway was to undertake to assert, or any other country, that the limit should be 50 miles, that would not make it so. No other seafaring nation would be bound by that, if that were all. Nor have they undertaken so far to put forth any assertion in respect to it. Without discussing how wide the fiord is, without dis-

cussing how wide the territorial line may be, which is adopted by the consent of nations, and which, as Mr. Gram says, Norway has never estopped itself by agreeing to, whatever that may be, they will notpermit foreign vessels to come there and destroy the industry on which their people depend.

The PRESIDENT.—But, Mr. Phelps, whether the assertion is founded on the principle of extension of territorial waters—whether it is founded on the defence of a national industry—do not you think that concurrence with the views from other nations is equally necessary?

Mr. PHELPS.—I do, and that is the very strength of the position that I have been attempting to maintain. Your question, Sir, anticipates the remark with which I was going to take leave of this branch of the case, upon which I hope it will not be thought I have taken more time than is necessary, although I fear I have. What do we claim from it all—from everyone of these cases where in so many nations, in so many waters, so many kinds of marine, or semi-marine, or submarine property (the foundation of industry and husbandry), have been successfully protected, and are protected to this day—what is it that we claim from that? We claim that it shows that in every such case it has been necessary for the nation to assert, and the nation has asserted, a property interest, well described by Mr. John Quincy Adams as an interest that may, perhaps, be an *incorporeal* interest. The term "property" is large. It is indefinite: it is broad. Nations have been compelled to assert, and in every case they have asserted, such a property interest in an industry founded upon these animals as entitles them to protect it from destruction; and in every case the whole world has so far acquiesced and assented to that assertion, whether it has had the necessity to make similar assertions for itself or not. So completely that the exhaustive diligence with which this case has been prepared has not shown you one instance of any claim to the contrary, except the solitary one (if it comes up to that), which Mr. Gram referred to, when, to the surprise of his people and his Government, a foreign vessel made its appearance, and proposed to take part in their fisheries, in violation of the regulations which are there established. There is not another instance in the whole length and breadth of this case.

There is not another instance, either, where a nation having this property has failed to assert it, or where any other nation, or individual of any other nation, has openly ventured, dared, or proposed to infringe it—not one. Of those few instances, principally of the seals in the southern hemisphere, where a nation regardless of its interest, perhaps at a day when the interest was not so valuable—has omitted in respect to the seals to make that assertion which would have been respected as it always is if it had been made—what is the consequence? The animal has perished off the territory where it belongs. Therefore these three postulates may be drawn, without any contradiction, from this long series of cases: first that the property interest is always asserted where it exists; secondly, that it is always respected where it is asserted; thirdly, that in a few instances where it has been omitted, not from fear of the right of asserting it, but from neglect, perhaps from the comparative unimportance of the industry—the consequence has been that it has gone; and if it had not been for the statutes I have referred to, there would not at this day have been a pearl oyster bed, nor a coral bed, nor a seal, on the face of the earth. And then the Herring Fisheries—even those pure fisheries of the open sea that I do not pretend come within the purview of this principle, except in a very wide view of it unnecessary for us to take here—even there it is questionable

whether the places that know them now where they form so important a part of the existence and the industry of the people, would know them at all. I do not mean to say that those fish would have been exterminated from the earth, because all seas are their home. They can go elsewhere. They need no particular shoal. I do not say the herring and the cod would have disappeared from the earth, but they would have disappeared from those shores where they constitute the commercial interest, the industry, the means of subsistence. And I say, therefore as the conclusion of this, that when it is adjudged, if it is ever adjudged—that the fur-seal—more valuable than any one of these products, more closely attached to the soil where it propagates and belongs, ten times over,—is to be excluded from protection, and that the right of extermination is in any individual man who chooses to go there and perpetrate it, you have then placed this animal, which should be the very first to come within the purview of these principles, upon a footing upon which no similar animal, no similar product stands or ever has stood, and you doom him to immediate destruction. We may talk about Regulations—which as a substitute for a dispute, as a means by which nations could bury the dispute, and come together and agree by convention upon what would have been the right of either to have enforced as against the other, if it thought proper,—that has its merits when it comes about in that way; but as the substitute for that right which alone has ever been sufficient to protect any such property, it is a mere rope of sand; and nothing that I could say would demonstate that so completely as the arguments of my friends on the other side, who day after day have been addressing you and urging that under the guise of Regulations you should adopt a series of measures that would defeat the very end which, theoretically, they are intended to subserve, which would promote the very business we are endeavoring to restrict—pointing out in every step of their argument, the embarrassments, the difficulties, the vexations and uncertainties that would attend any effort to enforce any sort of a Code which the learning and skill of the ablest men in the world would be able to prescribe.

Now a few words on the question of law—on a question of law that like so many questions of law in this case, is, in my humble judgment, quite likely to be mistaken, if considered outside the necessities of the case.—Upon what theory do statutes of the sort we have been perusing ever since yesterday morning take effect? Says my friend: A statute has no operation outside of the jurisdiction of the country that enacts it.

That is very true. That is a mere axiom in the law. How then do the statutes protect these seals? They protect them upon either of two theories, either of which is satisfactory—both of which are abundantly supported by authority. They go sometimes upon one ground; sometimes upon another. It is immaterial upon which ground they stand, as long as they do stand. A statute—a municipal statute—which has effect of course only within the jurisdiction of the territory, and upon nationals outside the jurisdiction—how does that operate? In the first place, what is the jurisdiction? To begin with, the jurisdiction of a nation is to the water line—that is plain enough. Then it has come to be understood and considered that it extends a certain distance into the open sea—the "high sea", for certain purposes only. The general jurisdiction of a nation through its statutory enactments does not extend an inch beyond the water line—low water mark. It cannot forbid, for instance, any vessel to sail up as near the shore as it can, assuming that it does no harm. It cannot exclude vessels from coming within three miles that is perfectly certain and agreed upon

everywhere. To exclude them you must connect their presence with some mischief, some harm, some danger; the jurisdiction for the three miles, or the cannon shot, or whatever indefinite distance it may be, is not a general jurisdiction, it is a jurisdiction for all necessary purposes, leaving to the nation a very liberal discretion in determining what "necessary purposes" are,—and nothing else. Thus, the jurisdiction of a nation outside of the water line it will be perceived is a special jurisdiction. Inside of its territory it may pass any law it pleases; beyond the water line it has a jurisdiction up to a certain extent for certain proper purposes—revenue, quarantine, pilotage, everything that a reason can be given for; and an exclusive right, unquestionably, of fishing and hunting and to the products of the sea.

Then, does this special jurisdiction terminate on the three mile line? I shall have occasion to point out, upon the very highest and most recent authority, how utterly vague and uncertain this idea of a three mile line is. But call it three miles for the purpose of my present discussion, and assume that the whole world have agreed to call it just three miles—no more—no less,—does the right stop there? How comes it there at all beyond the shore line?—Because it is found necessary, by universal agreement, that nations, for their own protection, should have that much; and therefore it has become settled by the usage of nations that they shall have it; in other words that they shall add three miles of the high sea to their territory for certain purposes only. Does it stop at this limit of three miles? It does not stop there if there is a just necessity in particular cases for extending it further; and I shall cite authorities to show that while beyond the three mile line the jurisdiction becomes still more special than it was inside, and is still more restricted, nevertheless, when it comes to pass that the three mile limit is not enough to answer the purposes for which it is accorded, but that for special occasions, perhaps revenue, perhaps quarantine, perhaps lighthouses, perhaps anything that is really necessary, the jurisdiction of that nation—I mean the special jurisdiction—the jurisdiction over waters, on the sea, goes farther still in the adjacent waters—goes as far as may be necessary. It has been extended to twelve miles and to various distances. And that while national jurisdiction is not complete within the three mile line because it only extends to proper subjects and proper cases, then when the real necessity of the case extends further, the jurisdiction of the nation goes with the necessity; in other words that the limit of the jurisdiction of a maritime nation upon the high sea is the limit of the actual necessity of the protection of its interests.

That is the proposition. It is not a geographical limit—it never was; it never can be—it is a limit of propriety—a limit of reasonable necessity. Of course as I said before on this subject of self defence, the nation that undertakes to assert that, must be prepared to justify it. I do not at all say that because a nation chooses to assert that a six mile limit or a ten mile limit, for certain purposes, are essential to its protection, that it is thereupon entitled to possess itself of that limit. It asserts it, and the judgment of the world is the tribunal. When a nation in the exercise of its governmental power makes such an assertion as that, it brings its case before the tribunal of the world, and there it will be decided one way or the other. It will be determined by the repudiation of nations,—the refusal of nations, the dissent of nations from such a proposition and the refusal to respect it, and then it perishes. It is a mere assertion that is found in the judgment of mankind to be an unwarranted assertion, and it falls to the ground.

On the other hand, when it is seen by the civilized world that this extension in a particular case is proper, is right, is necessary, works no harm or injustice to anybody, does give the nation its just and necessary protection—then it is affirmed, and, by the acquiescence of mankind it comes to be established as law—it comes to be established precisely as what is called the "three mile limit" has come to be established, and it derives, undoubtedly, additional force from the number of cases in which it is embodied in treaties, which, while they do not make law for any but the parties to the treaties, nevertheless shew the recognition of the proprieties, the justice, of certain propositions by the nations of the world.

If it is convenient to you, Sir, to adjourn now, it would be agreeable to me.

The PRESIDENT.—Certainly.

[The Tribunal then adjourned for a short time.]

Mr. PHELPS.—I had stated, Sir, before the adjournment this morning, one of the theories upon which, as it appears to me, both upon principle and authority, the efficacy of municipal statutes or regulations adopted for the preservation and protection of marine or semi-marine products appurtenant to the shore beyond the ordinary territorial line may depend. That is to say, that the question involves the enquiry, what is the necessary line for such purpose. I postpone referring to various authorities in support of that view until I have stated another theory, equally applicable and equally supported by authority, because the authorities I propose to refer to belong so generally to both these propositions, that they can be more advantageously taken up after both have been stated.

Now a statute, as it appears to us—a municipal statute, which takes effect within any line of territorial jurisdiction, say for instance, a three-mile line or a cannon-shot line, or whatever line may be prescribed—is enforced by judicial process, is law whether it is necessary and proper and just or not, and does not depend upon the executive authority of the country at all. That is to say, in a representative Government, where there is a legislative power within the territory, it is the absolute and positive law. It is the business of the executive to enforce it, if his interposition is necessary. It is the duty of the Courts of Justice to give effect to it, whenever the case arises. Outside of the jurisdiction it has the same effect as far as those subject to the national jurisdiction are concerned. The ships of that power on the high sea are still subject to that municipal law. Then when it takes effect, as we have seen these always do take effect somehow by the consent of the world outside of the ordinary territorial line, and upon those who are not nationals, or under that jurisdiction, they may be said not to take effect as statutes, but as what may be called "defensive regulations". The term is not material. It expresses the idea I am trying to convey. There is no magic in the term; there is no authority in the term. It becomes a regulation which the executive of the country may or may not enforce in its discretion. It is no longer a statute which must be enforced. It is a provision which may be enforced or may not be enforced. In order to justify to other nations its enforcement, the conditions unnecessary to its efficacy within the jurisdiction must occur—first, that it is necessary, then that it is reasonable. So that this provision, or regulation, which takes effect as a statute and by judicial enforcement within the jurisdiction, becomes without, only the guide, the measure of the executive authority which the executive might adopt if there were no statute at all, subject to a qualification which I

shall state in a moment. It is a part of the defence of the country which is in the hands of its Government, which may be legislated upon undoubtedly, but which whether legislated upon or not, must always be enforced by the executive department of the Government, which has control of the arm of the national force. Because as the writ does not run on the high sea except as against nationals, and the sheriff of the county or the marshal of the district cannot go there with his process, when such a regulation is enforced at all, it must be enforced by the executive power of the Government. Because the right of self-defence is declared to be the paramount right. It is not merely the right of an independent nation; it is the paramount right to which all others give way.

It is the first duty of the executive, in the necessary case and by the proper means, to exert the arm of power to protect the interest of the Government; and that duty would be not the less if the legislative Department of the Government had failed to interpose. It would still remain. On the other hand, it is not lost if the legislative Department does interpose. As it is not necessary that they should confer it, so it is impossible that they should take it away. But the propriety of a statute in such a case, the necessity of which does exist, is in order to make the act which is necessary likewise reasonable. It is not the statute that makes it necessary; the necessity comes from without. The statute neither gives it nor takes it away; but when as against another nation the act of defence is exerted, it must not only be necessary, it must be reasonable. Reasonable in the manner of its exercise; reasonable in the thing that is done. Where the necessity of a case will be answered by capturing a ship, for instance, and bringing it in, a nation is not to sink that ship into the ocean with all on board, to burn it, to execute or even to imprison, as has been well enough said by my learned friend in reference to a judgment in this case that I shall have occasion to allude to. The manner of the self-defence, even when the necessity is conceded, must be reasonable in view of the usage of nations as far as there is a usage that applies,—reasonable in its adaptation to the necessity, not transgressing the necessity; just as in the case of individual self-defence where the necessity for it arises, it must stop when the exigency is met.

Now, one of the incidents that must always attend, and the least reflection will show that it is an indispensable requisite, is that before measures of force are resorted to in defence of a nation, reasonable and proper notice, or information shall be given to the world of the objection that exists to what is being done, and of the regulation or the defence that it is proposed to exert. Why, it was a part of my learned friend's argument, in dealing with these seizures in the Behring Sea, "You have seized these vessels without giving notice to Great Britain that you were going to do so". Well, if that had been true, I mean by that if the facts that had taken place did not amount to sufficient knowledge, there would be great force in my learned friend's suggestion. This was the very point that, as I have remarked this morning, was the infirmity of the seizures that were made by Russia of the Canadian vessels for sealing. A vessel came there with no notice whatever that sealing in the high sea was going to be prohibited, and it had not been prohibited elsewhere; and the first warning that the vessel had was this seizure. Russia may well say that it was necessary to do it. "We cannot preserve this industry in any other way". "Yes, but is it necessary that you should resort to the extreme measure of capture of a vessel before you had given notice not to do here as they could do elsewhere, and had

given them a fair opportunity to withdraw", as it is presumed that they would withdraw when they found that the nation affected objected to it; then when they declined to withdraw and persevered in face of the objection and the notice, it would be time to go a step further and enforce your Regulations by actual seizure.

That is what a statute does, and that would be the weakness of the position of the President of the United States, if without any act of Congress which by its publicity gives notice to the world, without any proclamation or declaration he sends a vessel of the navy which is under his command to seize a vessel and bring it into Court. It may be necessary that measures be resorted to to stop the depredation of that vessel, but it is not reasonable that it should be done until notice has been given to the nation or to the vessels of the nation, and therefore you see transpiring in this very correspondence, that whenever a statute of that kind is passed, or a proclamation of that kind is made, the Government whose vessels are abroad and likely to be affected by it, immediately give notice. It becomes then the duty of the nation who finds that these acts are forbidden, to give notice to its subjects, and to inform them that if they go on they go on at their own risk; unless the nation prefers to take the ground of insisting that such a statute is inoperative, and that it will not submit to it and that it will justify and back up its vessels in disregarding it.

If the nation chooses to take that ground, that is one thing; but if it is not proper to take that ground, if it is even uncertain whether it will justify itself, or whether as a matter of policy, even aside from the question of right, it will go that far, then it gives notice to the ships, "you must beware". That is the object of the statute. Another object that makes it reasonable is this:—it is not reasonable to ask nations to refrain on the high seas on the grounds that the acts they do there are destructive to a national interest, when the subjects of the nation that demands it are not required to refrain, though their action would be just as mischievous. No nation could justify that. When the objection of the nation is the killing of these animals, at such times, in such places, and in such manner as is destructive, and, we insist, as a matter of national defence, that the subjects of other nations shall not do it, we cannot justify that proposition if we permit our own citizens to go out and wreak the very destruction which they object to in other people. Therefore, as the first step in the reasonableness of such a proposition or regulation as that, you must show that we have prohibited it to our own citizens. That we have made it a crime wherever our writ runs; wherever the jurisdiction of our Court reaches.

The next thing is that we give notice to the world, by these public statutes, that we propose to require other nations to desist from doing that which is a destruction of our interests, and which we have made criminal as against our own citizens. Then the foundation is laid for saying that such an act is, in the first place, necessary, which, of course, remains to be seen, and which the nation takes the risk of. In the first place it is necessary, and in the next place it is made reasonable when we have required our own citizens to abstain, at whatever cost or detriment and when we have notified to the world what we propose to do. That can only be done by a statute; I mean, the first of those requisites can only be done by a statute, restraining their own citizens and their own ships; and the statute, though not the only means of giving notice to the world, is, perhaps, the best means. Then, suppose that Congress or Parliament, perceiving the necessity of such restriction, passes such statutes, it still remains for the executive of the country to enforce them,

outside the jurisdiction, because they can be enforced in no other way. If he declines to send the ship, or the cruiser, or the armed force, then it is not enforced; but if he sends it, then it is enforced; and then the question arises between that nation and the other that is affected, "Is this a necessary thing to do in protection of your interest? Is it a reasonable thing to do?" The regulation then becomes, in the first place, through the statute, obligatory upon the citizens. It becomes in the second place notice to the world. It becomes, in the third place, the guide and the measure for the action of the executive, not necessarily to control it, because he must act upon his own discretion; but the guide and the measure that is suggested to him, which is analogous to what is enforced against his own people.

Now, I have dwelt longer than I intended upon a distinction that is without a substantial difference, a distinction that is technical, that is theoretical, as to the precise legal ground upon which this exercise of the right of defence stands. It may be supported and it is supported by the most respectable authority, upon either of these two theories,—either in the proper case, in the necessary case, that the jurisdiction of the Government itself goes far enough, or that, if you terminate the jurisdiction at an arbitrary line, then the power of the Government in the exercise of self-defence, as suggested and guided and directed by the provisions of the statute, is made reasonable, is notified to the world, and is enforced in that way.

Now, still a little further on this subject of national self-defence in respect to its theory. What is the right and the limit of national self-defence? As I have said before, it is the first of all national rights; it is the most important of all,—it may be the most necessary of all. It goes, or it may go, to the existence of the nation; it may stop much short of that.

Perhaps you will pardon me for reading some extracts. I read first from Vattel:

> Since, then, a nation is obliged to preserve itself, it has a right to everything necessary for its preservation, for the law of nature gives us a right to everything without which we can not fulfill our obligations.
>
> A nation or state has a right to everything that can help to ward off imminent danger and to keep at a distance whatever is capable of causing its ruin, and that from the very same reasons that establish its right to things necessary to its preservation.

Says Mr. Twiss, part I, section 12, of his book on International Law:

> The right of self-defence is, accordingly, a primary right of nations, and it may be exercised, either by way of resistance in an immediate assault or by way of precaution against threatened aggression. The indefeasible right of every nation to provide for its own defence is classed by Vattel among its perfect rights.

And Phillimore, International Law, chapter 10, sections 111 and 112 says:

> The right of self-preservation is the first law of nations, as it is of individuals. For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability.

And says Mr. Hall in his Treatise on International Law:

> In the last resort almost the whole of the duties of states are subordinated to the right of self-protection. Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary. There are, however, circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurts, states are allowed to disregard certain of the ordinary rules of law, in the same manner as if their existence were involved.
>
> If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members. The nation owes this to itself, since the loss even of one of its

members weakens it and is injurious to its preservation. It owes this also to the members in particular, in consequence of the very act of association; for those who compose a nation are united for their defence and common advantage, and none can justly be deprived of this union and of the advantages he expects to derive from it, while he, on his side, fulfils the conditions. The body of a nation cannot, then, abandon a province, a town, or even a single individual who is a part of it, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons founded on the public safety.

It will be seen, therefore, that the right of self-defence is not confined to the mere defence of the existence of the nation, as from an enemy that threatens its conquest or its destruction. It extends to every interest of the nation that is worth protecting, to every individual of the nation, to every part of the nation, and it is a paramount right. What is the limit and where is the limit of the place of its exercise? Must the nation remain on its soil and stand on the defensive until it is attacked? Nothing is more fundamental, than that the right of self-defence may be exerted wherever it is necessary to exert it, on the high sea, even on the territory of a friendly nation. You may even invade the territory of a nation with which you are at peace, to do an act which the just defence of the country really renders necessary. So far from there being any objection to enforcing this right upon the high sea, it may be enforced upon foreign territory. Says Vattel on this subject, page 128, section 289—and I read from page 148 of the argument:

It is not easy to determine to what distance the nation may extend its rights over the sea by which it is surrounded.

And Chancellor Kent made the same observation in different language. We have cited a number of cases on this point, and among them the case of *Church* v. *Hubbard*, the decision of the Supreme Court of the United States when Chief Justice Marshall presided over it, and which my learned friend in his observations on the case, thinks was not only right, but was so plainly right, that he could hardly think it necessary for the Chief Justice to have delivered an opinion in support of this conclusion. I agree with him. Now what was that case exactly? It was a case where a country had undertaken by one of its municipal regulations to prohibit trade with its colony, and the right of a nation to do that has become sufficiently recognized to be entirely established. A ship set out to infringe that Regulation by trading with a port of that country. It was captured on the high sea by the nation whose Regulation was about to be infringed. The evidence was sufficient to show that the presence of the vessel near the coast did have for its object and intent, a trading voyage to the prohibited port. It had infringed the Regulation by coming within the line which the Regulation prescribed, but which was a line upon the high sea twelve miles out—it had not infringed the territory of the nation—it had infringed the Regulation which took effect, if it took effect at all 12 miles out at sea, and the question was whether the capture was justified by the law of nations. The question arose in such a manner that it could not be justified at all, except upon established principles of law, because the question arose in an action upon a policy—an action upon a contract, in which the rights of the parties, whatever the rights of the nation may have been thought to be, must be determined by the existing and established law.

The Chief Justice makes it so clear, as he always made every thing clear in regard to which he spoke or wrote—he made it so plain that by the established principles of international law that right of self defence could be exerted on the high sea, that the vessel could be captured and brought in and condemned, that it never has been questioned

from that time to this by any authority that is produced for our consideration except a dictum of Mr. Dana, or possibly one or two of these American Jurists I alluded to yesterday, who have been introduced into public notice by my learned friends. If any person doubts that proposition I commend him to a reading of the luminous judgment of Chief Justice Marshall and his eminent associates, because it was not his judgment alone—the entire Court concurred in it.

That self-defence, it will be observed, was not of the existence of that nation. Nobody pretended that was in any danger. It was not a right in time of war. It was a period of profound peace. It was simply a protection of themselves against the comparatively insignificant consequences of one ship trading at one colonial port; and involved no question of existence, and no question of serious danger. Therefore, there cannot be supposed a case that is more completely and entirely in point than this case, if it is right. As we have pointed out, Lord Chief Justice Cockburn in his judgment, in the leading case of *the Queen* v. *Keyn*, speaks of this as declaring the law, and recognizes the ground upon which Chief Justice Marshall puts the case. He says:

> Hitherto legislation, so far as it relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first, the legislation is altogether irrespective of the three mile distance, being founded on a totally different principle, viz the right of the state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws. This principle was well explained by Marshall, C. J., in the case of *Church* v. *Hubbart*.

There is the difference, very clearly pointed out by the Lord Chief Justice, between the defensive regulation in its operation, and the statute itself. The opinion of Chief Justice Marshall is also cited as stating the law, by Chancellor Kent, by Mr. Wharton, and by Mr. Wheaton. Then it was followed by the case of *Hudson* v. *Guestier*, in which the question was as to the jurisdiction of the French Court, in the matter of a seizure at sea—whether it could be made beyond the limits of the territorial jurisdiction, for breach of a municipal regulation. That case went up twice, and it went upon a different state of facts, that is, a supposed different state of facts. It went up the first time, and it appeared that the seizure was within the territorial limits. Then, on a new trial, other proof showed that it was outside. Then it came up to the Supreme Court of the United States a second time, and there it was held, as was held before in the former Case, that the seizure on the high seas, for breach of a municipal regulation, was valid; that it was an exertion of the right of self-defence. Then a previous case to that, which was an intermediate case, I believe, after the decision of *Church* v. *Hubbard*, and before the decision of *Hudson* v. *Guestier*, was *Rose* v. *Himely*, in which under a similar law a seizure had been made on the high seas, but never consummated by carrying the vessel into port. The question was whether that was a justifiable act of self-defence. The Court divided on that question, and the majority of the judges held that it was not justifiable without carrying the vessel in; in other words the vessel should not be seized without carrying out and continuing that seizure up to the point that would give the parties a chance to be heard on the question of whether the vessel was violating the regulations in question. One of the judges, Judge Johnson, held that, notwithstanding that, the capture was legal, and he has given an opinion which we have taken the pains to quote, and which will be found in the Appendix to the Argument, in which he reasons out the conclusion that this act of self-defence did not depend, for its justification, upon bringing in the vessel,

but that the seizure was valid. The remainder of the Court thought otherwise. They did not base it upon the question of the validity of the seizure, but they held that the seizure was never consummated in the way that international law required; that the captors had stopped short of the point which was necessary to their justification.

The PRESIDENT.—That is a rule of prize jurisdiction of which you speak.

Mr. PHELPS.—Yes, but subsequently, in the case of *Hudson* v. *Guestier* to which I have just alluded,——

Mr. Justice HARLAN.—That is in the 6th Cranch.

Mr. PHELPS.—Yes, the case of *Church* v. *Hubbard* is in the 2nd Cranch. *Rose* v. *Himely* is in the 4th Cranch, and the final Case of *Hudson* v. *Guestier* is in the 6th Cranch. Now it is said the case of *Hudson* v. *Guestier* over-rules the decision of *Rose* v. *Himely* and there is a line in the report of the judgment of Chief Justice Marshall, that says in terms that the case of *Rose* v. *Himely* is over-ruled. If so, then the doctrine of Judge Johnson (which goes further than it is necessary for us to go here) becomes the law. I confess from the report of the case I cannot see in what particular *Hudson* v. *Guestier* over-rules *Rose* v. *Himely* but that is quite foreign to my purpose. Perhaps it over-rules the *dicta*. If it is not so, the authority of the case of *Rose* v. *Himely* will show that the judges who thought that seizure was not lawful, put it exclusively upon the ground that it was not consummated by carrying the vessel into the Court of the country, and Judge Johnson alone thought it valid without.

Hudson v. *Guestier* only holds that a seizure which is carried into Court, as it happened to be in that case, is valid. But it is quite immaterial to our present inquiry whether the one case over-rules the other, or not, because both cases concede our point.

From that time to this, in no authority that is brought forward, and none that I have ever seen or heard of, have the doctrines established there been questioned. But again and again, by writers and judges of the greatest eminence, they have been recognized and declared to be right. Mr. Dana alone who edited an edition of Wheaton's International Law over-rules the author whom he edits on this point, who had stated this decision as stating the law, and thinks that the Supreme Court of the United States was mistaken. Now in Wheaton, the author whom Mr. Dana has edited, chapter 1st, part 4, page 290 of this edition, which is the 8th—and this is Mr. Dana's edition, by the way—it is said:

> The independent societies of men called States, acknowledge no common arbitor or judge except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every state has, therefore, a right to resort to force as the only means for redress for injuries inflicted upon it by the others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself what are the nature and extent of the injuries which will justify such a means of redress. Among the various modes of terminating the differences between nations by forcible means short of war are the following,

giving several methods of embargo and taking possession of things and retaliation and reprisal.

The second of these is:

> By taking forcible possession of the thing in controversy by securing to yourself by force, and refusing to the other nation the enjoyment of the right drawn in question.

Another is embargo; another is retaliation, and the fourth is reprisal.

Mr. Justice HARLAN.—Are those extracts embodied in your brief anywhere?

Mr. PHELPS.—No. I think that this was not noticed in the written Argument.

Mr. Justice HARLAN.—Then will you give me the page?

Mr. PHELPS.—It is part IV, chapter I, section 290, page 290 likewise, of the 8th edition of "Dana's Wheaton".

Sir RICHARD WEBSTER.—In the chapter about belligerent rights?

Mr. PHELPS.—It is "International rights of States in their hostile relations". Section 292, on page 292 also, says:

> Any of these acts of reprisal or resort to forcible means of redress between nations may assume the character of war in case adequate satisfaction is refused by the offending State. Reprisals, says Vattel, are used between nation and nation in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, or repair an injury, or give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage till it obtains payment of what is due together with interest and damages, or keep it as a pledge till the offending nation and so forth.

That refers more particularly to a past injury than the prevention of a present.

The case of the *Marianna Flora*, in the 11th Wheaton's Reports of the Supreme Court of the United States, in which the opinion was delivered by Mr. Justice Story, is to the same effect as the decisions I have previously quoted, though considerably later in the history of the Court, on the point of the right of self-defence; and the case will be found an instructive one as to the extent to which the ship of a nation may go on the high seas in the right of self defence against the armed vessel of another nation with which it is at peace. I cannot read that long opinion; but I venture to commend it to the perusal of anyone to whom it is not already familiar. The facts are that a vessel of the United States Government was approached by the vessel of another nation, a Portuguese armed ship, and approached so near that finally a shot was fired, I believe from the Portuguese vessel. It was really an offensive act by the Portuguese ship, perhaps not intended as offensive but rather ill-advised, and the result of it was that Captain Stockton, who commanded the American vessel, captured the vessel and brought her into port. The question came up in a double aspect; first, whether the ship could be held or confiscated; secondly, if not, whether Captain Stockton was liable in damages for having made the seizure. It was claimed, on the one side, that the vessel was open to condemnation, that it had made an assault upon an armed vessel of the United States, and could be condemned as a prize. It was claimed, on the other hand, that that was not so, and that really the seizure was so unjustifiable by Captain Stockton, that he was liable in damages. It was not a naval vessel of the Portuguese Government. It was an armed vessel.

The Supreme Court of the United States dismissed both those applications. They held, in the first place, that Captain Stockton was within the exercise of his right of self-defence of the honour of his Government. He was not placed in any danger. His vessel was the superior force. He did not require to defend himself or his ship, and, if he did, it was not necessary to capture the other ship. But the Court put it upon the ground that an officer of the Navy of the United States had a right to protect the honour of his flag against being assaulted and fired upon, and that, therefore, under the circumstances, he was right in capturing the vessel; and was not responsible in damages. They held, on the other hand, that in view of what the mistake really was on the part of the foreign vessel, upon an examination of the facts, not as they appeared to Captain Stockton, but as they actually took place,

the vessel could not be condemned and the vessel was discharged. It is a most instructive case, because the opinion of Mr. Justice Story, like all his opinions, was very able, and had the concurrence of the whole Court.

The case of the schooner Betsey in Mason's Reports, page 354 is a decision to the same effect by Mr. Justice Story sitting by himself in the Circuit Court over which he presided.

On page 148 of the American Argument is a citation from the first of Kent's Commentaries; page 31:

And states may exercise a more qualified jurisdiction over the seas near their coast for more than the three (or five) mile limit for fiscal and defensive purposes. Both Great Britain and the United States have prohibited the trans-shipment within four leagues of their coast of foreign goods without payment of duties.

That illustrates what I was saying this morning as to the right of a state to extend its jurisdiction beyond the three mile limit. And in the notes you will find several citations on that point. Mr. Twiss says in his volume of International Laws:

Further, if the free and common use of a thing which is incapable of being appropriated were likely to be prejudicial or dangerous to a nation, the care of its own safety would authorize it to reduce that thing under its exclusive empire if possible, in order to restrict the use of it on the part of others by such precautions as prudence might dictate.

That English author has applied this rule to the very case that we have in hand, where the free and common use of a thing which is incapable of being appropriated was likely to be prejudicial or disastrous to a nation.

Wildman, on the same point says:

The sea within gunshot of the shore is occupied by the occupation of the coast. Beyond this limit maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations had for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal and defensive regulations more immediately affecting their safety and welfare.

Creasy, on International Law, remarks

States may exercise a qualified jurisdiction over the seas near their coasts for more than the three (or five) miles limit, for fiscal and defensive purposes, that is, for the purpose of enforcement of their revenue laws, and in order to prevent foreign armed vessels from hovering on their coasts in a menacing and annoying manner.

Halleck says, in his book on International Law,

The three-mile belt is the subject of territorial jurisdiction. Even beyond this limit states may exercise a qualified jurisdiction for fiscal and defensive purposes.

Then referring again to the language of Lord Chief Justice Cockburn, who quotes from Chief Justice Marshall's opinion in *Church* v. *Hubbard.*

To this class of enactments belong the acts imposing the penalties for the violation of neutrality and the so-called "hovering acts" and acts relating to the customs. Thus, the foreign enlistment act (33 and 34 Vic. C. 90) which imposes penalties for various acts done in violation of neutral obligations, some of which are applicable to foreigners as well as to British subjects, is extended in S. 2 to all the dominions of Her Majesty, "including the adjacent territorial waters".

In the Appendix to this argument, on page 183, we have taken the pains to bring together a number of citations from Continental Courts. What we have cited before has been from English or American authorities, either judicial or writers of distinction. Says Azuni:

Every nation may appropriate things, the use of which, if left free and common, would be greatly to its prejudice. This is another reason why maritime powers may extend their domain along the sea coast, as far as it is possible, to defend their rights... It is essential to their security and the welfare of their dominions.

Then Plocque, after discussing the limits of the territorial sea, and pointing out the great divergence of opinion that has existed on the point, says:

Moreover, in custom-house matters, a nation can fix at will the point where its territorial sea ceases; the neighbouring nations are supposed to be acquainted with these regulations, and are consequently, obliged to conform thereto. As an example, we will content ourselves with quoting the law of Germinal 4th, year II, Art. 7, Tit. 2: 'Captains and officers and other functionairies directing the custom-house, or the commercial or naval service, may search all vessels of less than 100 tons burden when lying at anchor or tacking within four leagues from the coast of France, cases of *vis major* excepted. If such vessels have on board any goods whose importation or exportation is prohibited in France, the vessels shall be confiscated as well as their cargoes, and the captains of the vessels shall be required to pay a fine of 500 livres'.

There is an example of a statute operating territorially outside the ordinary three miles, about three times as far.

Says Pradier-Fodéré (Traité de Droit international, Vol. II, sect. 633):

Independently of treaties, the law of each State can determine of its own accord a certain distance on the sea, within which the state can claim jurisdiction, and which constitutes the territorial sea, for it and for those who admit the limitation. This is especially for the surveillance and control of revenues.

And in a note to this passage he says:

It effect, in the matter of revenue, a nation can fix its own limits, notwithstanding the termination of the territorial sea. Neighboring nations are held to recognize these rules, and in consequence are considered to conform to them. On this point the French law of the 4th Germinal, year II, can be cited.

This law fixes two myriameters, or about twelve English miles as the limit within which vessels are subject to inspection to prevent fraud on the revenue.

La Tour (De la mer territoriale, page 230), speaking of the exterritorial effect of the French revenue laws at four leagues from the coast, thus justifies them.

Is not this an excessive limit to which to extend the territorial sea? No, we assert. At the present day this question will hardly bear discussion, on account of the long range of cannon; and though we should return to the time when that range was less, we should still undertake to justify this extension of the custom-house radius; and for this it is sufficient to invoke the reasons given in matters of sanitary police. It does not involve simply a reciprocal concession of states, or a tacit agreement between them, but it is the exercise of their respective rights...

The American and English practice allows the seizure, even outside of the ordinary limit of the territorial waters, of vessels violating the custom laws.

Says M. Calvo (Le droit international, sec. 244):

In order to decide the question in a manner at once rational and practical, it should not be lost sight of at the outset that the state has not over territorial sea a right of property but a right of inspection and of jurisdiction in the interest of its own safety, or of the protection of its revenue interests.

The nature of things demonstrates then that the right extends up to that point where its existence justifies itself, and that it ceases when the apprehension of serious danger, practical utility, and the possibility of effectively carrying on definite action cease.

Maritime states have an incontestable right however, for the defence of their respective territories against sudden attack, and for the protection of their interests of commerce and of revenues, to establish an active inspection on their coast and its vicinity, and to adopt all necessary measures for shutting off access to their territory to those whom they may refuse to receive, where they do not conform to established regulations. It is a natural consequence of the general principle, that whatever anyone shall have done in behalf of his self-defence he will be taken to have done rightly.

Every nation is thus free to establish an inspection and a police over its coasts as it pleases, at least where it has not bound itself by treaties. It can, according to the particular conditions of the coasts and waters, fix the distance correspondingly. A common usage has established a cannon shot as the distance which it is not permitted to overleap, except in the exceptional case, a line which has not alone received the approval of Grotius, Bynkershök, Galiana, and Kluber, but has been confirmed likewise by the laws and treaties of many of the nations.

Nevertheless we can maintain further with Vattel that the dominion of the state over the neighboring sea extends as far as it is necessary to insure its safety, and as far as it can make its power respected. And we can further regard with Rayneval the distance of the horizon which can be fixed upon the coasts as the extreme limit of the measure of surveillance. The line of the cannon shot, which is generally regarded as of common right, presents no invariable base, and the line can be fixed by the laws of each state at least in a provisional way. (Heffter, Int. Law, Secs. 74-75.)

Bluntechli says (Int. Law, Book IV, sec. 322):

The jurisdiction of the neighboring sea does not extend further than the limit judged necessary by the police and the military authorities.

And section 312:

Whenever the crew of a ship has committed a crime upon land or within water included in the territory of another state and is pursued by judicial authorities of such state, the pursuit of the vessel may be continued beyond the waters which are a part of the territory, and even into the open sea.

And in a note he says:

This extension is necessary to insure the efficiency of penal justice. It ends with the pursuit.

Carnazza-Amari, after citing from M. Calvo the passage quoted above says:

Nevertheless states have a right to exact that their security should not be jeopardized by an easy access of foreign vessels menacing their territory; they may see to the collection of duties indispensable to their existence, which are levied upon the national and foreign produce, and which maritime contraband would doubtless lessen if it should not be suppressed. From all these points of view it is necessary to grant to each nation the right of inspection over the sea which washes its coasts, within the limits required for its security, its tranquillity, and the protection of its wealth. . . . States are obliged, in the interest of their defence and their existence, to subject to their authority the sea bordering the coast as far as they are able, or as far as there is need to maintain their dominion by force of arms. . .

It is necessary to concede to every nation a right of surveillance over the bordering sea within the limits which its security, its tranquillity, and its wealth demand. . . . Balde and other authorities place the line at 60 miles from the shore. Gryphiander and Pacuinez, at 100. Locennius, at a point from which a ship can sail in two days. Bynkershöck maintains that the territorial sea extends as far as the power of artillery. This limit is regarded as the correct one, not because it is founded on force, but because it is the limit necessary for the safety of the state.

One other case I will cite upon this point, and that is the Case of *Manchester* v. *Massachusetts*, in the 13th United States Supreme Court Report; and the law on this subject is so well stated by Mr. Choate in his argument, that we have cited his language as well as the opinion of the Court which sustained his contention. It is page 151 of the argument and the report is at page 240 of the 139th Supreme Court Reports.

Without these limits were the "high seas", the common property of all nations. Over these England, as one of the common sovereigns of the ocean, had certain rights of jurisdiction and dominion derived from and sanctioned by the agreement of nations expressed or implied.

Such jurisdiction and dominion she had for all purposes of self-defence, and for the regulation of coast fisheries.

The exercise of such rights over adjacent waters would not necessarily be limited to a 3-mile belt, but would undoubtedly be sanctioned as far as reasonably necessary to secure the practical benefits of their possession. If self-defence or regulation of fisheries should reasonably require assumption of control to a greater distance than 3 miles. it would undoubtedly be acquiesced in by other nations.

The *marine league* distance has acquired prominence merely because of its adoption

as a boundary in certain agreements and treaties, and from its frequent mention in textbooks, but has never been established in law as a fixed boundary.

These rights belonged to England as a member of the family of nations, and did not constitute her the possessor of a proprietary title in any part of the high seas nor add any portion of these waters to her realm. In their nature they were rights of dominion and sovereignty rather than of property.

Mr. Justice Blatchford, in delivering the opinion of the court, says: "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation, and all governments, for the purpose of self protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond these limits.

Now, Sir, by these various authorities, at the risk of being tedious upon a point that, if it had not been controverted on the other side, I should have thought was elementary, I have endeavored to sustain the proposition I advanced in respect to the two different theories, applicable to different cases, arising under the same rule, in which the statutes or regulations, or action without statutes or regulations, of a nation in its own defence do take effect, and are recognized by the established principles of international law as effectual, outside of any arbitrary line of three mile distance or cannon shot.

They show that, in the first place, for all purposes of self-defence—defence of revenue, of fishery, of industries and of everything that is worth defence, the effect of these statutes goes out beyond any arbitrary line, goes out as far as is necessary in the case where it is necessary. We have shown likewise—and I have not attempted to separate them because they are not easily separable—that without any special statute, wherever the protection of an interest, if it is only an interest of commerce or industry, requires it, the strong arm of the nation may be extended, as in the cases in question in these decisions in the Supreme Court, upon the high seas; that a vessel may be pursued and arrested, or may be arrested when caught in the actual occupation of infringing one of these regulations.

Now a word or two about the three mile line so often spoken of. It is often recognized in treaties; it is sometimes referred to in statutes; it has come to pass that it is quite generally recognized, and therefore with that class of superficial minds that have occasion, (or think they have), to talk about this subject, it is regarded as an arbitrary and fixed distance which limits the authority of a Government; that it is an annexation of three miles to the territory within which a nation can do anything, without which it can do nothing. The moment that point is examined, and it is examined with the very highest ability and fairness in the case of *The Queen* v. *Keyn*, 2 Exchequer, not only by the Lord Chief Justice Cockburn but by all the judges of England—I think everyone of them delivered an opinion in that case and there is no one of these opinions that may not be usefully perused—it is shown that the whole idea of the three mile jurisdiction, instead of being the limit of a nation's power of self defence is, itself, only an incident of the general power of self defence.

Mr. Justice HARLAN.—Justice Blatchford used the word "minimum".

Mr. PHELPS.—Yes. The suggestion is as pertinent as the language—which is very pertinent. That is given as the distance which is ordinarily necessary. Up to that point, no question will be made but that the necessity of self defence will extend to it, and yet as I remarked

this morning it is but a qualified jurisdiction within the three miles, because as the judges in that case point out, innocent navigation of vessels within three miles can not be excluded. It is only for the purpose of self defence; and the whole theory of the three mile line is but an incident of the right of self defence for which it is given, so far as it goes, but which does not limit the right itself. It is the off-spring of the necessity and does not limit the principle from which it springs.

Senator MORGAN.—In this Treaty, Mr. Phelps, in the only instance in which it is mentioned, it is called the "ordinary" three mile limit.

Mr. PHELPS.—Yes. That language is often used and it is correct, because it is ordinary; but the word "ordinary" is a very different word from "exclusive".

Now, Sir, you will perhaps pardon me—(because I can really make this clearer by using the language of great judges than in any words of my own) for reading a little from Lord Chief Justice Cockburn's opinion in the case of *the Queen* v. *Keyn*. The Lord Chief Justice, after reviewing with great fulness and learning the whole subject of the three mile limit, from end to end, and referring probably to every respectable authority which at that time existed on the subject, in a long opinion and a very voluminous one, sums it up in this way.

From the review of these authorities we arrive at the following results: There can be no doubt that the suggestion of Bynkershoek that the sea surrounding the coast to the extent of cannon range should be treated as belonging to the state owning the coast, has, with but very few exceptions, been accepted and adopted by the publicists who have followed him during the last two centuries. But it is equally clear in the practical application of the rule in the respect of the particular of distance, as also in the still more essential particular of the character of sovereignty and dominion to be exercised, great differences of opinion have prevailed and still continue to exist. As regards distance, while the majority of authors have adhered to the three-mile zone, others, like Mr. Ortolan and M. Halleck, applying with greater consistency the principle on which the whole doctrine rests, insist on extending the distance to the modern range of cannon—in other words, doubling it. This difference of opinion may be of little practical importance in the present circumstances, inasmuch as the place at which the offence occurred was within the lesser distance: but it is nevertheless not immaterial as showing how unsettled this doctrine still is. The question of sovereignty, on the other hand, is all important and here we have every shade of opinion. . .

Then omitting a passage and reading lower down, he says:

Looking at this we may properly ask those who contend for the application of the existing law to the littoral sea, independently of legislation, to tell us the extent to which we are to go in applying it. Are we to limit it to three miles, or to extend it to six? Are we to treat the whole body of the criminal law as applicable to it, or only so much as relates to police and safety? Or are we to limit it, as one of these authors proposes, to the protection of fisheries and customs, the exacting of harbour and like dues, and the protection of our coasts in time of war? Which of these writers are we to follow?

The Lord Chief Justice, in that opinion, points out the great difference between the authors, some of whom have assumed this distance to be to the horizon line—some as far as one can see—some 200 miles—one 100 miles—another 60 miles and so on; but he says that the majority of publicists have rather settled down on the ordinary line of three miles; but later in the opinion, on the question of what a nation may do within the three mile limit, on the point whether they can exclude foreign ships from innocent passage, he says it is a "doctrine too monstrous to be admited". And again he says:

No nation has arrogated to itself the right of excluding foreign vessels from the use of the external littoral waters for the purpose of navigation.

And Sir Robert Phillimore, in his opinion in that case (which is quoted in the note to page 146 of our Argument), uses this language:

The sound conclusions which result from the investigation of the authorities which have been referred to appear to me to be these: The consensus of civilized independent states has recognized a maritime extension of frontier to the distance of three miles from low water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent state.

It is for the attainment of these particular objects that a dominion has been granted over these portions of the high seas.

This proposition is materially different from the proposition contended for, viz: that it is competent to a state to exercise within these waters the same rights of jurisdiction and property which appertain to it in respect to its lands and its ports. There is one obvious test by which the two sovereignties may be distinguished.

According to modern international law it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

In the former case there is no *jus transitus;* in the latter case there is.

The reason of the thing is that the defence and security of the state does not require or warrant the exclusion of peaceable foreign vessels from passing over these waters, and the custom and usage of nations has not sanctioned it.

Nor is there any author that I know of, that has ever claimed any such right of a nation of jurisdiction over the three mile limit itself.

The PRESIDENT.—Would not it be perhaps that it would be more against the right of the comity of nations than against the right of the sovereign nation, as a matter of theory?

Mr. PHELPS.—With much deference you will find it to be put in all these cases by the English, American and Continental publicists, upon the ground of right. That word is used over and over again—it is a part of the right of the nation. The three mile line is a measure of defence. So long as defence can be adequately and sufficiently conducted within it, there is no apology for a nation going outside it. The necessity fails. When necessity passes the limit, the right of defence is co-extensive with it, and goes as far as that goes.

I propose, on the next occasion—I should not have time to enter upon it to-day intelligently—to show the extent to which this right of defence may be exercised upon the sea—all the authorities that I have cited thus far refer to the sea—what may be done outside of the three mile, or "cannon-shot" line. I shall purpose to show that the same right extends and is exercised and is justified and sustained by eminent statesmen and diplomatists—not only asserted on the one side but conceded on the other, even to go into foreign territory if it is necessary. It must be an extreme case, I am sure, that justifies a nation—that is to say, that makes it necessary for a nation, in time of peace, to trespass on the territory of another nation in order to exert its right of self defence—a case of rare occurrence—and yet a case that does occur, and when it occurs I do not think anybody has ever questioned that the right to go on to such territory exists. It has been exerted by various nations, by Great Britain, by the United States, in various instances, it has been exerted by the one against the other, and by both against other nations; and the only question that could be raised in any of these cases would be upon the facts of the particular case.

The right is always conceded. The dispute arises in respect of the particular necessity, and that, of course, is always a grave question. But when you have established the necessity—when it is necessary for Great Britain to enter the territory of the United States to exert its just and proper right of self defence in time of peace, then it has not been denied by either nation, and it cannot be denied, that the right exists; and I shall propose when I have the honour to address you further, to point out instances of a larger and wider nature, so as to show

that there is absolutely no limit to the thing which may be defended—the property right—the industry—the possession; and there is no limit to the place where it may be exerted, and there is no limit to the manner in which it may be exerted, subject all the time to the primary condition that what is undertaken to be done is necessary to be done, and, the way in which it is undertaken to be done is reasonable and just.

The PRESIDENT.—The Tribunal will adjourn to Monday next at half past 11 instead of to morrow.

[The Tribunal adjourned accordingly to Monday the 3rd July 1893, at 11.30 a. m.]

FORTY-EIGHTH DAY, JULY 3RD, 1893.

Mr. PHELPS.—In order, Sir, to recall the line of argument I was pursuing before it was interrupted by the recess of the Tribunal, I may perhaps in a very few words recapitulate the propositions I had endeavoured to support, setting out with the proposition that it was for those who claimed the right to inflict upon the United States, not to say the world, the injury which we claim results from this business of pelagic sealing, to establish its justification; that in support of the attempted justification they had rested their argument on two principal propositions; first, that these animals are *feræ naturæ* in the legal sense of that term and, therefore, open to pursuit in any place where the pursuer has a right to be; and, in the next place, that the sea is free, and that a pursuit of this sort is incident to the freedom of the sea and is, therefore, a part of the common rights of mankind.

In respect to the first proposition, I had contended at some length that these animals are not *feræ naturæ* in the legal acceptation of that term, but that they were in the place, under the circumstances, in connection with the industry that has been established there upon the United States' territory, the property within the legal meaning of that term of the United States, I had nearly concluded all that I desired to say upon that particular branch of the case. In the effort, however, to explain the legal operation of the numerous statutes which were cited last week, which afford protection to similar property in many countries and under many circumstances, I was drawn, somewhat out of the logical line of my argument, to consider the subject of the right of self-defence, to which I shall have to recur again in its more appropriate connection, without, of course, repeating what I have already said. Only two topics connected with the subject of property, I had desired to observe upon before taking leave of it; and one of those, on account of a mistake as to some references I desire to consult, I must pass this morning in its regular order; that is a subject that has been discussed on both sides of to the Newfoundland Fisheries as the rights were claimed by Great Britain and the United States to exist at the time of the Treaty of 1783, following the American Revolution, and the Treaty of 1818 which followed the war of 1812 between those Countries. Only one other topic in that connection I desire to refer to, and that is what has been called the right of the Indians to pursue the taking of the seals in the water. You will bear in mind that in the Regulations, a draft of which was submitted on our side, there was an exception made in favour of the Indians to a certain extent.

It is said by my learned friends on the other side that if we concede the right to the Indian to take the seals, we concede the whole case—that the right of the Indian is no greater than the right of the white man—that the right to take at all, involves the right to take to any extent which is profitable and desirable to the pursuer, and that there is an inconsistency therefore—an irremediable inconsistency in the judgment of my learned friends, between the position of the United

States that this right of fishery does not exist, and the concession to the Indians. It does not seem to me that the suggestion has given or will be likely to give the Tribunal much trouble. What is conceded to the Indian is not a right—it is a toleration—it is a charity—it is a provision which the nations are bound to make for their wards. That is all. If we come to the question of strict right, an Indian has no more right to pursue this business than a white man. He has as much; he has no more.

They are a people who stand by themselves, and will not stand very long. They are a relic of a race that belongs to that Continent. Its original denizens, its original proprietors, who have almost entirely passed away and will soon be gone. They must be provided for by the nation who under the necessities of civilization has taken from them their homes, their means of subsistence. They must be provided for in their own way, because civilization is to them a curse. If they are to live at all, they must be permitted to live, as far as possible in the changed condition of human affairs, in their own way, and to get their subsistence from the table of the Almighty, and not from any of the conventional arrangements of civilization. They are the gleaners that follow the harvest, not upon a legal right, but upon a toleration that all the world approves of. They are like the recipients of your charity who, if they undertake to demand it, become highwaymen and are dealt with accordingly. Again, nothing that these Indians have ever done in their aboriginal condition as Indians, before they become the instruments, the paid employés of others who are entered upon a very different business—nothing they ever did for their own subsistence—their food, their clothing—perhaps the simple barter to provide them with other necessities, ever worked the least appreciable harm to this herd. The great fact on which the case of the United States depends, that the right which is asserted against them is, as I have said, the right of extermination, does not apply as against these Indians. No possible scrutiny would ever discover in the diminution of this herd the consequence of any inroad upon them which they have made, and the reason why we have put into the regulations this exception in favor of the Indian, is in order to enable them to continue harmlessly that simple pursuit which is necessary to their subsistence, which, if it were withdrawn, must be supplied by the Government with some new means—some new and, to them, unnatural means—of provision. That, Sir, concludes, with the exception I have stated, to which I shall have to ask your indulgence to refer, perhaps to-morrow, a little out of its order, what I desired to say upon the principal question of how far these animals are to be regarded as *feræ naturæ*. Here comes in, Sir, in my apprehension, with propriety, as corroborating and sustaining the proposition we have advanced on this subject of property, the questions that are submitted in this Treaty regarding the former Russian occupation of the islands, and the extent to which we, the United States, derive any claim from it.

I said in the opening that those questions were necessarily subordidate, not because they were made so by one side or the other, but because they must be so; because they are of no sort of consequence except so far as they may help to throw light upon the claims of the one side or the other; because as you will readily see, Sir, if you are to answer those questions, all of them, in favor of the contention of the United States, and yet decide that we have no right to protect ourselves against this business, we have gained nothing by that decision. On the other hand, if you should decide them all in favor of the contention of Great

Britain, and yet decide that we possess the right we contend for, Her Majesty's Government has gained nothing by such a decision. This will be seen upon a moment's reflection. But, as I said, they are not without their importance. In the first place, they are propounded in the Treaty, and a specific answer is requested, a request that it will be, of course, the desire of the Tribunal to comply with, if they find themselves able to determine the questions.

Lord HANNEN.—It is more than a question. It is required.

Mr. PHELPS.—I think that is correct, my Lord. I used the word because I supposed all that was desired of this Tribunal was expressed in that sense. Although the request comes from a nation, it is but a request, at any rate to those members of the Tribunal who owe no allegiance or service to either of the contending nations. Ordinary diplomatic courtesy would require that the invitation to decide these questions addressed to eminent gentlemen not belonging to either of the two contending countries, should be put in the form of a request.

Lord HANNEN.—I was only referring to the words of the Treaty—"shall". It is difference between "may" and "must". If you discharge your duties you must answer these questions.

Mr. PHELPS.—I am quite aware of that my Lord, and in using the word "request" I used it in the sense your Lordship gives, which under other circumstances might have been called "requires." They must be answered, and not only that, but whether they are to be answered or not specifically, even if the Tribunal can construe this Treaty to admit of their passing them over in silence, nevertheless they need to be considered, because in our estimation, and as we shall contend, the answer to them, or the facts upon which the answer depends, strongly corroborate and confirm the American title.

As I have said before, our learned friends were extremely dissatisfied that we did not rest our whole claim on the right to shut up Behring Sea, and then rest our right to shut up Behring Sea upon the former usage of Russia. We have declined both these propositions. We do not claim, as you have long since perceived, to shut up Behring Sea. We do not claim that Russia ever claimed the right to shut up Behring Sea; nevertheless, Sir, in respect to what Russia did claim, I shall, briefly I hope, invite your attention this morning.

There is no human right of property, I respectfully suggest, direct or indirect,—which is not influenced, controlled and ultimately determined by what is called prescription, occupation and the flight of time. How far that applies between nations I shall consider presently. I state now the general principles of municipal law, and a principle which finds its analogy, as far as it is possible to find it in international law. It has been eloquently said by a countryman of my learned friend the Attorney General, whose countrymen have said so many eloquent things, that in the policy of the law the hour-glass which Time is represented as holding in his left hand, takes the place of the memorials and the evidence that the scythe which he carries in his right sweeps away. It is a figurative, still it is an exact statement, in my apprehension, of the foundation and the result of this policy of the law; and, therefore, although in this instance we have expressly disclaimed reposing the title of the United States on the former occupation and claims of Russia, although we have preferred to rest it upon the stronger, the more equitable, the clearer grounds that, as it seems to us, it stands upon in their own right, and not in any derivative right, it is nevertheless true that the position they take derives the strongest corroboration, confirmation and support from the previous history of this subject, and

the occupation of this property and this industry by our predecessor whose title we have derived. That is the place that, in our estimation, these questions take; that is the purpose for which a decision of them was desired—required, if you please—from this Tribunal, and the only purpose.

I need not say in completing the statement of this general principle, what all lawyers understand, that while the effect of prescription, of possession, of occupation is in due time to create titles, to ripen into titles, so that the greater part of the property of this world to-day undoubtedly reposes in its last resort upon that principle—yet the possession short of that, if it has been of any considerable duration, if it has been under the proper circumstances and the proper claim, is regarded in all Courts of Justice as strengthening, and confirming titles. We have the familiar principle of Courts of Equity in respect to the operation of time short of any Statute of Limitations, short of any absolute prescription which makes a title—the lapse of time, the acquiescence, the omission to assert claims—as turning the scale upon doubtful questions of fact. Many a case which, upon the elements of its precise right as between the parties as it stands, might be questionable and doubtful, is set at rest by the consideration of the passage of time, long enough not to form an absolute legal bar, but to characterize the claim to such an extent as to turn the scale. Now as to these questions there are four in the Treaty which I shall refer to briefly. The first is:

What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

Now I need not say, that the only sense and purport of that question in its place on this subject is in reference to the seal fishery. The question is not made here of the right of exclusive jurisdiction over the sea, but the main purport of the question is, what exclusive rights in the seal fishery did Russia assert and exercise? And that will be made plain enough by supposing for the moment, that Russia did not assume for herself an exclusive right over the seal fishery, but did assert certain exclusive rights in the sea, not comprehending the fishery; it would be manifest that would have no effect at all upon the determination of this case. And on the other hand, suppose it is found by the Tribunal, as it seems to me it must be found, that exclusive rights to this seal fishery were asserted and maintained from the original occupation of the Islands down to the cession to the United States in 1867, then of what consequence does it become to the decision of this case, what rights Russia did or did not assert as to the whale fishery, or to any other interest or right in the Behring Sea? It is plain, therefore, that this question is to be read under the contention of this case, in as much as there is no contention of the right of *mare clausum*, what exclusive right *in the seal fishery* did Russia assert and exercise down to this time, and it is only in that connexion that I shall consider it.

The PRESIDENT.—I believe what you have just stated is quite confirmed by the leading phrase of Article VI:

"In deciding the matters submitted to the Arbitrators", we are not to construe the five following questions in any other purport than that which is a matter submitted to us.

Mr. PHELPS.—That is a very pertinent suggestion, Sir, and it makes clear what I was contending for, that these questions are submitted to the Arbitrators only for the purpose of determining the principal questions in the case.

Question 2 is in other words this question.

How far were the claims of Russia affected by the Treaties of 1824 and 1825?

That is the second question, because Great Britain and the United States recognized the claims of Russia just as far as they were included in that Treaty, and no further. Just so far as the original claims of Russia were taken back, diminished, modified, altered by the Treaties of 1824 and 1825, so far those countries declined to recognize what Russia had previously asserted. Just so far, on the other hand as by the provisions of those Treaties the original pretensions of Russia were left undisturbed, just so far both those countries recognized and acceded to it. Nothing can be plainer than that. So that the actual reading of Question N° 2 is what I have stated—how far were the original claims of Russia in respect to these seal fisheries withdrawn or modified by the Treaties of 1824 and 1825?

Then the third question—and I go through with these in order to make clear what I desire to say, that all these four questions resolve themselves into a very simple enquiry, as far as the purpose of this case is concerned, which is, whether the body of water now known as Behring Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825. That is the same question that I just stated, over again, in a different form and having reference to some of the actual contentions in the negotiation. Question 3 states over again Question 2.

How far were the pretensions of Russia withdrawn, or modified, and how far were they acceded to? The controlling enquiry, putting it in other words, and coming to the actual terms of the negotiation, is, was Behring Sea included or was it not? If it was included, then it is not to be denied that Russia's original pretensions were more or less considerably modified. If it was not included, then it is plain that any original assertion of Russia on the subject of this seal fishery never was affected at all by anything that took place between the countries, and I respectfully submit that this conclusion will be found to be inevitable.

The fourth question, as to whether the rights of Russia as to jurisdiction passed to the United States, is no question, because both parties concur that, whatever rights Russia had, passed to us by the Cession. That would be very plain without admission; but it has been admitted by Lord Salisbury, and has been admitted by my learned friends. We are not at issue about the fourth question, but the question is "What rights did Russia possess?" and that depends first on the claims she had asserted originally and maintained by her possession, secondly, upon the question how far, if at all, were those claims affected by the remonstrances of Great Britian and the United States and the modification, if there is a modification, that is contained in the Treaties of 1824 and 1825.

Then you see, if I am correct in what appears to me very plain, when we come to analyse those questions and to deal with them in the light of the controversy in this case and the great question that has to be decided, you must state these questions again in another form, and still they remain the same in effect. Did or did not Russia throw open to Great Britain and to the United States, by the operation of these Treaties, the right to this seal industry and pursuit which she had formerly possessed? Because it is not open to question that these Islands were discovered by Russia, a discovery, as you will remember, upon a voyage that was undertaken, or rather the last of a succession of voyages that were undertaken for the purpose of discovering the

home of the seals. It was observed by navigators and by those who had given some attention to it that there must be somewhere in that region of the world a breeding ground whence the seals came; and you will remember from the correspondence that has been read, that it is in consequence of that idea that the voyage was undertaken, which resulted in the discovery of the Pribilof Islands. Then it will be borne in mind that from that time, or soon after, before or about the beginning of the present century the business of taking the seals was pursued by Russia through the Russian American Company, which was first chartered in 1799 with very large powers, excluding foreigners, excluding all Russian subjects except the grantees or lessees, whatever you choose to call them, of the Russian Government. It was pursued not intelligently, because the subject was then unstudied; but still it was pursued, and we shall see in another connection with what results, from the time of the original discovery down to about the year 1847, when the present method by designation and killing only the young males was entered upon.

The Ukase of 1821 was the very first occasion on which any question arose, either by any attempt by private individuals to go there and participate in this business, or by any assertion on the part of any nation of any right in Behring Sea. Down to the Ukase of 1821 the possession of Russia had been absolutely unbroken; a possession under a claim of exclusive right, a possession enforced by its laws, its Government, its authority; a possession with which nobody in the world undertook to interfere.

The case is therefore very plain till you come down to the Ukase of 1821, because there is no conflicting evidence. Then the Ukase of 1821 was put forth, which was ill-advised in its phraseology, beyond question. The Emperor was made to assert what he did not mean to assert, and it is beyond question that the document in its legal and actual effect, when it was applied to the region to which it had reference, did have an effect by its terms much beyond what it was either the necessity of Russia or its intention to assert. That brought out a remonstrance from both countries, and that remonstrance resulted in a negotiation in which the subject gradually grew less and less clear, as is very apt to be the case in diplomatic correspondence. What seems to us, in the light in which we look back upon this, as a very simple proposition, gradually became more and more obscure as these formal letters passed between the parties; but, at last, we have an exit out of all this, because the parties ultimately came together; they came to a conclusion that was satisfactory to the three parties, and has remained undisturbed ever since, without any question that we hear of between either of these three nations down to the time when pelagic sealing was begun by the Canadians. The settlement of the matter that is found in those Treaties was, therefore, not only satisfactory then, but it has remained satisfactory ever since, till it is brought into consideration in this present connection.

I need not detain you by referring to those passages which have already been read, illustrating what I have said about the claims of Russia. You will remember the terms of the Ukase of 1799, under which the Russian American Company was chartered. Perhaps a few words will illustrate better what I say, and recall to your minds what I mean. The first, second, third, fourth and tenth Articles in the Charter of 1799, which will be found in the first volume of the American Appendix, pages 14 and 15, are those to which I refer; and it will be seen by reading them that the right asserted by Russia then, in the origin

of this business, to this industry and to all industries there, was an exclusive right, and that in the strongest terms the right was conveyed to the Russian American Company to the exclusion of all others. and very large and stringent powers were conferred upon them for the purpose of enabling them to maintain it. The language of the Ukase has likewise become familiar to the Tribunal. In 1821 the exclusive claim is there re-asserted, and it is in terms said that the Russian American Company have these industries, or opportunities and facilities of hunting and fishing, to the exclusion of all others. So that there cannot be a question that down to and including the Ukase of 1821 in the first place the right asserted was an exclusive right; in the second place, that right was neither challenged nor interfered with by anybody in the world, either nation or individual.

Now, pausing there, in illustration of what I have said about the language of the Ukase of 1821, I refer to a letter from Mr. Middleton, I believe it was, or it might have been from the British Minister at St. Petersburg (in which he speaks of this Ukase of 1821, and says the same thing),—I do not quote his very words, but he says this was probably *surreptitiously* obtained from the Emperor; and that the language carried an assertion which it was not the intention of the Government really to make: that it was drawn up (that is what he intimates by the word "surreptitiously") and the signature obtained to it, without it being perceived by the Emperor or his immediate advisers to go much further than the language went, than it had any occasion to go, or than he could maintain himself against the other nations of the world in going.

Let us suppose that the Ukase of 1821 had been simply a claim to the exclusive use of the seals in Behring Sea. Suppose instead of saying that no ship will be permitted to come within 100 Italian miles of the coast, which if literally construed shuts up the Sea altogether because no ship could get in or being in could get out again,—instead of using language which when it came to be applied to the very imperfectly known country at that time really amounted to a shutting of it up at the north and at the south, the Ukase had simply asserted the right of Russia to the exclusive property in the seals on the Pribiloff Islands, had, in other words, asserted just what we assert today for the United States; would that have been challenged by Great Britain or by the United States? Go back to the correspondence which has been before you, and see what were the objects of the United States, and see what were the objects of Great Britain; and see what were the interests, the claims, the supposed rights of those countries; and in the light of all that was said on this subject as well as in the still more striking and conclusive light of the Treaties themselves, enquire whether if Russia in the Ukase 1821 had simply put forth in regard to the seals in Behring Sea what we claim to day, the property right which entitles us to protect them against extermination by foreigners, it would have been challenged on either side.

There is nothing in the whole case that is more plain than that; and the more carefully the diplomatic correspondence of the three nations is scrutinized, the more clearly it comes out that, if that had been all, nobody would have objected. In the first place, they had no wish and no interest to object; and, in the second place, it would not have occurred to them, if we may judge from anything they said, that they had a right to dispute a claim of that character.

When Russia put forth this, she claimed down to the 51st degree of north latitude, almost the entire part of what is now British America,

and then on down to 45° 50′ on the Asiatic side, still lower. But this was not only a claim virtually to shut up Behring Sea, that is in its results, (though the Russians themselves said they did not claim any such thing as that,) but it was a claim which included down to a point which the British Government could not concede without giving away their territory, and which the United States Government as it then claimed the line, could not give away, because you will remember that until in 1846 the line between Great Britain and the United States was adjusted where it is now, the American claim was considerably further to the north than it was ultimately settled, by a wise and friendly compromise between the two nations.

The only importance of it now is as bearing on the quarrel of 1821. When Russia made this assertion it not only took what the British claimed as their territory, but would have included what the United States then claimed as their territory, not as it is now adjusted by the boundary line, but as was then claimed. Therefore you see—and that is the only importance of it, on both these grounds a challenge by these two nations to the language of the Ukase of 1821 and to the boundary which it extended was inevitable, and immediately took place; and the only consequence now is whether it went far enough to cover the fur-seal industry which we are concerned with. If it did, then it has a material bearing; if it did not, it left undisturbed the rights which, as I pointed out, Russia had held without dispute down to that time.

Then the question comes to this—whether or not by those Treaties was surrendered to these Governments or either of them by Russia any part of her claim to the fur-seal business, or fishery as it was called. If she did, then she modified this claim of exclusive possession that down to that time she had maintained. If she did not, then that claim remained undisturbed down to the time of the cession in 1867. In the first place, what is that which it is now proposed to be inferred Russia surrendered? What is it that it is now claimed she virtually gave up without being asked—because you will see from the correspondence that no such claim was set up either on the part of Great Britain or the United States—what is it that she gave away under this Treaty which she had held, I repeat, without dispute down to that time? Pressed with that enquiry, and seeing at the threshold that it is a very grave proposal to establish that she gave away all this industry, my learned friends have remarked that it was not regarded as of any substantial value; that down to the time of the purchase, the fur-sealing business was not thought much of.

That it was not thought anything of by Great Britain and the United States will be plain enough when you refer to the correspondence. But what was it to Russia? Up to the date of the negotiation of those Treaties over 3,000,000 skins of the fur-seal had been taken by Russia out of the Behring Sea from the herd that frequent the Pribilof Islands, more than has been taken ever since by the United States. In the speech of Mr. Sumner in 1867, which has been introduced into the British Case with high commendations of its authority, vol. 1, page 79, you will find it stated that from 1787, the year after the Islands were discovered till 1817, which was seven years before the first Treaty and eight before the second, 2,500,000 seal skins had been taken, besides 700,000 thrown into the sea because they were badly cured and did not pay to send to market. Therefore the statement of 3,000,00 is under rather than above, because adding the 700,000 to the 2,500,000 taken down to 1817, there were over 3,000,000 down to 1817 and then there were seven years afterwards. In the United States Case, vol. 1, page

261, these facts are confirmed by Mr. Byrne and by Veniaminoff, and by Lutjens, and by other authorities, and that is at pages 126 and 164.

The profits of the Russian-American Company up to 1821, when the Ukase was issued, had been 30 per cent on its capital, and in the second period of its lease following 1821, it was 55 per cent. You will find those figures in the United States Case, vol. 1, page 266, and at the time of the negotiation of these Treaties, the sea otter had almost entirely disappeared and the fur-seal product was the chief source of its industry.

It is that business which we are asked to infer was conceded—thrown open to the world, or to these countries, which constituted the world so far as that subject was then concerned—it is that business and that property which we are invited to believe was given away by Russia, when, as you perceive by the correspondence, no such demand was made, and the subject of the fur-seal does not appear in the entire limits of the correspondence.

Senator MORGAN.—Are those facts disputed about the number of seals taken by Russia in that period?

Mr. PHELPS.—I do not understand them to be disputed, because we have given in our case—in the Appendix—the reference I have just made. But they are the evidence on the side of Great Britain, and I am aware of no evidence to the contrary. That is the condition of things in which we approach the question of the construction of the Treaties that followed the Ukase of 1821.

Now referring to this correspondence—some confusion in my judgment has been thrown upon this branch of the case, by trying to consider the negotiation between Great Britain and Russia, and the negotiation between America and Russia at the same time;—they were entirely separate as you will remember.

The American negotiation was first; it resulted in the Treaty of 1824. The British negotiation was subsequent—not subsequent to 1824, but subsequent to the American negotiation—and related to the Treaty of 1825. To understand what the parties did we must take it in the order of time and consider these negotiations separately. Let us find out in the first place what Russia and America did, and then we shall be a long way towards determining what Great Britain and Russia did. I confine myself, therefore, in the first place to the negotiation between the United States and Russia, and leave Great Britain quite out of the enquiry for the present moment. What did Mr. Adams object to in the first place in his very first letter to Mr. de Poletica, the Russian Minister, when the language of the Ukase of 1821 was brought to his attention. On page 132 of the 1st. United States Appendix you will see this first letter dated February 25th 1822:

> I am directed by the President of the United States to inform you that he has seen with surprise in this edict the assertion of a territorial claim on the part of Russia, extending to the fifty first degree of north latitude on this continent, and a regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizures and confiscation the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply. The relations of the United States with his Imperial Majesty have always been of the most friendly character; and it is the earnest desire of this Government to preserve them in that state.
>
> It was expected, before any act which should define the boundary between the territories of the United States and Russia on this continent, that the same would have been arranged by treaty between the parties. To exclude the vessels of our citizens from the shore, beyond the ordinary distance to which the territorial jurisdiction extends, has excited still greater surprise.
>
> This ordinance affects so deeply the rights of the United States and of their citizens that I am instructed to inquire whether you are authorized to give explanations of the grounds of right upon principles generally recognized by the laws and usages of nations which can warrant the claims and regulations contained in it.

Now, Sir, there is stated, in the first place, in the very clear language of Mr. Adams, the Minister of the United States, exactly what it was that the United States complained of in the Ukase of 1821; and pardon me for pointing this out on the map with a little particularity, because it is the statement of the controversy which you do not find modified; you find it talked about, discussed and rediscussed, and as I said made perhaps more obscure in the course of the diplomatic correspondence. He says Russia by the Ukase has claimed down to the 51st degree of north latitude, thus fixing arbitrarily a boundary between Russia and the United States which had never been agreed upon by treaty, in this new and comparatively undiscovered country that was principally unoccupied. He says: You have asserted without any agreement, as a boundary, that which we cannot agree to; and then what? You have excluded the Government of the United States and its citizens from resorting to the shores affected within 100 miles, and therefore you have interfered with our rights.

Now is it not clear in this case that at that time no United States vessel had ever gone into the Behring Sea or gone up there [Indicating on the plan]? They had no settlements; they had no trade, but they had a trade that had begun to be important as you will remember from the evidence along *this* shore [Indicating on the map]. What did Mr. Adams mean when he said that the rights of the United States were affected by exclusion from the shores, in the language I have just read? Did he mean that they were excluding the United States from taking fur-seals in the Pribilof Islands, or in Behring Sea? There is no suggestion of such a thing.

What is the reply of Mr. de Poletica to that. It will be found in the following passage:

> I shall be more succinct, Sir, in the exposition of the motives which determined the Imperial Government to prohibit foreign vessels from approaching the northwest coast of America belonging to Russia within the distance of at least 100 Italian miles. This measure, however severe it may at first appear, is, after all, but a measure of prevention. It is exclusively directed against the culpable enterprises of foreign adventurers, who, not content with exercising upon the coast above mentioned an illicit trade very prejudicial to the rights reserved entirely to the Russian-American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established.
>
> The American Government doubtless recollects the irregular conduct of these adventurers, the majority of whom was composed of American citizens.
>
> Has been the object of the most pressing remonstrances on the part of Russia to the Federal Government from the time that Diplomatic Missions were organized between the countries.

Is it pretended there was ever a remonstrance from Russia to the interference of the United States vessels in Behring Sea?

Then the letter continues:

> These remonstrances, repeated at different times, remain constantly without effect.

Then it says:

> The Imperial Government saw itself under the necessity of having recourse to the means of coercion, and of measuring the rigor according to the inveterate character of the evil to which it wished to put a stop.

In other words, this is what the Russian Minister says, if you interpret it by the language that is put into his mouth now: "The object of this provision in the Ukase of 1821 is to put a stop to depredations in Behring Sea which have become injurious, although nobody has ever attempted to enter the sea at all." He would contradict himself, in the language that he utters, if you attribute that language to the interior

of Behring Sea, rather than to the real North-west coast. He says he must request the Secretary to consider that the ordinary conditions of a shut sea attend the case, and that the Russian Government might well have claimed it, but he says:

But it preferred only asserting its essential rights without taking any advantage of localities.

Now what is Mr. Adams' reply to that? It will be found on page 134. Of course, I do not read it all.

This pretension.

having recited what I have just quoted from M. Poletica.

Is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of the United States, as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence.

Then further down he says:

The right of the citizens of the United States to hold commerce with the aboriginal Natives of the north west coast of America without the territorial jurisdiction of other nations even in arms and munitions of war, is as clear and indisputable as that of navigating the seas. That right has never been exercised in a spirit unfriendly to Russia; and although general complaints have occasionally been made on the subject of this commerce by your predecessors no specific ground of charge has ever been alleged by them of any transaction in it which the United States were, by the ordinary laws and usages of nations, bound either to restrain or to punish.

Now is it possible to doubt what those gentlemen were talking about in such language as that? What locality did they refer to. Did they refer to a locality which the United States vessels had never invaded, where they had no trade, and no business—where no remonstrance ever could have been made, or did they refer to the shore to which alone such language had any sensible application?

Then comes M. de Poletica's reply, and this is the last letter in this connection that I have occasion to read. He says:

As to the right claimed for the citizens of the United States of trading with the natives of the country of the north-west coast of America, without the limits of the jurisdiction belonging to Russia, the Imperial Government will not certainly think of limiting it, and still less of attacking it there. But I cannot dissemble, Sir, that this same trade beyond the 51st degree will meet with difficulties and inconveniences, for which the American owners will only have to accuse their own imprudence after the publicity which has been given to the measures taken.

Now what I derive from this, Sir, is that in the origin of this controversy between America and Great Britain when the language of the Ukase of 1821 was first challenged, the claim of the United States by language which cannot be mistaken because it was only one subject that it had application to was, first: "You have extended your boundary without authority to a limit that we do not agree to." Secondly: "You have undertaken to put a stop to the business which the United States vessels have long been carrying on in trading with natives on their coast and to exclude us from coming within 100 miles of that coast, and that assertion we altogether deny".

Now I repeat, Sir, what I said a little while ago: suppose all there had been in the Ukase of 1821 was: "we assert the exclusive right to fur-seals in Behring Sea", is there any reason to suppose that what Mr. Adams said or what he ever said or what any American has ever said who corresponded on this subject—either that the Government had any desire to controvert that or any personal interest in converting it, or that such an assertion of right would have been for a moment chal-

lenged? You will observe, Sir—you have not failed to observe I am sure in what has been derived from this correspondence—that the inclusion of the Behring Sea in the result of this correspondence is altogether by inference; and—I am speaking now of the American negotiation—with respect to the American negotiation the controversy was entirely in regard to what is called "the north-western coast" in this controversy, as it would seem to be, in contradistinction to what I have called the "north-eastern coast". The controversy was altogether in regard to the actual rights and occupation of the United States on the north western coast, and the boundary line; and we only bring Behring Sea into that controversy by assuming that the general language which is employed speaking of the the northwest coast *would* include it—not that it *did* include it in the estimation of the parties, because the use they were making of the language shewed that it was not included at all.

This runs through the correspondence. I could cite much more, if I cared to read over again, what has been read; but my eye now falls upon the passage I alluded to a little while ago. It is in Mr. Middleton's letter at page 136 of the first volume of the United States Appendix, where Mr. Middleton writes to Mr. Adams how this strong language of the Ukase of 1821 came to be employed. He says:

> For some time past I began to perceive that the provisions of the Ukase would not be persisted in. It appears to have been signed by the Emperor without sufficient examination, and may be fairly considered as having been surreptitiously obtained. There can be no doubt therefore that with a little patience and management it will be moulded into a less objectionable shape.

You see then, Sir, in approaching this subject, first how little probable it was that Russia would have readily given away this valuable industry; secondly, that it was not intending to give it away; that the United States never had sought to interfere with it in any way, but confined its remonstrance to other points; so that when you come to read the article of the Treaty which was very readily agreed on, the longer this correspondence proceeded the plainer it became that it was a controversy over words and not over rights—that Russia never intended the full meaning of the words of the Ukase of 1821—it disclaimed it from the outset; it was only bringing the parties together, and if it had been done, as I have said, directly, instead of through the convolutions of a long correspondence, with the embarrassments that always attend such correspondence that must be made public, it would have been done even still more readily than it was; and when you come to the actual concurrence between Russia and the United States there really was no difficulty at all, and all the discussion that had taken place was as to the claims which were made in terms, and not intended to be made or to be insisted upon in reality.

Then comes this Treaty. You, Sir, I am sure (whose diplomatic experience has suggested to you the extreme difficulty that attends even the reducing to form of a Treaty which has substantially been agreed upon), will have been surprised to see how easily this negotiation between Russia and the United States resulted in the Treaty of 1824—how neither party gave away anything that it had insisted upon in reality—how Mr. Adams, having stated his objection, was met at once by the explanation from Russia—"Well, but we never meant that: we did not mean to insist upon that; what we meant was so and so." "Well, so and so", rejoins Mr. Adams, "we have no quarrel about: we have made no point about. *This* is what we claim—the adjustment of the boundary, and that our legitimate trade on the coast

shall not be interfered with." "That, we never intended to interfere with", says Russia, and the Treaty of 1824 results, without the least compromise. Russia gives away nothing, except, as Mr. Middleton points out, the unfortunate phraseology which went a great deal too far. Mr. Adams obtained all he claimed. I should modify that observation by saying that the only thing in this Treaty which was anything else than an explanation, was the provision that for 10 years the ships of neither party should be interfered with in certain trading rights which are not material to this point.

Now the Treaty of 1824 proceeds thus:

It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following Articles".

Senator MORGAN.—That is the 4th Article?

Mr. PHELPS.—No, that is the 1st Article. The 4th Article is this:

It is nevertheless understood that during a term of 10 years, counting from the signature of the present convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing, and trading with the natives of the country.

Senator MORGAN.—Why did they limit the right of fishing and trading with the natives for a period of 10 years, and make it reciprocal, if those rights were surrendered by Russia into the hands of the other two Governments?

Mr. PHELPS.—Because the provisions of Article 10 refer to a liberty that the respective nations should have, to go to the shores of each other and Article 1 undertakes to define what those shores are.

Senator MORGAN.—And it seems to relate also to the right of fishing as well as resorting to the shore.

Mr. PHELPS.—Certainly it does. Article I provides that both shall have the right—that is to say that neither shall be disturbed, or restrain the other—neither in ten years nor in any other time. That is only a difference of phraseology from saying both sides shall have the right "in that part of the Great Ocean."

Whether that includes Behring Sea is the question I am coming to. Then it says that for 10 years neither party shall be restrained from visiting the interior seas. That is article 4. Of course, I should refer to article 3 which gives the boundary line, and that makes the two intelligible. I read the 1st article first, and then article 4, without reading article 3. Article 3 says this:

It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said states, any establishment upon the north west coast of America, nor in any of the islands adjacent, to the north of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under authority of Russia, south of the same parallel.

Senator MORGAN.—The difficulty in my mind is this. If the rights in article I and Article IV are identical, why should these two Governments first agree that they should be surrendered absolutely and forever, and then afterwards agree that a limit of ten years should be put on them.

Sir CHARLES RUSSELL.—Article IV applies to territorial waters—"interior seas, gulfs, harbors, creeks, and so on."

Mr. PHELPS.—I suppose this is the reading of the Treaty in plain words, as I construe it—of course it will be for the better consideration of this Tribunal. Like many Treaties it is not very plainly expressed, among which might be included the one that has constituted this Tribunal. The parties are so afraid of giving something away that it results in obscurity; but I understand this to be the meaning of the Treaty, bearing in mind that it was largely an unoccupied and partly undiscovered country at that time: Russia shall have the exclusive right to make settlements down to 54° 40′—in other words, that shall be considered the territory of Russia, and you shall not come above that: Below that, as far as Russia and the United States are concerned at any rate, (because the rights of Great Britain do not come in here) it shall be considered the territory of the United States, and Russia will not go below 54° 40′. Now you have a boundary line. This having been determined, for 10 years the ships of the two countries may enter each other's territorial waters and the islands in the interior seas and gulfs for the purposes of certain trade and subject to certain restrictions. That is the meaning of the Treaty.

Senator MORGAN.—And after that, they may enter Russian waters permanently for the same purpose?

Mr. PHELPS.—Oh no. Articles I and III draw the territorial line. Then Article IV provides that that territorial line may be invaded by both sides by mutual consent for certain purposes. That is the way I read the Treaty; and all that we have to do with it here for the purpose of elucidating the question we are charged with, is to find out whether Behring Sea was or was not included within the terms of this Treaty; and the difference that makes is this; if Behring Sea was included within the meaning of the term in the 1st Article of this Treaty, then it is open to be argued by implication, and not directly, that Russia did throw open to the United States a right of fishing and so forth, in the Behring Sea which might be argued to affect the exclusive right to this fur seal fishery, though it does not say so. On the other hand, if Behring Sea is not included within the terminology of this Article of the Treaty then the Treaty has nothing to do with the case whatever.

Lord HANNEN.—Nothing to do with *Behring Sea*. It would have to do with the question of fishing in whatever is the proper meaning of the words "Pacific Ocean".

Mr. PHELPS.—Yes; not with *Behring Sea*.

Lord HANNEN.—Yes, that is what I say.

Mr. PHELPS.—That is what I mean; it has nothing to do with this case so far as Behring Sea is concerned. That is what I meant to say. I will repeat that, in order that we may start in what I am imperfectly trying to say with a perfectly clear conception of what I am contending for: That Russia had had exclusive occupation and exclusive claim to the fur-seal fishery *at least*, probably to more than that, down to 1821, is not disputed. It cannot be disputed because there is no evidence to dispute it upon. Now if Russia ever gave away her claim on that subject she gave it away when she signed this Treaty with the United States and afterward with Great Britain. If she gave it away then directly, or by implication to any extent, then the Treaty touches the question of Behring Sea in this case. If she did not, that possession continued unbroken down to 1867 when she conveyed it to the United States. It all turns then—all these questions that are submitted to you except so far as the facts are undisputed because the possession is undisputed,—it all turns upon the question whether in the treaties of

1824 and 1825 Russia did throw open to these countries the only right that she had previously asserted to be exclusively in herself? If she did, that is one thing. If she did not, then those Treaties so far as the Behring Sea is concerned disappear out of this case.

Senator MORGAN.—I understand your contention to be, that in order to throw open, as you say those rights, there would have to be a distinct and affirmative expression in the Treaty?

Mr. PHELPS.—Yes, Sir, or else a toleration of an invasion of it. It may be expressed or implied. It is expressed when the nation puts it into a Treaty or a convention: it is implied when she permits the world to come there and interfere with, and participate in, the fisheries. As I pointed out, there is no evidence of actual interruption down to 1867, and therefore if Russia has done anything to weaken her claim she did it by the provision of a Treaty, which, as we shall see, never was acted upon in that sense by either of the parties to it. These two questions then: What is meant by the "North West Coast", and whether Behring Sea is included in the term "Pacific Ocean" and "Great South Sea" are the same question. You are again stating the same thing in different words. If Behring Sea is included, then you may say the North West Coast runs up and attaches the Western Coast of Behring Sea—what is now Alaska. If Behring Sea was not included, then the North West Coast was limited as we say it was limited. The two inquiries are the same.

The PRESIDENT.—You are of opinion, at any rate, that the Treaty of 1824 has nothing to do with the eastern coast, with the Siberian Coast.

Mr. PHELPS.—I think it has nothing to do with the Siberian Coast.

The PRESIDENT.—Then Article I would not apply to the Coast of Kamschatka?

Mr. PHELPS.—Certainly nobody claims, I suppose, that it would have that effect. That was one consideration that I was intending to advert to on the question of the construction of this—that if you gave the construction that my friends contend for, you include this whole Siberian Coast [indicating on the map] that nobody ever laid any claim to or had any business with, and which Russia would certainly not have volunteered to surrender. That is one consideration that bears on the meaning.

Now we come to the meaning of the words in the first Article in the Treaty.

Any part of the Great Ocean, commonly called Pacific Ocean, or South Sea.

What is the question?

It is whether "Behring Sea" in the common speech and understanding of men at that time was designated as the "Pacific Ocean", or whether it was not?

Commonly called—not *sometimes* called—that is a very different expression. Was it then commonly called and designated as part of the Pacific Ocean? If it was, then this Treaty includes it: if it was not, the Treaty does not include it. If that question is too doubtful to be determined, then we should have to resort to other principles of construction to find out what the Treaty meant. If Behring Sea is included in the phrase "Pacific Ocean", it must be upon one of two grounds—either that the language of the Treaty includes it, that is to say, the description "commonly called Pacific Ocean" includes it. If it does, that is an end of it. If it does not, and the language is found to be ambiguous, then it must be incorporated into the Treaty by the understanding which it is proved the parties had of the definition of an

ambiguous term. I suppose it is quite fundamental in the construction of all contracts, Treaties and everything else—the first resort is to the language of the Treaty—of the contract. Both parties are bound by that. They are not to be heard against their own words in the absence of a consideration that cannot apply to a Treaty between nations—namely fraud. If therefore these words do include Behring Sea in the "Pacific Ocean", then the United States are bound by it and Russia is bound by it.

If on the other hand the term "commonly called", excludes that, then they are not bound by it. Then in the third contingency: If the Tribunal finds itself in the situation of being obliged to say: "These words are so far ambiguous that we cannot say that they do necessarily include Behring Sea in "the Pacific Ocean", and we cannot say that they necessarily exclude it, then you have to find out what the parties meant by the use of language which is susceptible of two very different meanings. Which way did they understand it? Both sides set forth very large lists of maps. The moment you go to the meaning of the phrase "commonly called the Pacific Ocean", you have recourse to the maps. There are 105 in Mr. Blaine's list; there are more than that in the British Case or Counter Case. My friend Sir Richard Webster was mistaken in saying that most of these in Mr. Blaine's list were included in theirs—there are only about ten. He will find, when he compares the lists that there are only about 10 of Mr. Blaine's maps that are to be found in the British Collection.

Sir CHARLES RUSSELL.—Before my friend goes to the maps might I ask him to read M. de Poletica's description of what he understood by the "Pacific Ocean". It is in the despatch my friend has passed over.

Mr. PHELPS.—I have passed over them all.

Sir CHARLES RUSSELL.—The date of it is the 28th February 1822.

Mr. PHELPS.—If you will kindly give it me, I will refer to it.

Sir CHARLES RUSSELL.—It is only this passage.

I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend, on the north-west coast of America, from Behring Strait to the 51st degree of north latitude, and on the opposite side of Asia and the islands adjacent, from the same strait to the 45th degree.

Mr. Justice HARLAN.—Mr. Adams' reply to that shews that he understood that the part of the Pacific Ocean there referred to, was south of the Aleutian Islands, because he speaks of the distance being 4,000 miles.

Sir CHARLES RUSSELL.—With great deference not so. Mr. Adams in reply points out that the description would cover an extent of ocean which, at one part, south of the Aleutians, would measure 4,000 miles.

Mr. PHELPS.—That has been read before, and does not touch the point of my argument in the least degree. If you are going to examine the witnesses, and find out whether, every time that a man when talking about another point uses the phrase "Pacific Ocean" as including this sea or uses it as excluding it, you never would come to an end. Nothing is more indeterminate on such an inquiry, than the language which is used when the particular point of where the boundary line is, is not in mind and is not in controversy. If I were to ransack history, literature, and travels for the purpose of accumulating instances in which the "Pacific Ocean" is spoken of as not including Behring Sea, why what a mass of material I should bring together. And what does it prove? Nothing at all. Because when the parties were using that general expression their minds were not on the particular point we are now discussing.

So, on the other hand, if you cull this correspondence you will find plenty of instances in which casual expressions are used which would look one way or the other—(I attribute no importance to them on either side); but when you go to maps of geographers from whom we get all our ideas of geography, atlases, charts, maps and so forth conveying and embodying all the knowledge there is — when you come to find out where they drew the line, then you are approaching the answer to the question; what is commonly called the Pacific Ocean?

Then in the consideration of maps there is a further discrimination to be made, and that will reconcile, in a striking degree, what is, on the threshold, to a superficial observer, the conflict between these sets of maps. A person who has not taken the trouble to analyse them will suppose that there is a great conflict in this evidence—that there is really an enormous conflict: a great many maps say one thing—a great many say another. When you come to analyse, you look at the maps and consider what the map is dealing with, what it is undertaking to show—discriminating those that are authoritative—that are made upon authority, that are made deliberately, from little maps that are attached to books of travel, or to elucidate something which does not require this distinction to be made.

Now my friend's tactics (if it is not disrespectful to apply a military term to the conduct of a controversy), all through this case, are what may be known as the "battalion system" of witnesses. As I shall have occasion to point out in a great many instances, he has a battalion. They are all in formation. The effect of them is tremendous. We have 100 to 150 witnesses swearing to the fact. Are you going to doubt that fact? It is not until you call the roll of this battalion and let each man stand out by himself that you find a large share of them swear directly the other way,—another large share do not swear at all—that those who really support the point as to which they are called, become so insignificant that the battalion shrinks into a corporal's guard.

It is exactly so with these maps. I was appalled (supposing that I had some idea of what the merits of this question was), when I found there were some 136 maps that apparently on the face of this case defined this boundary differently from what I had supposed. It is not until you analyse the 136 that you find what the result is. To begin with, and to find out what these men meant in 1824 by "commonly called", we may dismiss subsequent maps. They were talking about the geography of the world as it was understood then. Geography and geographical terms change as everything else does. We should, few of us, recognize maps by which we began the study of geography, as applying to the world at the present time, though the world is very much the same as it was then. I discard the subsequent maps, and address myself to the consideration of the maps that were then considered authorative—that you may assume in the absence of evidence, guided the views of intelligent people as to these geographical distinctions. So let us consider the maps between 1800 and 1823, the American Treaty being in 1824. Then let us remember that these two countries naturally—not to the exclusion of other maps—look at their own; the first resort of a country intelligent enough to have scientific maps and publications is to its own maps. Take the Russian maps for instance and I shall dispose of what there is to say about that before the recess. There are eleven Russian maps cited.

Mr. Justice HARLAN.—On both sides.

Mr. PHELPS.—On both sides. Four in Mr. Blaine's list, and seven in the British list. All but one of them give a separate name to Behring Sea. It was called at this early date as you know, the Sea of Kamschatka or "Bassin du Nord"—to some extent the "Beaver Sea." All those eleven maps but one give a separate designation to this sea, and the question is what a Russian, in making an agreement of that sort, commonly understood? The map that fails to give it is a map by Lisianky, which illustrates his book of travels. It is not a geographical map or chart—it is a map annexed to a book illustrating his travels; he did not go into the Behring Sea, and the consequence is in his map no special designation is given to Behring Sea. It is left without a name, but in all the others every one of them—and some of them quite authoritative, you find a separate name given.

Mr. Justice HARLAN.—Mr. Phelps, I would like to ask you there, do you know what some of those Russian words on the map of 1802 mean? Perhaps Sir Charles Russell may be able to say? I see on that map of 1802, there are certain words marked on what we call Behring Sea in Russian; and below that, certain other words. Do you know what those Russian words mean?

Sir CHARLES RUSSELL.—"Beaver Sea", I believe it is called.

Mr. Justice HARLAN.—What is the English of the Russian words below the Aleutian islands in large letters?

Mr. PHELPS.—"Southern Sea, or still Sea", I think, Sir.

Sir CHARLES RUSSELL.—There is apparently an alternative reading. The reading of the words to the right is "Pacific Sea or Pacific Ocean"; The words to the left I do not exactly know the meaning of. You will find the explanation Judge, of this particular map, on page 95 of the 1st volume of the Appendix to the British Counter Case. It is the map of 1802, and apparently the words below are "Southern Ocean or Still Sea".

Mr. PHELPS.—Yes, that is what they mean.

Sir CHARLES RUSSELL.—That is No. 24 on that page. You will find the explanation of all of them. There is also the name "Kamschatkha Sea" running parallel to Kamschatka. It is marked on the same plan.

Mr. PHELPS.—Now as to these maps—if you will indulge me Sir with another word before luncheon, I shall be able to dismiss them. I have said that ten of these maps gave a separate designation to Behring Sea. This map has the importance of being in the first place the Official map of the Russian Government, published by its Quarter Master General's Department. The others are the work of private Geographers. This is the Official map. In the next place the case shows that this map was actually used in this negociation because a copy of it with manuscript notes of his own is sent by Sir Charles Bagot in his Despatch to his Government on the 17th November 1821; so that it is not only official but it was actually used at St. Petersburg between the British Minister and the British Government and transmitted by the representative of the British Government to his own country.

Now I ask if you have to give a meaning on the part of Russia to this term "commonly called the Pacific Ocean" are you going to give the meaning that is opposed to ten maps, out of eleven, opposed to the official map of the Government, opposed to the map that was used in the negotiation?

I shall now, Sir, with your permission consider some other maps in the case.

[The Tribunal here adjourned for a short time.]

Sir CHARLES RUSSELL.—I have asked my learned friend's permission before he resumes, to point out in reference to the map before Mr. Justice Harlan that there are some other words that had better be explained.

The PRESIDENT.—If you please, Sir Charles.

Sir CHARLES RUSSELL.—You will observe just north of Behring Strait a number of words stretching away to the right and going down in the direction of the 50th degree,—ending just above the 50th degree. The translation of those words beginning from Behring Strait and going down between 55° and 50° is "Part of the northwest Coast of America". I do not, of course, argue upon it; I merely wish to translate it. The fact is referred to at page 62 of the British Case.

Mr. PHELPS.—Now, Sir, the question we are upon is, whether or not by this designation of what is commonly called the Pacific Ocean or South Sea, Behring Sea is included? I say that is a question that can only be decided at this day by the authoritative maps then in existence, and which these parties may be presumed to have been informed of, or which we know they had before them. This official and important map of 1802 lays that down in such a way that it is perfectly inconceivable, I respectfully submit, that any negotiators drawing a Treaty intending to include Behring Sea should have left it with any such words as these, with the map before them showing as it does that it is not included, but is designated by a different name;—that if they desired to include it they would not have used language that would have included it. Before we have done with this discussion, I shall show that it was proposed to introduce just such language, and Russia refused.

Before leaving the Russian maps, however, let me call attention to a map of 1817, which is named in the British list and which is likewise so far an official map, called the Russian War Topographical Depôt Map; likewise an official and public map published by the Russian Government much later, being the then latest Russian map at the time of these negotiations; that is to say, being 5 or 6 years old. In that, *Behring Sea* is named in the same way as Okhotsh Sea is, and *Pacific Ocean* is named. So that if the Russian Government had reference to or was informed by its own latest official map, it states still more strongly and clearly than the map, if possible, of 1802.

Let me now refer to the American maps. If the Russian maps, which they must be presumed to have been instructed by and which they did have before them, designate this water as a separate sea, let us see what the Americans, if they referred to their own maps, had in the way of information before them. Of the 10 maps published in America and cited, all but two give a separate name to Behring Sea. You have there exactly what you find on the other side of the Atlantic, in Russia. What about those two? One of them is a map which is in an atlas published by Fielding Lucas, in 1812, and the map in that atlas immediately preceding it and the map immediately following it give the separate name of the Sea of Kamschatka to this Behring Sea. The particular map which my learned friends set out from Luças' Atlas, does not give a separate name to Behring Sea, but when you turn over the page and look at the one that precedes it and when you turn over the page the other way, and look at the one that succeeds it, you will find the publisher of that map did understand this to be a separate water, and omitted that in this particular map because it was a map of the World; the one preceding it is the map of the western hemisphere, and the one following it I do not know the name of; but in the map of the World, which, of course, would render this very much

smaller, the words are omitted which he gives in the previous map. The other map in which it is not given a separate name, is one published by Carey & Son, Philadelphia 1823; the map is map 3 in the atlas, and the subject is not given, though the eastern part of Behring Sea is shown and it has not a separate name.

Why is only one of those maps cited? We have not the other maps, and they are not in the case, and I cannot answer the question. I infer that if map No. 2 and map No. 4 had been produced, you would have found just what you did in Lucas' Atlas; that in the other maps the separate words, "The Behring Sea", are given. With that exception, those are all the American maps. Then, what is it that you are asked by my learned friends to find? It is that, in giving a definition to the words "commonly called the Pacific Ocean", you are to accept a definition which is opposed by 10 out of 11 maps in Russia and by 8 out of 10 maps in the United States with the explanation that I have given, which show that the omissions in those three maps, one in Russia and 2 in America, are totally inconsequential.

Let us go a little further. I need not say that France at that day was largely the headquarters of the best geographical science, and the best scientific knowledge in the world; and it was so prominent in diplomacy, that the French language became the language of diplomacy, and remains so to the present day, notwithstanding the vast increase in the region over which the English language is spoken. France contained geographers so celebrated that their names are known to everybody—the names of Brué, Lapie and Malte-Brun even men of such small geographical attainments as I have are familiar with, and it is not to be supposed that educated persons, Diplomatists and Governments were ignorant of the great contributions that had been made by France to the Science of the Geography of the World. There are 15 French maps made between 1818 and 1823, and all give the separate names of "Mer de Behring" and "Bassin du Nord" to this Sea. Then, to bring it within their definition that the Pacific Ocean does include Behring Sea, you wipe out at once the results of the work of these men, who were then the greatest geographers in the world beyond doubt. Whether they are so now, may be another question; but those names were then superior to any others, and France was taking the lead among nations on the subject of diplomacy.

Now, let us go to the English Maps, not because England was engaged in the negotiations that I am now dealing with; but because we in America, deriving our literature and language from the mother-country, are, of course, supposed to be, and it is fairly to be inferred that we were, acquainted at that day with the English maps and with other English literature and science; and, while perhaps in the estimation of the world they were not as high at that time as those of France, still they were of a very respectable character,—more so, even in the estimation of the world than those of America, which were not as widely known.

When I speak of the maps that are referred to on both sides, the Tribunal will, of course, understand that I mean maps published between 1818 and 1823. I shall refer briefly at last to those maps that would not come within that definition; and when I say so many are cited on one side and so many are cited on the other, I mean so many published between those dates are cited on one side and the other. When you go to the British maps there is more diversity. A great many are cited, some that are of authority, and some that are less so. There are five charts, single sheet charts, and general maps; and by the term "general" I mean a map that assumes to give both the land and water

divisions, not a map that gives the land nor a map that gives the water exclusively, but a map that is large enough and intended to give the whole. There are five of them and everyone of them called Behring Sea "the Sea of Kamschatka."

Then there is another division that you may call maps, in atlases containing quite a number of maps in the same publication, and 20 of those are what I call general maps, and 15 of those are land divisions. Of those 20, 16 give a separate designation to Behring Sea. It is called the sea of Kamschatka in 16 out of the 20 English maps; and the other 4 which do not give it a separate name are a map of the world in Ostell's atlas, in 1810, a map of the world in Goldsmith's Atlas in 1813, a Mercator's map of the world in Goldsmith's Atlas, and a map of the globe in Bradley's Atlas in 1813. None of those are of special authority. They are, I should infer, school-book atlases. They are not official. They are not from any author celebrated as a geographer, and they are all, you see maps of the world. When you are restricted to the size of a quarto sheet, which atlases usually are, and undertake to give a map of the whole world, you have not room for the separate designations on land or water such as are always given when you give a map of a part of the world, having room to explain the divisions. Take the United States for instance; in a map of the world you find the United States laid out on it, but you do not find any division of states.

There are some German maps cited, that may be worth a moment's consideration. Germany was not a country concerned in the negotiations, or a country then, as far as I am aware, particularly celebrated for its geographical knowledge. At the same time, as they are cited they should be attended to. There are 16 German maps in this case on one side and the other; three of them are translations of maps that I have dealt with before. Another is a reproduction of one of Lapie's. Of course that adds nothing; but there are 12 that are original in Germany by different cartographers, among them several geographers of respectability and reputation. In all these except two, the Sea of Kamschatka has a separate name, so that out of 12, 10 German maps give a different designation. The two exceptions are in an atlas—both in the same—published in Weimar in 1816, which is probably a compilation, because in the same atlas another map gives this sea the name of Behring Sea.

I should have spoken in connection with the English maps before leaving that subject, of the Arrowsmith maps, which are the leading and best British maps of that period, and of which you have several, and they are worthy of a brief separate reference. Of these Arrowsmith maps the first one is dated in 1790, ten years earlier than the period to which I have thus far limited myself. It is called

Chart of the world exhibiting all the new discoveries to the present time with the tracts of the most distinguished navigators from the year 1700 chiefly collected from the best charts maps voyages etc., extant, by A Arrowsmith, Geographer, as the "Act directs. London 1790".

In that Chart Behring Sea is termed the sea of Kamtchaska.

Sir CHARLES RUSSELL.—What is the reference to that?

Mr. PHELPS.—This is in Mr. Blaine's list in the Appendix to the United States Case, Volume I, page 288.

Senator MORGAN.—What is meant by "as the Act directs"?

Mr. PHELPS.—I suppose it refers to some Act of Parliament.

Lord HANNEN.—I think you will find that refers to its being registered at Stationers Hall, or something of that sort.

Mr. PHELPS.—It may be—I really do not know, and Lord Hannen of course would know better. The second map of Arrowsmith is dated 1794, and is probably a second edition of the same map and contains the same designation of Behring Sea.

Senator MORGAN.—Is there the same reference to the Act?

Mr. PHELPS.—I do not know. I have no memorandum of that.

Lord HANNEN.—All I meant to say is that it relates to the mode of publication. It has nothing to do with the map itself. It is the publication of it.

Mr. PHELPS.—Then you come to the map of 1802 which is given in the list of the British Counter Case. It is called

Chart of the Strait between Asia and America with the coast of Kamschatka.

And it appears in an account of a geographical and astronomical expedition to the northern part of Russia, and in that Behring Sea has no distinctive name. There is an Arrowsmith map in which it is not given separately, but Billing's Exploration, while it carried him across, was not directed to those waters. This is really little better than a route map, and the Pacific Ocean shown as far south as 47° is not named at all. Showing that this is intended as an illustration of that route or as a Chart.

In the fourth map (1804) the eastern part of Behring Sea is included as far west as Behring Island without a separate name, and the Ocean is called the North Pacific Ocean. This is a land map of the Continents of North and South America. It is not a general map as including water divisions.

Sir CHARLES RUSSELL.—There is a map of America of the same year 1804.

Mr. PHELPS.—Yes, I am about to mention that. That is a fifth map called "a map of America". The same remarks apply. In that map there is no specific name for Behring Sea. These are probably included in Arrowsmith's General Atlas of 1804 mentioned in Mr. Blaine's list, and very likely it may have appeared there.

Now in 1810 there is an Arrowsmith map in 9 sheets, with corrections to 1818; includes Behring Sea, but shows it as a large, blank, unnamed space, and there is not a separate name. A large part of Behring Sea is not included. It cuts off about latitude 62°. He does not include in the Pacific Ocean the Sea of Kamschatka, otherwise he would have given the whole sea, and not limited his chart to latitude 62°. He included the portion he did, because he found it necessary to take in that part of the Pacific Ocean now known as the Gulf of Alaska.

The 8th map, 1811, in the British Counter Case, a hydrographical chart of the world by Arrowsmith, has Behring Sea named the Sea of Kamschatka, and the North Pacific Ocean is given as a separate body of water. This marks all the waters of the globe, and is not confined to one sea.

The 9th map in Mr. Blaine's list is an Arrowsmith map of 1811, and Behring Sea is there named the Sea of Kamschatka.

The 10th map is 1818, of Arrowsmith, and Behring Sea is there named the Sea of Kamschatka, and the North Pacific Ocean is separately specified.

There is another map of 1818, a map of Asia by Arrowsmith of the same year, and Behring Sea is not named, though a considerable part of the western side of it is included. The difference with the same geographer is that one is a map of Asia, and the other a hydrographical map, or the countries round the north pole.

The 12th map by Arrowsmith includes the greater part of Behring Sea. That is the map of 1822 and it is stated in the British list as 1822, but it shows additions to 1823, and it cannot have been published till 1823. There is something very curious about that map. If it can be supposed to have been before the parties in that negotiation, and there is no evidence that it was—my learned friend, Sir Richard Webster, infers it was not, and I infer it was not.

Mr. Justice HARLAN.—You have references about that; for in Sir Charles Bagot's letter to Mr. Canning of October the 17th, 1823, he speaks of a certain locality as laid down in Arrowsmith's last map.

Sir CHARLES RUSSELL.—We are not sure of the exact date of that. We have no means of ascertaining the particular edition; but the Russian map, the Quartermaster-General's map, and Arrowsmith's map were in the hands of the negotiators.

Mr. PHELPS.—I was going to call attention to those letters. It cannot have been both those. It could hardly have been those in the American negotiation, I agree with Sir Richard Webster, because that negotiation took place in 1823 and this map was so recent it is hardly to be presumed that with no communication and no particular reason for it, it had found its way there. It is not produced by my learned friends. If it is because they concur with us that it probably was not used, then its omission to be presented is of no consequence; but if they are at all of the idea that this map was one that was referred to or was before them,—that by it is meant Arrowsmith's last map, then it should have been produced.

Lord HANNEN.—I thought there had been an explanation, or attempted explanation, that an enquiry was made in London, and it could not be found.

Sir CHARLES RUSSELL.—Yes; I could refer to the page about that.

Mr. PHELPS.—We have made every enquiry; and, of course, we should not have the access to the British publications and documents that my learned friends have on the other side. We have made every effort that we could to find that map, but without success. It has disappeared, and we cannot find it even in the British Museum, or in the Libraries, or anywhere else. From that I should infer it was not very celebrated.

Senator MORGAN.—I think you have spoken of the Arrowsmith maps as hydrographic maps?

Mr. PHELPS.—One of those that I passed over is a hydrographic map.

Senator MORGAN.—Is that intended to indicate they are made under the authority of the Hydrographic Office?

Mr. PHELPS.—I do not so understand it. They are only intended as hydrographic maps by the Author.

Sir CHARLES RUSSELL.—But he was, in fact, the Hydrographer.

Lord HANNEN.—That is now a separate Government Department.

Sir CHARLES RUSSELL.—And I think he was then called "Hydrographer to His Majesty."

Senator MORGAN.—Did he have a Commission?

Sir CHARLES RUSSELL.—Well, whether it was by Patent or not, I do not know.

Senator MORGAN.—He must have had some authority to be called, "Hydrographer to His Majesty."

Mr. PHELPS.—Whether he had or not, I am utterly unable to say; and I do not feel authorized to say that he had an official authority. I do not know what he had.

Sir CHARLES RUSSELL.—In one of the maps of 1822, he describes himself as "A. Arrowsmith, Hydrographer to His Majesty."

Mr. PHELPS.—Whether that means anything more than it does when a Milliner announces herself as "Milliner to Her Royal Highness, the Princess of Wales," I really do not know, and do not claim anything from it. If he had an official authority, it adds to the authority of the map; if he had not, then it is the best conclusion of Mr. Arrowsmith who, at that time, was the principal Geographer and Designer of Maps.

Senator MORGAN.—It all seems to have been done in pursuance of some Act of Parliament.

Mr. PHELPS.—Lord Hannen explains that Act as being an Act having reference to the publication and not to the authority. This is a question also upon which I have no knowledge.

Mr. Justice HARLAN.—Sir Charles, in the memorandum there in the British Case of that map of 1818, it is there stated with additions to 1823.

Mr. PHELPS.—I think not. I think the map in which that is contained is 1822 "with additions to 1823,"—there may have been subsequent additions to that.

Mr. Justice HARLAN.—"1822, with additions to 1823". When that memorandum was prepared, by whoever made it, he must have had the map of 1822 before him. Is that map in the case; or can it be got.

Mr. PHELPS.—No, that is the map that cannot be found; it is not in the case. Those words are taken from the title, and the title is obtained from I do not know where.

The PRESIDENT.—No copy is to be found?

Mr. PHELPS.—We have not been able to find any, and my learned friends say the same thing.

The PRESIDENT.—Neither Sir Charles Bagot's copy,—no copy in the world?

Mr. PHELPS.—No. How they got the title I do not know. I infer, from finding the map referred to in some book of geography, or something of that sort.

Mr. Justice HARLAN.—The value of it must depend on whether it was taken from something else.

Lord HANNEN.—It would come with the fresh edition with additions.

Sir CHARLES RUSSELL.—I understand by referring to N° 98 in the Appendix to the Counter Case, volume I, that explains it; and what I understand is, this was in fact at the British Museum, and it purports on the face of it to be a map published originally in 1822, but also on the face of it appear to be fresh additions to 1823, that is the only map, and it did not involve seeing separately the map of 1822 at all. It was the map of 1822 with further additions to 1823 upon it.

Mr. Justice HARLAN.—It was, then, a map of 1823?

Sir CHARLES RUSSELL.—It was a map of 1823.

Mr. Justice HARLAN.—That is not in the case?

Sir CHARLES RUSSELL.—That is referred to in N° 98.

Mr. Justice HARLAN.—But the map is not here?

Sir CHARLES RUSSELL.—No, it is in the British Museum.

Mr. PHELPS.—The objection to that is, we are assured by the British Museum people that it is not there.

Sir CHARLES RUSSELL.—Not the map of 1823?

Mr. PHELPS.—No. With regard to this map of 1822 or 1823, it was said, in response to the enquiry of our agent whom we sent there, by the custodian of that branch of the British Museum that there was no such map there.

It is really of no importance. We give this subject more time than it deserves. I agree with my learned friend, Sir Richard Webster, that this map could not have been before these negotiators. The reference to Arrowsmith's last map is the last map that was probably then in hand. That might be either one of those—the hydrographic map I have referred to, or the map of 1818 of the countries round the North Pole—possibly that of 1811, two of which appear in the case. I now speak of the American negotiations; it is plain that when the Treaty of 1824 was negotiated between Great Britain and the United States, this map could not have been before them, and there is no evidence to show that it was. I will consider later on whether it came too late and figured in the negotiations of the Treaty of 1825, which is a very different question; it is enough for my purpose, that there is no pretence that it was before Mr. Adams or M. de Poletica or the Russian Foreign Office—no pretence on the evidence that there was a reference to it, and from its date there could not have been, especially as communications at that time of the world were much slower in getting to foreign countries than they are now, and especially when there was no possible object or inducement in either country to refer to it.

There are some other earlier English maps—Cook's Voyages—Lieut. Roberts' chart of 1808 published in London, in which Behring Sea appears as the Sea of Kamschatka—the various maps of Cook's discoveries earlier than that, before the century commenced; all of them vary, and of course are merely maps to accompany particular discoveries, not geographical maps or charts.

Now let me put this question with some degree of confidence. Suppose it were necessary upon the evidence in this case, that is to say upon the maps, for there is no other—the authors of this negotiation have long passed away and have left behind them no evidence of what was in their minds or of what was said in these negotiations except these letters—suppose it were now necessary to decide this question of whether Behring Sea was or was not included in the term Pacific Ocean in that Treaty by the maps, that is all the evidence that there is.

Lord HANNEN.—You say that is all the evidence. You have not referred—probably you are going to—to the treatises.

Mr. PHELPS.—I was not intending to refer to gazeteers. They are principally of a later date. There are a few cited of a previous date, but they are very inferior to the map for the purpose of laying down the divisions and subdivisions.

It is not, as I tried to explain this morning, the observation of a writer or a speaker when his mind is not upon the point which is in dispute.

But when a geographer of acknowledged authority undertakes to lay down a map for publication, possibly officially, certainly with all the prestige he has, and open to the criticism of the world as to its accuracy, then it shows what he thought. It may be worth little, or worth much; still it shows what he understood. Men may write books, because to the making of books there is, unhappily, no end; they may use general phraseology which amounts to nothing either way. I could not rely for a moment on casual expressions that might be accumulated on our side of the contention, and I pay no regard to the few that have been brought together on the other side of the contention. We have not attempted to do that. But when a map is made and published to the world and intended to be accurate—it is there you have to look, if you value it, to ascertain either the authoritative speech of men, or the common understanding of men. Because I need

not repeat that we all, who are not the sources of geographical knowledge, get our ideas on that subject from the maps with which we are familiar.

Now I repeat, was or was not that sea "commonly called" part of the Pacific Ocean? And the answer to that is almost unanimous—all the authorities of the maps are that way.

The PRESIDENT.—Do you think it would be easy to solve the question if it was put for to-day and not in 1824 or 1825, whether two diplomatists using the word Pacific Ocean, and making an analogous Treaty to that you are speaking of, intended to include Behring Sea in the term Pacific Ocean?

Mr. PHELPS.—I by no means assert that it would.

The PRESIDENT.—I do not know whether to-day we consider Behring Sea as being part or not part of the Pacific Ocean, and I believe most of my fellow diplomatists would say the same.

Senator MORGAN.—If you say "a right vested in the ocean commonly called the Pacific Ocean", it would take a very astute mind to figure out the proposition that you did mean Behring Sea.

The PRESIDENT.—Or that you did not mean it.

Mr. PHELPS.—I have not particularly examined the later authorities. I have confined myself to the period of time when this language was used, but I readily conceive, if the question were to be taken now it might be open to the same uncertainty. But, Sir, what is the result of that? If when accomplished and experienced diplomatists, in bringing a long negotiation to an end, were attaching importance to the inclusion of Behring Sea as a part of the Pacific Ocean is it conceivable that they would not have said so?

It is because, as I shall be able to point out upon something better than my suggestion, it was totally inconsequential to those countries, that Behring Sea should be included, that they omitted to use the language which was necessary to include it; and it is not for my learned friends, now, after the dust of 70 years has fallen on the transaction, to say, "Though we did not say so, we understood Behring Sea to be included; though it was important that it should be included, we did not include it in terms; but now we argue that it can be strained inside of the words 'Commonly called the Pacific Ocean', though at that time it was not commonly so called."

It is for the party that seeks to include within a grant a particular territory to make it out. He has the affirmative of the proposition. When I have bought whiteacre by description and claim that it includes blackacre, which the grantor denies, it is for me to make out that in saying one thing he meant another—that in saying whiteacre he intended to give the description "including blackacre" or "blackacre also"; that under the circumstances it was in some way included. What does the language of the Treaty say? What does the description in its fair construction, dealing fairly with language mean? What was the common definition of the Pacific Ocean and did it include Behring Sea. I say that on the threshold of the subject it is utterly impossible to bring the description within the language. You may say if you please that it is ambiguous—that I admit; but you cannot say that the language included Behring Sea, I respectfully submit, because the vast majority of the evidence is the other way. And the only escape from the conclusion that Behring Sea was excluded from what is commonly called Pacific Ocean is to say there were maps and statements the other way, and therefore perhaps it is not quite conclusive that it was excluded. But if you have to give a meaning to the words

"commonly called", the only question is whether you shall go with the evidence or against it. Whether you should assume that which is commonly called the Pacific Ocean in nine-tenths of the maps, including all the authoritative ones, is the common acceptation, or whether you shall say the common acceptation is that which is rejected by those maps and by all the evidence which bears upon the subject.

We shall find out presently, as we pass along, why that language was not used. It is no imputation on the very eminent men engaged in these negotiations; they were not children in the business of diplomacy, or in the management of Affairs of State. There were probably no better men on earth at that date to conduct an affair of that kind than Mr. John Quincy Adams, Mr. Stratford Canning and Mr. George Canning.

Senator MORGAN.—Or since that day.

Mr. PHELPS.—I accept it, Sir. The day of great diplomatists has well nigh gone; the telegraph and the newspaper have nearly put an end to that science. The names of the great Diplomatists are written, and written for the most part on the tomb.

These were not men struggling with a subject they were incapable of dealing with; and you find not only in the American negotiations, but in subsequent British negotiations that three words would have settled this question forever, on what is now said to be the important part of it, which were omitted to be used.

Then let us suppose for the sake of the argument, that I am wrong in my conclusion as to the balance of the evidence on the point of what may be said to be "commonly called" Pacific Ocean; then, what follows? It is perfectly plain that the evidence does not establish the converse, that Behring Sea was commonly called the Pacific Ocean. If it does not establish that it was not, then what happens? Why, the parties have employed language which is so ambiguous that upon the face of the instrument you cannot assign a meaning to it at all. They have employed language from which you cannot find out, looking at the language alone, whether this body of water was included or was not. Then, what is the result, under the fundamental principles in the construction of a contract. When the ambiguity is on the face of the instrument, or when it is raised by extrinsic evidence and language becomes ambiguous that appeared to be plain,—and let me say in passing none of these astute gentlemen could have possibly supposed they had used plain language when they said "commonly called the Pacific Ocean"; if they meant to extend it beyond that undoubted body of water that everybody always called the Pacific Ocean;—but suppose it results in an ambiguity, then you have to ascertain the intention of the parties in the language they used. If it is found that the language they used is consistent with either meaning, that it may include Behring Sea in the Pacific or it may not, then you have to get at the conclusion how the parties understood it. The familiar rules of construction applicable to such a question need not be repeated. You look at the subject matter of the contract, at the object in view in making it, at the situation of the parties, and, where time enough has elapsed, to the subsequent practical construction which the parties themselves have given to their own language. Those are the sources from which, as all lawyers understand, you are to derive the meaning and intention of the parties as to the meaning of ambiguous phraseology in a contract.

The fur seal business was not the matter in dispute. It was, as I have pointed out, first boundary, and secondly the attempt to interfere with that occupation of the North West coast which the United States people were beginning profitably to have, and Mr. Adams complains as

I have pointed out on those two points;—the fur-seal is not named, and Behring Sea is not named between Russia and the United States.

Then when the Treaty is drawn up, and while it is before the Senate for ratification, the Russian American Company taking fright at the language employed, which they perceived was vague and might receive different constructions—made a representation to the Russian Government; "you are giving away and throwing open to the United States of America our fur and other industries in Behring Sea". That awakened the attention of Russia to the fact that the language employed in this Treaty might at some time be claimed to be broader than was meant—a second case of using language unadvisedly. Baron de Tuyll, the Russian minister, was instructed by the Russian Government to do what? To go and recall that Treaty? It was not too late. It was before the Senate. It was not ratified. If the Senate passed it, it was still for Russia to decline the ratification, if it found it was going to receive a construction it did not expect. Did they recall it? No. They go to Mr. Adams, and point out the ambiguity that might be supposed to attach to this language.

Is there any doubt that he and his government were acting in perfect good faith in doing that? Was he not there on a perfectly sincere and proper errand to say to Mr. Adams, "of course you do not claim a construction that neither of us expected?"

How is he met? How was he bound to be met if the United States claimed any such thing? Did Mr. Adams say to him, "Sir, I am surprised to hear that having entered into a Treaty, the language of which is plain, you are here now to inform us that the Russian Government does not mean what it says, and that, on signing a Treaty with us that says one thing, you notify us you are going to claim that it means another"? Did Mr. Adams meet him by saying, "Sir, you propose to take back one of the very important points on which we are insisting in this discussion. Now that we have the Treaty you propose to rob us of one of the principal fruits of the Treaty". That is what Mr. Adams would have said, and he was bound to say it, unless he and his Government were attempting to entangle a nation with whom they were in friendly relations, and just about to sign a Treaty, in an agreement which they did not understand they were making. That is not to be attributed to any Government. It is not to be attributed to any statesman. Neither party is open to such a charge as that; only upon conclusive evidence would any person permit himself to make such a charge as that against any sovereign power, or against any representative of a sovereign power.

Mr. Adams meets that by saying, in effect: "There is no necessity for saying a word about it. We never had any idea of going up there. Why do you suggest to our people a thought that comes for the first time from you." That is the language of a gentleman who, we are told by my learned friend, had been carefully negotiating to get the very access to these industries to which Baron de Tuyll objects and which he repudiates, and he says to Baron de Tuyll: "If you raise these questions you will affect the ratification of this Treaty. You know a Treaty has to be ratified by two-thirds of the Senate of the United States." Baron de Tuyll sees the sense of that. He accepts it and permits the Treaty to be ratified, and then, upon Mr. Adams' suggestion, he files this document which shows the understanding of the language which Russia had, and it is accepted by the United States Government without reply.

Now can there be anything that is more completely conclusive on that point? Imagine two individuals making a contract. I am making a contract with my friend on some important matter. Unluckily there has crept into the contract some language that may be ambiguous. My friend comes to me and says, "Of course, you know our understanding. You do not mean to attribute such and such meaning to this term in the contract". What am I bound to say to that? If I do insist upon it, I am bound to say so. I am bound to say, "Sir, I do not agree with you. I do not agree to your interpretation of these ambiguous words. I will tell you what I understand." But suppose I say, "Why my dear friend, there is no occasion to mention that, I never claimed any such thing. Do not interrupt the execution of this contract by any such cavil. If you want to send me, after the contract is executed, a paper showing exactly what you understand by it, do so."—"Very well," he says, and so in perfect good faith he signs the contract and immediately sends me such a paper saying, in effect, "You understand, Sir, of course, in the doubtful language embraced in this contract, that it means so and so", and I accept it and file it away. I should like to know, if after that I were capable of going into a Court of justice and claiming against him in opposition to that paper and in opposition to the interview, how I should be received.

I should be received by being informed that I was engaged in the perpetration of a fraud. I should be received by being reminded if there was an ambiguity in this language, even one that might have admitted of my construction, that when my friend came to me and confronted me with the question, I gave him to understand that I should not make any such claim, and did understand the contract as he did, and advised him if he thought there was any doubt about it that might be raised after he and I were passed away, that he should send me a paper which I would attach to the contract, and he did so, and I received it without reply, that I was bound by the construction so adopted. I should like to know how I, or those who might succeed me 75 years afterwards and after there had been unbroken possession in pursuance of the contract as he understood it, would fare in undertaking to set up a construction that I had thus formally abandoned and repudiated, and on the strength of which repudiation they had executed the contract and gone on with it all this time. The same rules apply to the execution of a Treaty. You must impute at least ordinary propriety to these Governments, and this leads you inevitably to the conclusion that in the negotiations between the United States and Russia, it was not intended, it was not understood, that Russia was throwing open to the United States this valuable and important industry which the United States had not even claimed or asked for; but that the United States was content with obtaining from Russia what it did obtain, everything that it contended for, subject only to the one provision by which the parties seem to have celebrated and marked the friendly conclusion to which they had brought the whole matter after they had settled their mutual rights, by saying, on each side, for 10 years we open these disputed territories to each other.

Now, I come to the British Treaty.

The PRESIDENT.—Before we leave this Treaty, Mr. Phelps, will you allow me to ask you it being your construction that Article I and Article II are not applicable to Behring Sea? what do you say to Article V? See the Treaty of 1884, page 36, of your first Appendix. Do you think this is not applicable to Behring Sea?

Mr. PHELPS.—I see no language in article V that extends the application of the Treaty.

The PRESIDENT.—Might not the Treaty be construed in such a way that Article III and Article IV are the only Articles that refer to the American North-west Coast, and the other Articles of the Treaty applied to Behring Sea as well, and I might say even to the coast of Siberia?

Mr. PHELPS.—If you refer to Article V I do not know that there is anything in the language of that Article to extend it, neither would it be material, as it seems to me, to the present controversy whether it was extended or not. The first Article, which is the dominant one as to territory, raises this very question whether the Behring Sea is included in the Pacific Ocean. If it is, the Treaty refers to it; if it is not, the Treaty does not refer to it.

The PRESIDENT.—I would not say Article I refers to territory, Article III refers to territory.

Mr. PHELPS.—I do not think Article I refers to territory.

The PRESIDENT.—May I beg your attention to the very general purport of the introduction of this Treaty.

> The President of the United States of America and His Majesty the Emperor of all the Russias wishing to cement the bonds of amity which unite them and to secure between them the invariable maintenance of a perfect concord.

These words as you are well aware are generally employed for Treaties of a very general application, for Treaties which relate to all the possible connections and relations between two different nations or two different States.

If this Treaty, and of course, I do not express my view, I put the point as it might be argued against you, applies only to a question of boundary and navigation and fishing, and so forth along the coast, or in front of the coast, then do you think they would use such a general expression as this, "Wishing to cement the bonds of amity which unite them, and to secure between them the invariable maintenance of a perfect concord"? That is a very general expression for merely a boundary Treaty.

Mr. PHELPS.—It is. The expression shows that the Treaty is one of a general character.

The PRESIDENT.—I should think so.

Mr. PHELPS.—But I respectfully submit that those words do not enlarge the specific provisions of the Treaty. It will be observed that the condition of things then was very different from what it is now. *This* was Russia [pointing on the map] as well as *this*. Alaska was then Russia. All *this* territory and coast, and a good deal more was claimed or had been claimed by Russia up to that time, but in the very settlement that they made *this* was Russia down on the one side until we get to near Japan, and *this* also was Russia, so that international relations did not begin between these two countries till you get down to 54° 40′, or whatever may be the disputed line.

Now the Treaty was a good deal more than to settle that line. That was one object of it; and I quite agree that such words might or might not be used. It depends a good deal on the fertility of those who were writing. If the whole country was new, and the right of other countries to make settlements, and discovery and occupation was still open to dispute, Russia's claims to come down as far as it did, were, as Mr. Adams pointed out, only supported by some settlements—some very few, sparse settlements—I believe there was one at Archangel, which was the same as Sitka. Mr. Adams points out, that it no longer had the

exclusive right of occupation and discovery which might have been open at that time to considerable dispute, on the strength of one little settlement at Archangel. And you will perceive that Mr. Adams takes occasion to deny, whether he meant to insist on it or not, but as a part of his argument, and to show Russia that their claims were not so well established,—he says in effect, "If you choose to get into a debate on the subject of how far Russia has the exclusive dominion over all this territory, by right of possession and occupation, there are two sides to that question, and we may have something to say upon it". Now, all that is settled. There is, as I said, a grant on each side for 10 years, of the right to visit and trade with the settlements of the other, and it must be plain that these general words of friendship cannot control the terms which fix the boundary.

Senator MORGAN.—This was the first Treaty between the United States and Russia of any kind?

Mr. PHELPS.—Yes.

Senator MORGAN.—It was natural that there should have been an expression to each other of a cordial state of feeling.

The PRESIDENT.—Yes. I quite admit that.

Mr. PHELPS.—This general language does not help you in determining the meaning of Article I whether Behring Sea was or was not included in the term Pacific Ocean. You get no light from the preamble, because it is equally applicable and proper in either case. It does not help us to exclude Behring Sea; it does not help us to include it, and when you come to Article V you will notice that it is a limitation on Article IV, which grants this 10 years mutual right. It says all spirituous liquors, firearms, other arms, powder, munitions of war of every kind are always excepted from this same commerce permitted by the preceding Article, that is Article IV.

Now, Sir, as I have reached the point of considering the British negotiations, perhaps you will think it better to adjourn before that is taken up.

The PRESIDENT.—Yes.

[The Tribunal there adjourned until Tuesday, the 4th July, at 11.30.]

FORTY-NINTH DAY, JULY 4TH, 1893.

Mr. PHELPS.—I need hardly say, Sir, that I find it quite as difficult to speak in weather which is so oppressive, as the Tribunal must to listen; and if you perceive, Sir, as I do, that I am taking twice the necessary time to make my propositions half as clear as they ought to be made, I beg you will remember that it is in some measure my misfortune and not altogether my fault.

The PRESIDENT.—We never perceive that you do not make your propositions quite clear, Mr. Phelps.

Mr. PHELPS.—Yesterday, Sir, I was engaged in discussing this much discussed question of the assertion and occupation of Russia from the time of the discovery of the Islands down to the time of the cession of them to the United States in 1867, and especially relating to the period of time embraced between the promulgation by Russia of the Ukase of 1821 and the conclusion between the three Governments respectively of the Treaties of 1824 and 1825; and I had endeavored to point out that, so far as this case is concerned, the whole enquiry embraced in two or three questions in the Treaty results after all in determining whether in the language of those Treaties, and the language it will be remembered is the same in both Treaties, that Behring Sea was or was not included under the term "Pacific Ocean"; because as I tried to point out, there is no interruption whatever to the exclusive assertion and occupation of Russia so far as the fur-seal business is concerned, from the time of the first discovery down to the time of the cession, unless such an interruption is found in the language, though as it will be seen not in the results—of the Treaties of 1824 and 1825, by which it could be made out that the access to Behring Sea for general purposes was thrown open to these two Governments. I had said that, of course, in determining that question which really determines all there is in dispute, the first resort is to the language of the Treaty; what is meant by the term, "commonly called Pacific Ocean"; and, in reviewing the maps, which are the only sensible resort for the purpose of giving a definition to those words, I had gone through with the consideration of the maps in discussing the American Treaty which preceded by a year, as you will remember, the conclusion of the British Treaty; and I have one single observation to make in parting with that topic and in approaching the consideration of the British Treaty. Suppose, Sir, that all the distinguished geographers who were then living had been called at that time as witnesses in a Court of Justice on the question of whether the Behring Sea was comprised within what is commonly called the Pacific Ocean,—in other words, suppose this controversy had taken place immediately after the conclusion of those Treaties and some Tribunal had been charged with determining the very question that is submitted here to-day; and suppose all those eminent geographers, then living, whose opinions would have been regarded as entitled to general, and international respect, had been called as witnesses before the Tribunal and the question had been put to them as experts in the science

of geography, "What do you understand by the words that are here used"? what would have been the answer? You will find the answer in the maps that those men had published and did publish, where it became necessary to put down the answer to that question on the face of the map. Is there any doubt that every one of these witnesses would have given to this language the construction that we contend for?

Now taking leave of the American Treaty, having seen, I think very clearly, that whatever the term "Commonly called Pacific Ocean" means, it was understood by Russia and understood by America as excluding Behring Sea and these industries or trades or whatever there was there, how stands the case of the British Treaty? It is of course conceivable that Russia and the United States had understood this one way and Great Britain had understood it in another way, and although, as I shall contend, that could not make any material difference in the discussion of this question, still it is worth attending to as we pass along, to see if there was a different understanding by one nation in respect of the same language from that which was entertained by both the others.

In the first place this American treaty was adopted by the British Government, not merely by the employing of identical language; it was adopted upon an agreement that Great Britain would accept just what had been conceded to America;—not merely the language, but the provisions that had been conceded to America. I must ask your attention on that point to the 2nd volume of the Appendix to the British case page 74. It is a letter from Mr. George Canning of instructions to Mr. Stratford Canning:

> Perhaps the simplest course after all will be to substitute, for all that part of the *projet* and counter-projet which relates to maritime rights and to navigation, the first two Articles of the Convention already concluded by the Court of St. Petersburg with the United States of America, in the order in which they stand in that Convention.
>
> Russia cannot mean to give to the United States of America what she withholds from us; nor to withhold from us anything that she has consented to give to the United States.
>
> The uniformity of stipulations *in pari materia* gives clearness and force to both arrangements, and will establish that footing of equality between the several contracting parties which it is most desirable should exist between three Powers whose interests come so nearly in contact with each other in a part of the globe in which no other power is concerned.
>
> This therefore is what I am to instruct you to propose at once to the Russian Minister as cutting short an otherwise inconvenient discussion.

Subsequent correspondence shows that Mr. Stratford Canning in pursuance of the instructions did exactly what he was instructed to do, that is to say he proposed to the Russian Government to cut short a discussion that I shall refer to in a moment, by adopting between Russia and Great Britain what had been adopted by the United States, and Great Britain.

Now if that is the case, in adopting these provisions they adopted them as they were understood and intended by the parties. In adopting the language they adopt the construction, and if it is found—I observe that Lord Hannen appears to dissent from that proposition—

Lord HANNEN.—Well, to put it very clearly, I will not assume that it is so, but suppose it were clear that the Russian Government had led the English Government to think that they put the same construction on the language of the first clause of the Treaty as the English now contend for, you would not then be able to say they were bound by the construction that was understood by the United States.

Mr. PHELPS.—No, Sir, that would state an entirely different case, but I think I shall be able to point out presently from the correspondence, that, so far from Russia setting up to Great Britain a different construction of this language from what had obtained between Russia and the United States, it was exactly the other way, and that Great Britain did understand distinctly that the construction of that language did not include Behring Sea. When I stated the proposition that in adopting by agreement not merely the language that had been employed by the two other countries they adopted the construction, that is to say they adopted what the agreement meant between the parties, of course, that is in the absence of specific proof to rebut that by showing the contrary. Any presumption of that sort or any inference of that sort is open to be rebutted, but in the absence of rebutting facts I understand that it would not be possible to contend that where a contract has been made between two parties and a third party agrees with one of those contracting parties, "I will take exactly the contract that you have given to the other man;" that he does not adopt it upon the construction which the law would give it as between those two parties; and if that construction turned out to depend not so much on the language as on the understanding, why then he has adopted the understanding. But there is a correspondence on this subject that seems to me to make this perfectly clear. In the progress of this negotiation between Great Britain and Russia, Mr. Canning the Foreign Minister, sent to Sir Charles Bagot who was then the Ambassador at St. Petersburg, a proposed draft of this Treaty, and it will be found on page 63 of the second Volume of the Appendix to the British Case; and I invite your attention particularly to this language.

Mr. Justice HARLAN.—Sent by whom?

Mr. PHELPS.—By Mr. George Canning, Secretary of State for Foreign Affairs, to His Majesty's Minister at St. Petersburg, Sir Charles Bagot. He enclosed this as Great Britain's proposal, and the first Article reads in this way.

> It is agreed between the high contracting Parties that their respective subjects shall enjoy the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits.

There are the words which put this ambiguity out of the question. There are the words that, as I remarked yesterday, it is inconceivable should not have been inserted if it was intended by the parties to include Behring Sea, and not leave the whole Treaty upon language so ambiguous and doubtful, to say the least, as they employed. That shows that the attention of the Foreign Minister and of the negotiators on the part of Great Britain was drawn to this point, and that it occurred to them that more words were necessary. Then "comprehending the sea within Behring's Straits," was proposed to Russia as if it was intended to make this clear.

From Russia in reply we get what you will find in page 68, a counter-draft. They cannot accept Great Britain's proposal entirely, and they sent on their own side a proposal, and you will see that Article 1st in the British proposal becomes Article V in the Russian proposal, and it will be found at the bottom of page 69 in the original French. It is not translated in this copy:

> The High Contracting Parties stipulate on behalf of their respective subjects that free navigation over all.

Lord HANNEN.—"Throughout the whole extent".

Mr. PHELPS.—"Throughout the whole extent, as well north as south", and so on, and the words "comprehending Behring Sea" or any similar words are omitted.

Sir CHARLES RUSSELL.—"And that they will enjoy the right of fishing in the high sea".

Mr. PHELPS.—"And that they will enjoy the right of fishing in the high sea", and so forth. But I speak of the omission in that statement of the words contained in the British proposal. That would have set this question at rest. In other words, Article V is substantially the same as Article I of the British contention.

Sir CHARLES RUSSELL.—Would you read Article VI—of the right to navigate Behring Straits.

Mr. PHELPS.—I will read that.

The PRESIDENT.—How do you construe these words, Mr. Phelps—"as well in the north as in the south"? Where do you put the north and south as of interest between Russia and England?

Mr. PHELPS.—That is only introducing another ambiguity. They introduce words there that are more ambiguous than the terms employed before; they relieve an ambiguity by a worse ambiguity; but they decline to put in the plain and simple words that would have settled the point.

The PRESIDENT.—Perhaps the Russian policy had particular views about that at the time.

Mr. PHELPS.—Exactly, Sir; that is the very reason.

Sir CHARLES RUSSELL.—My learned friend will surely be glad to be assisted on this. The words in the *Projet* are not "Behring Sea" but "comprehending the sea within Behring Straits". And that is treated by Count Lieven in the memorandum on page 65 as being a claim to navigate the seas in the Arctic Ocean, which he says is a new proposition. It is not a question of Behring Sea.

Mr. PHELPS.—I quite understand that and will come to it in a moment. I have not overlooked any word in this correspondence, and I shall not fail to allude to it. What I am upon now is—and I think I shall be able to make myself understood, that on this single and only question with which we are concerned, whether or not Behring Sea was intended by these parties and understood to be comprised within the term "Pacific Ocean"—the British negociators, I repeat, put into their draft words which would have settled that question and determined it. The Russians declined to accept it, and left them out, and the British executed the treaty without them. That is the point.

Lord HANNEN.—But Sir Charles' suggestion, Mr. Phelps, is that the words are equivalent. You will have to deal with that.

Mr. PHELPS.—We will consider that presently. Why, if Russia meant to include Behring Sea, did she strike them out? What reason can be given for striking out from the draft of the Treaty those plain words which, upon the theory of my learned friend, both parties understood to be there? Why employ equivalent words unless you can employ better ones? Why supply the place of those plain words with the ambiguous words to which the President just now alluded—"north and south". The Russians did not suppose, as we learn from the Baron de Tuyll's communication to Mr. Adams that they were throwing open the fur seal pursuits of Behring Sea to countries that did not ask for them. We see plainly that Russia did not so understand it, and we see why it was they struck out these plain words and substituted words which are not equivalent to them, because they do not add anything to

what was there before. To add to the term "commonly called Pacific Ocean" "as well north as south" adds nothing as far as touches this point.

Senator MORGAN.—Is it shown anywhere, Mr. Phelps, which was first submitted?

Mr. PHELPS.—Certainly, Sir; the British was first submitted, and the Russian you will remember was the *contre-projet*.

Now, the attention of the British was called to this; and you will perceive that it was criticised subsequently in one of these letters which will be found on page 72 of December the 8th from George Canning to Stratford Canning. He criticises this *contre-projet*, and he complains that Article I in his *projet* is made Article IV in the Russian *contre-projet;* and he says in regard to that:

> You will observe in the first place that it is proposed by the Russian Plenipotentiaries entirely to change that order, and to transfer to the latter part of the instrument the Article which has hitherto stood first in the *projet*.
>
> To that transposition we cannot agree, for the very reason which Count Nesselrode alleges in favour of it, namely, that the *economie* or arrangement of the Treaty ought to have reference to the history of negotiation.
>
> The whole negotiation grows out of the Ukase of 1821.
>
> So entirely and absolutely true is this proposition that the settlement of the limits of the respective possessions of Great Britain and Russia on the north-west coast of America was proposed by us only as a mode of facilitating the adjustment of the difference arising from the Ukase by enabling the Court of Russia, under cover of the more comprehensive arrangement, to withdraw with less appearance of concession, the offensive pretensions of that edict;

and he continues to the same effect.

Sir CHARLES RUSSELL.—I should be glad if you will read the next passage.

Mr. PHELPS.—I will certainly.

> It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the Continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.
>
> You will therefore take care, in the first instance, to repress any attempt to give this change to the character of the negotiation, and will declare without reserve that the point to which alone the solicitude of the British Government and the jealousy of the British nation attach any great importance is the doing away (in a manner as little disagreeable to Russia as possible) of the effect of the Ukase of 1821.
>
> That this Ukase is not acted upon, and that instructions have been long ago sent by the Russian Government to their cruisers in the Pacific to suspend the execution of its provisions, is true; but a private disavowal of a published claim is no security against the revival of that claim. The suspension of the execution of a principle may be perfectly compatible with the continued maintenance of the principle itself, and when we have seen in the course of this negotiation that the Russian claim to the possession of the coast of America down to latitude 59 rests in fact on no other ground than the presumed acquiescence of the nations of Europe in the provisions of an Ukase published by the Emperor Paul in the year 1800, against which it is affirmed that no public remonstrance was made, it becomes us to be exceedingly careful that we do not, by a similar neglect on the present occasion, allow a similar presumption to be raised as to an acquiescence in the Ukase of 1821.
>
> The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged.

The PRESIDENT.—How would you construe in the meaning of Mr. George Canning these words;—"The right of the subjects of His Majesty to navigate freely in the Pacific?" How do you believe Mr. Canning understood the word "Pacific"?

Mr. PHELPS.—I understand the word "Pacific" there means just what it means in the Treaty.

The PRESIDENT.—Not Behring Sea?

Mr. PHELPS.—Behring Sea for a certain purpose, which I shall point out directly, was made of importance in subsequent negotiations,—the right to navigate through Behring Sea unquestionably, because that is specially spoken of in the correspondence that if vessels cannot pass through Behring Straits no further discoveries in the North could be made. The gate is shut to the whole world, and the right to pass through Behring Straits is spoken of; and it is immediately met by an assurance on the part of Russia that they had no intention whatever of closing up Behring Straits.

Lord HANNEN.—That had been already the subject of negotiation, because you see the allusion in the passage is this:

For reasons of the same nature we cannot consent that the liberty of navigation through Behring's Straits should be stated in the Treaty as a boon from Russia.

Mr. PHELPS.—Yes, I see.

It cannot be doubted that the Americans consider themselves as secured in the right of navigating Behring's Straits and the sea beyond them.

I am obliged to your Lordship for calling attention to it. That was unquestionably understood.

Lord HANNEN.—But under what words was it stipulated or agreed in any way that the Americans should have the right of navigating Behring Straits and the sea beyond?

Mr. PHELPS.—You will see it in Mr. Stratford Canning's letter, on page 80.

Lord HANNEN.—But I mean what words of the Treaty carry it?

Mr. PHELPS.—It will come in under the Article we have been discussing in the American Treaty, Article I.

Lord HANNEN.—That is, under the term "Pacific Ocean".

Mr. PHELPS.—Under the term "Pacific Ocean".

Sir CHARLES RUSSELL.—Fishing and navigation.

Mr. PHELPS.—But as controlled by the other language. It is one thing to concede the right of navigating and, if you please, fishing through the Behring Sea and through the Behring Straits which was never in dispute between the parties; it is another thing to throw open to them, according to the language of this first Article of the Treaty, the right to pursue these various industries.

In this letter that I was about to refer to, you will see that that was never disputed. Mr. Stratford Canning writes, on page 50, in his letter of the 17th of February, 1825:

With respect to Behring's Straits, I am happy to have it in my power to assure you, on the joint authority of the Russian Plenipotentiaries, that the Emperor of Russia has no intention whatever of maintaining any exclusive claim to the navigation of those straits or of the seas to the north of them.

It cannot be necessary, under these circumstances, to trouble you with a more particular account of the several conferences which I have held with the Russian Plenipotentiaries; and it is but justice to state that I have found them disposed, throughout this latter state of the negotiation, to treat the matters under discussion with fairness and liberality.

There is another letter somewhere in which this is referred to; and in reply to a letter which you will remember was written by one of the British Negotiators, Russia replies that they had no idea whatever, just as Mr. Canning says was repeated to him, of interrupting the navigation through Behring Straits.

Lord HANNEN.—They had at one time an idea of doing so, and said it was a new proposal, they did at one time think of disputing it.

Mr. PHELPS.—Well, they subsequently withdrew from that, because they said they never had any intention of disputing it.

Now, the difference between the right under the terms of this first Article, in reply to the question that you put just now, the difference between conceding what was never denied, the right of free navigation through Behring Sea, which could not be denied unless they intended to make it a closed sea, and conceding all that is given under the first Article is very plain, because it is the difference as to the effect of that particular Article on the industry or business with which we are now charged.

Lord HANNEN.—The passage I was referring to will be found at page 66, where it is said:

"As to the clause of the same projet" (that is a letter from Count Lieven) "having or its object to ensure to English vessels the free entry into the Icy Sea by the Straits of Behring, it seems, in the first place, that that condition, which is entirely new, is by its nature foreign to the special object of the negotiation".

They did not in the first place yield that, but yielded it in consequence of further negotiations; and then the question is, on what terms did they yield it, and what was the effect of the terms on which they yielded it?

Mr. PHELPS.—Still, the force of the observation that I have made does not appear to me, I respectfully submit, to be at all diminished. It is plain that the right to navigate through the Behring Straits was not in dispute. If it was in the first place, as suggested by his Lordship, that was speedily abandoned by Russia, who took the ground that they had never intended to deny it, and they did not deny it; and Mr. Stratford Canning writes he is happy to be assured by all of them that there is no question on that point.

Then on the question whether the fishing in Behring Sea was included, the British, I repeat, proposed words that would have set that at rest. If Russia meant to assent to that, why strike out the words. She gave no reason whatever. None can be conjectured. There cannot be an objection to using the words that Mr. Canning had put in this first *projet*, unless it is that they did not mean to concede so much as that.

Then you see that the British Government, after those words are stricken out, and the ambiguous language of the present Treaty employed, were laying stress upon the very position in the Treaty which this assumes, and calling attention to the fact that its importance and prominence is diminished by being at the end of the Treaty instead of at the beginning; and while Russia accedes to that suggestion, and restores the article to its position in the Treaty which Great Britain desired it to occupy, and conceded its importance, nevertheless they declined to insert the words that would have put this beyond dispute and Great Britain acquiesced in a draft of the Treaty that did not contain them.

How came they to do so, because the point that they were labouring upon, the right of free navigation as the primary question and the boundary line as the secondary question, were equally conceded by the language of Russia and is explained by what is said by Mr. Canning. Then in Mr. Addington's letter which will be found on page 66 of the same book as late as August 2nd 1824.

"A convention concluded between this Government"—that is written from Washington and the words "this Government" means the United States—

A convention concluded between this Government and that of Russia for the settlement of the respective claims of the two nations to the intercourse with the north-western coast of America reached the Department of State a few days since. The main points determined by this instrument are, as far as I can collect from the American Secretary of State, (1) the enjoyment of a free and unrestricted inter-

course by each nation with all the settlements of the other on the north-west coast of America and (2) a stipulation that no new settlements shall be formed by Russia, south, or by the United States, north, of latitude 54° 40′.

That is the summary of this Treaty as derived by Mr. Addington from Mr. Adams.

The question of the *mare clausum*, the sovereignty over which was asserted by the Emperor of Russia in his celebrated Ukase of 1821, but virtually, if not expressly, renounced by a subsequent declaration of that Sovereign, has, Mr. Adams assures me, not been touched upon in the above-mentioned Treaty.

Not been touched upon. That is precisely what I say.

This assertion which they read, and the language authorized them to read, as an attempt to exercise an exclusive sovereignty over Behring Sea, to shut it up and preclude navigation, and therefore to shut up the Behring Straits, was completely abandoned; was so withdrawn, was so explained away as something not intended to be asserted, and certainly not intended to be enforced, that the parties were content to let the matter drop, and, as in the letters I read you yesterday, Mr. Canning instructs the Minister at St. Petersburg as follows:

We do not want to insist upon anything that humiliates Russia by calling upon her in a Treaty to formally renounce what she has asserted. All that we want is to get rid of any such claim as that. That answers our purpose, and therefore when that is assured, the main object that we have in this negotiation is disposed of. The territorial line is altogether a secondary consideration.

That is the reason why language is adopted in the Treaty that does not in terms refer to the right of navigating there—does not refer to Behring Sea at all, but only to the right of navigating the Pacific. But we are here concerned with the question whether anything more than that was needed, in order to meet the requirements of the case. My learned friends have to contend that Behring Sea, including the seal fisheries that centred at Pribilof Islands, and I believe also on the Commander Islands was thrown open to the world, and not merely the right to navigate. I will read the last clause which I am reminded I have omitted to do.

Mr. Adams seemed to consider any formal stipulation regarding that renunciation as unnecessary and supererogatory.

The PRESIDENT.—Might I ask you what you think Mr. Adams and Mr. Addington alluded to when he quoted this subsequent declaration of renouncement by Russia? What is this declaration:

The question of the *mare clausum*, the sovereignty over which was asserted by the Emperor of Russia in his celebrated Ukase of 1821, but virtually, if not expressly renounced by a subsequent declaration of that sovereign.—

Mr. PHELPS.—It is the declaration made by M. de Poletica, and the declaration made to the British Plenipotentiaries. I have read the declaration by the Representatives that they never intended to submit such a claim or to maintain it. That is the declaration he refers to, not the provisions in the Treaty, because he says it is omitted.

The PRESIDENT.—You mean the despatch in which M. de Poletica said that Russia might assert Behring Sea was a *mare clausum*, but did not intend asserting it just then.

Mr. PHELPS.—That is one, and throughout that correspondence it will be found that Russia continued to occupy more distinctly that attitude, and you will find, as I read just now, the assurance given to the British negotiators on the part of Russia, which Mr. Stratford Canning communicates to his Government, that there was no intention of asserting an exclusive claim—perhaps I had better refer again to that. One of these passages is the one I have read at page 80.

The PRESIDENT.—That was later.

Mr. PHELPS:

I am happy to have it in my power to assure you, on the joint authority of the Russian Plenipotentiaries, that the Emperor of Russia has no intention whatever of maintaining any exclusive claim to the navigation of those straits, or of the seas to the north of them.

Mr. Justice HARLAN.—That is not the declaration referred to in Mr. Addington's letter.

Mr. PHELPS.—No; I was saying that this transpires all the way through. I have not the reference at the moment to the particular one; but you will not have failed to observe from perusing this correspondence from the very beginning, Russia disclaimed, both to the United States and Great Britain, the right to shut up this Sea and make it a *mare clausum;*—that was disclaimed from the very beginning and all the way through on all occasions, and never asserted; and, therefore, you find both on the American side and the British side in these negotiations, they were content to rest on the construction that had thus formally and explicitly been given to the Ukase of 1821 by the Plenipotentiaries; and then they make the Treaty.

The PRESIDENT.—I would not like to throw any disrepute upon Diplomacy; that would not behove me at all, speaking to you, Mr. Phelps, in particular, but as you made an obituary of diplomacy yesterday, perhaps we may speak of ancient diplomatists, if not of those of to-day. Do not you think it sometimes happened that two nations living on very friendly terms as Russia and Great Britain undoubtedly did at that time, if you remember the historic state of the features of Europe between 1820 and 1830,—there was great friendship you will remember in 1822, 1823 and 1824 between Russia and England,—do not you believe it may be that when a difficulty arises, or a point which is difficult to interpret, or give an interpretation to, between diplomatists, that they are often satisfied, each maintaining his own point of view, to adopt an ambiguous phraseology leaving to the future to solve the difficulty; and, indeed, very often the future solves many difficulties which diplomatists at the then present time cannot solve? Might not this be one of those cases where Russia and England each had their view and did not wish to concede a point of principle consistent with their policy, and yet did not care to put their respective principles in opposition to one another?

Mr. PHELPS.—I shall be quite willing to adopt that view, Sir.

The PRESIDENT.—I should not call it bad faith; but it is perhaps procrastination.

Mr. PHELPS.—It is a suggestion, Sir, that I am quite willing to adopt; and it is one that I was going to make presently, when we had reached the point. I was not going to omit to discuss it, because it is not for me to anticipate what the conclusion of the Tribunal will be.—When we have reached the point that language is employed here which can be understood one way by one party and the other way by the other party, then we have reached a conclusion which is inevitable; that it is for neither party to assert that his construction was the one adopted.

Lord HANNEN.—And then there would be no contract.

Mr. PHELPS.—And then there would be no contract.

Lord HANNEN.—Then we should have to consider it on general principles.

The PRESIDENT.—Yes. We might say, as Mr. Adams did to Baron de Tuyll, the Treaty would stand for itself.

Mr. PHELPS.—Yes; it stands for itself, but subject to the legal rules of construction. A party cannot fortify himself on the one side any

more than on the other by adopting language that is confessedly ambiguous. It leaves the Treaty just where it would have been left if they had said in terms in it, "We refrain from settling this point," or "We leave this point open."

Senator MORGAN.—Might I ask you a question, Mr. Phelps? I understand that the fringe of sea round the border of a country to the extent of the 3-mile limit is *mare clausum* at the option of that country; but has it ever been held that within that limit the right of innocent or free navigation would be or could be under international law denied to any ship or vessel of any foreign country unless the country to whom that border of sea belonged should prohibit it.

Mr. PHELPS.—No, Sir; neither do I understand that the country to which that territory or littoral sea belongs can prohibit merely innocent navigation.

The PRESIDENT.—No, you said so yesterday.

Senator MORGAN.—And the right of free navigation stands above every other right in international law; and that is the view that these nations had of free navigation when they were making these Treaties.

Mr. PHELPS.—That is true. There is no power in any nation that I know of to prevent harmless and innocent navigation in a littoral sea, or within the three miles or cannon-shot distance. The only restrictions are those necessary to the accomplishment of some interest or some good purpose, of which the nation is largely its own judge; but Lord Chief Justice Cockburn, as you will remember, uses very strong language about that, and he says the proposition to exclude innocent navigation even in the three-mile limit is not to be thought of, and I think all authorities concur on that point.

Now, the questions of the President and of Lord Hannen have drawn me somewhat into hypothetical instances. I do not, for a moment, concede that Great Britain stood in a position where it could have any reservation on the construction of this Treaty, because the understanding that took place between Russia and America as to the effect of the American Treaty was communicated to the British Government more than a year, or almost a year, before. That is found in the Addington letter that I have referred to, and I go back to it to call attention to its date, August the 2nd 1824. It is on page 66 of the same book that I have been reading from. That Treaty was signed the 28th of February the next year. In that document the British Representative communicates to his Government from the highest authority, that is the American Secretary of State, what the understanding of the construction of that Treaty was, so that six months after, they adopted it with the knowledge that the construction put upon it by those parties was such as is here expressed. How can any party to a contract, whether it is a nation or an individual, reserve the right in accepting a contract with the knowledge of the understanding that the other party has of it, to repudiate that understanding where the language is ambiguous.

Lord HANNEN.—I do not see where you get from Mr. Addington's letter a knowledge of the construction put upon the words by the United States?

Mr. PHELPS.—Only generally, when he says in the language I have read.

The question of the *mare clausum*, the sovereignty over which was asserted by the Emperor of Russia in his celebrated Ukase of 1821, but virtually, if not expressly, renounced by a subsequent declaration of that Sovereign, has, Mr. Adams assures me, not been touched upon in the above-mentioned Treaty.

And that is in reply to the enquiry of the learned President to me; but, under what language, and in what way did Great Britain obtain the

right to navigate here through Behring Straits? She obtained it because she had never lost it. She refused to accept it as a boon from Russia; she refused to say, "We will accept as a grant, a gift from Russia, a right to navigate this Sea; we insist upon having the pretensions to interfere with that right withdrawn. We do not care that they should be withdrawn formally if that should be humiliating to our friend and ally; but we want to be satisfied that it is out of the way." The Representatives *were* satisfied that it was out of the way, and they were apprised that the Treaty of 1824 between Great Britain and Russia did not touch that question at all. As my associate suggests to me, the United States had accepted these renunciations, when they went forward with the negotiation; they had accepted these renunciations of any such construction of the Ukase of 1821 as they had taken alarm at. They made the Treaty; and when Great Britain adopts the language of that Treaty, she is apprised distinctly that the United States had accepted those renunciations, and that the Treaty they had then executed was not understood as containing the reference to this subject which is now here insisted upon.

The PRESIDENT.—Mr. Phelps, I am sorry to interrupt you so often.

Mr. PHELPS.—I assure you, Sir, it is not the least interruption. I am only too happy to be asked a question.

The PRESIDENT.—I suppose this subsequent declaration of virtual, if not expressed renouncement would be in the allusion to the circular of Count Nesselrode of October 21, which is printed at page 3, and which has been sent to all the Governments; and being a circular, it had the authority of the general declaration of the Russian Government. I suppose that in your opinion, the Governments both of the United States and Great Britain may have construed this circular as admitting of their right of navigating freely through Behring Straits, and consequently through Behring Sea.

Mr. PHELPS.—Yes.

The PRESIDENT.—And consequently would not imply the right of fishing on the way.

Mr. PHELPS.—Yes, fishing is one thing.

The PRESIDENT.—Well, sealing on the way.

Mr. PHELPS.—That is another thing.

The PRESIDENT.—Or whaling on the way.

Mr. PHELPS.—Yes, whaling may be regarded as fishing, I do not go into that. It is not in dispute.

The PRESIDENT.—No, it is an analogy.

Mr. PHELPS.—It is an analogy, but we have never insisted upon our having the right to preclude fishing generally at a distance from land. We saw what the law was regarded to be, in respect to the Newfoundland fisheries, at that time. Whether it would be the law at this time is a different question, and depending on different considerations. If it was important to go into the question whether the right of navigation may carry with it the right of what is called fishing, that is to say, capturing those fish which are the denizens of the open sea, that are attached to no territory, and are in no sense the subject of property that may be well enough conceded; we have not controverted that here, and if there is no distinction between the case of the seals and the case of the fish in the open sea, then there is very little in the claim to a property or a right of protection in the open sea.

The PRESIDENT.—What I wish to ascertain is this: that your construction is that both Governments, the United States and the Great Britain, fully understood and admitted that the concession by Russia

of their right of navigating, perhaps including fishing and whaling, perhaps not, at any rate did not include sealing?

Mr. PHELPS.—Yes.

The PRESIDENT.—And that they fully understood that at the time?

Mr. PHELPS.—Yes; that is our position.

Senator MORGAN.—That is shown by the Ukase of 1799. It takes a plain distinction between hunting and fishing.

Mr. PHELPS.—And you will observe, Sir, that they require no recall of this provision in the Ukase of 100 miles of demarcation from the shore—nothing. This subject is not touched upon—it is not alluded to. The only figure that Behring Sea cuts in this whole matter, is on the question of free navigation so as to pass through the straits, with the addition, perhaps, to the word "navigation," of the words, "navigation and deep sea fishing," which go together unquestionably. The right of navigation carries the right of fishing, because fishing belongs to navigation in the open sea.

Mr. Justice HARLAN.—The treaty mentions clearly both navigation and fishing.

Mr. PHELPS.—Yes they are mentioned together. What Russia withdrew from the Ukase of 1821, as you will see, was nothing but a construction which that language justified, and at which these two Powers had taken alarm and its explanation was: "We meant this only as a protective measure—we did not mean to shut the sea—we did not mean to exclude you from navigation; we shall assert no such right—we are willing to say so in the most formal manner—we intended it as a protective regulation."

The PRESIDENT.—Do you mean to say that the 100 miles exclusion was maintained after the treaty?

Mr. PHELPS.—It was left untouched in this treaty, and it was not only maintained but these industries were never interfered with in the whole of the sea either within 100 miles or without it, until after 1867.

Senator MORGAN.—But it was negatived as I understand by the right of free navigation to that extent?

Mr. PHELPS.—Not negatived, Sir, if you will permit me—only an explanation that it was never intended.

Lord HANNEN.—Is it your theory that the 100 mile limit did not come into existence in Behring Sea?

Mr. PHELPS.—So far as the protective measure, it did my Lord, and of course, consistently with the right of navigation. When you look on the map and lay out 100 miles, it passes through the Aleutian chain, and passes through Behring Straits. If you maintain the 100 mile limit you do shut up the sea, and therefore I do not mean to say that it was literally maintained, but that the protective character—the protective force of the Ukase of 1821, was retained; and as I said yesterday the whole discussion turned out to be, as very frequently is the case, nothing but a misunderstanding. Say Great Britain and America: "You are closing the sea to navigation which is the right of mankind." Says Russia: "Certainly not; we are protecting our industry." Say Great Britain and America: "We have no wish to interfere with your industries." As I said before if the Ukase had been confined to that in terms, there never would have been any discussion. Then when with that construction—that explanation—that renunciation, if you choose to call it so, of the right to interfere with the navigation and to pass through Behring Straits, is conceded, the protective force of the ukase of 1821 to protect these industries was allowed to be maintained. The best evidence of that is that as before they had never been inter-

fered with, so afterwards they never were interfered with—not a British ship nor an American ship ever entered that sea to interfere with the trade, with the settlement, with the fur-seal industry, or the fur bearing industry, which then extended beyond the fur-seal.

In the Treaty of Great Britain with Spain in 1790 (which will be found at page 33 of the first American Appendix) there is a similar provision by Great Britain.

Lord HANNEN.—That is the origin (as pointed out in your case) of this Treaty.

Mr. PHELPS.—Article 4 of the Treaty between Great Britain and Spain says this.

His Britannic Majesty engages to take the most effectual measures to prevent the navigation and fishery of his subjects in the Pacific Ocean or in the South seas, from being made a pretext for illicit trade with the Spanish settlements; and, with this view, it is moreover expressly stipulated that British subjects shall not navigate, or carry on their fishery in the said seas, within the space of ten sea leagues from any part of the coasts already occupied by Spain.

That is an illustration of what I am trying to say in regard to the effect of this Ukase of 1821.

Lord HANNEN.—That was a Treaty.

Mr. PHELPS.—That was a Treaty—yes; and we say that this Ukase, as left by the Treaty, had a similar effect—not that it was specifically provided that they should not approach within a certain number of miles, but they obtained the right of free navigation without obtaining the right to disturb the industries, settlements, and trade, of Russia. That was at the time when restrictions of trade were common.

The PRESIDENT.—Mr. Phelps, in the letter of Mr. Canning which you have just read, upon page 73, it is difficult to put those together so as to make what you have just read concordant with the words of Mr. Canning. He says:

But the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

You will therefore take care in the first instance to repress any attempt to give this change to the character of the negotiation, and will declare without reserve that the points to which alone the solicitude of the British Government, and the jealousy of the British nation attach any great importance is the doing away (in a manner as little disagreeable to Russia as possible) of the effect of the Ukase of 1821.

Mr. PHELPS.—Yes, Sir, it has an effect upon navigation, but you will find that there is not asserted, from beginning to end, any pretence on the part of either of these countries to interfere with these rights.

The PRESIDENT.—You mean to say that England understood that sealing was excluded, and did not care for it; she only cared to maintain the right of navigation?

Mr. PHELPS.—Yes—the sealing and all their industries—not sealing specifically more than anything else—the fur industry, their settlements, their trade—whatever there was: that the result of this Ukase, as modified by the Treaty, was to leave the right of navigation free, but not to open to the world these valuable industries.

The PRESIDENT.—Are there any documents, besides the Ukase of 1821, from which you might infer that this question of sealing was specifically raised?

Mr. PHELPS.—No Sir, not specifically raised.

The PRESIDENT.—I do not see that the English documents make any allusion to the right of sealing, either to except or include it.

Mr. PHELPS.—They do not. That supports my contention—that when this Ukase of 1821 came out, to the extent the Russians explained it—to the extent that they relied upon it—no question was ever raised. Nobody, on the part of the United States or Great Britain rose up and said: "You are excluding us from taking the fur bearing animals". They never had taken a fur bearing animal.

Lord HANNEN.—They did not say so as to the whole.

Mr. PHELPS.—No.

Lord HANNEN.—You do not deny that they had the right to go up there and fish for whales?

Mr. PHELPS.—They said only "fishing"—there is nothing about whales and nothing about seals.

The PRESIDENT.—Do you not think the British diplomatists, in their eagerness to come to an agreement with Russia, would naturally, express something agreeable to Russia—an acknowledgement of the exclusive right of Russia to take the seals in the Behring Sea. I think any diplomatist would be very eager to state that as a concession.

Mr. PHELPS.—Undoubtedly, if the special point had been raised; but the question under discussion was how far the Ukase of 1821 should be modified. The Ukase of 1821 covered that and a great deal more. It was what it purported to cover *beyond that* that was in dispute; and when that was renounced and the right of navigation re-affirmed so to speak, that was the end of the controversy and the confusion, if you will allow me to say so, sir, that attends this subject.

The PRESIDENT.—Then both Governments, the United States and England accepted the maintenance of the Ukase of 1821.

Mr. PHELPS.—Yes, subject to the explanation that they did not intend it to intercept navigation.

The PRESIDENT.—At any rate your meaning is very clear.

Mr. PHELPS.—Yes. I was about to say, Sir, that the confusion arises, at this late period, in trying to bring this subject to bear upon a discussion with which it has really nothing to do and mingling together the consideration of two very different topics. Now let me go back to the application of this to our present discussion. What we claim and all that we claim is this: That from the discovery of these islands down to the cession of them to the United States by Russia, this fur-sealing industry as maintained and carried on and created by Russia and preserved, never was interfered with. No nation—no individual—claimed a right to do what the Canadians claim the right to do in this case; and we claim that as a powerful confirmation, a corroboration, of the title we assert now, and which Russia might have asserted, of course, if it had been challenged at the beginning of this century in 1800. We claim it as a powerful corroboration that during almost a century, if not quite, the right that we stand upon was enjoyed by Russia, and never was interfered with or challenged or questioned.

Now to meet that—to break the force of that contention—which is all we care for—they say: "Why there was a Ukase of 1821 which asserted this and a great deal more, and that was withdrawn and modified, and the modification of that is to be taken, not as a direct concession (because the subject is not mentioned), but as an inferential concession by Russia that she had not this right over the fur-breeding animals." Well, the moment you perceive that that question was not involved—that neither Great Britain nor America in that negotiation or correspondence any where claimed such a right—that no citizen of that country ever claimed such a right—and that the whole discussion was upon the subject of the right of navigation in the sea and through

the sea into Behring Straits, why you perceive, if that view of it is correct, that it does not militate against our proposition that the possession and occupation of Russia has been absolutely unbroken; and to make it bear upon that you must endeavor to put a construction upon ambiguous language which will make it read as the parties did not understand or intend that it should read (because they were not disputing upon that point), in such a way as to say: "You may come in here and take the fur-seal in Behring Sea". If it does not say that, it says nothing that is pertinent to this case—it does not touch this case. If the Treaties of 1824 and 1825 do not say in their legal effect: "It shall be lawful for the citizens of the United States and Great Britain to come into Behring Sea and destroy the fur-bearing animals,"—if it does not say that, it does not touch this case at all, and it is no matter then what it does say, for our purpose.

It is therefore the question: Can you put into the language of that Treaty those words,—that is to say by finding general terms in the Treaty that mean that—that express that: Can you find an acknowledgment in that Treaty that the pursuit of these fur-bearing animals was open to the citizens of these two countries or open to any one without Russian permission?

If you can, then you find that our uninterrupted possession of a century, in our grantors, is broken to that extent. If you cannot, then the Ukase of 1821 and the Treaties of 1824 and 1825 disappear out of this case, and have no relation whatever to this controversy. Well, now, if you can import into this Treaty language that has the legal effect of conceding that right, it is only, at the utmost, by finding that Behring Sea for all general purposes that are covered by the first Article of this Treaty, is included within the "Pacific Ocean".

When you come to look at the language of the Treaty, you find that the language does not justify it. If the parties choose to use language and take their risk as to what that meant, that risk is determined when you find out what it did mean. If you go further than that and say: "The language is ambiguous and therefore we must find out from other evidence, proper to be considered, what the parties meant by it", then you find out in the first place what America and Russia agreed that they meant by it. You find that that construction was conveyed to the British Government six months before their Treaty, so that in adopting, in terms, as they did, the provisions of the American Treaty, they adopted the construction which the parties had put upon it; and the suggestion of his Lordship to me that the rule would not apply if Great Britain and Russia had a different construction, or if Russia made Great Britain understand that the construction was different, does not arise, because it is exactly the other way.—Instead of Great Britain being made to understand, or left to understand, that Russia put a different construction from that which it had with America, the contrary is conveyed; and they adopt the American Treaty with a knowledge of the construction it contained.

I respectfully submit that this long discussion and this interminable correspondence, comes down to that, and it is all that it has to do with this case. With other purposes, and for other purposes it had its place—its importance—which has long passed away, and is now only historical. The question is whether it touches the case we have now before us? It does touch this case somewhat—not very fatally—if you can say that it interrupts the uniform possession of Russia of this seal industry from the discovery down to the cession.

In order to do that you must therefore find either that the words of the Treaty necessitate such a construction which plainly they do not—or else that the parties so understood it; and you find that America and Russia understood it in one way, and Great Britain accepts that with the knowledge of the construction that is put upon it, and the reason why she did accept it, and ought to have accepted it, was because that touched a point that she was not contending for.

If she had been contending for the right to go in and take fur-seals, as she is now, she never would have signed that Treaty without explicit language to that effect and she would have insisted on the words which she proposed in the projet she submitted; because if she did not get that, she did not get the material thing, or one of the material things in dispute. She abandoned that readily; and if she had insisted upon it she would not have got it, because that Russia would have thrown open to the world this valuable industry is not to be supposed; it would have broken off the Treaty altogether.

The PRESIDENT.—Could you say that neither the United States nor England had any actual interest in the sealing—they did no care about it?

Mr. PHELPS.—Exactly, and that is the reason they did not insist upon it.

The PRESIDENT.—Is there any evidence in the case as to the date when the fur industry began—that there was a connection between the sealing in the Behring Sea and the fur industry in London,—when the consignments from Behring Sea to London began—when England began to take any sort of interest in it?

Mr. PHELPS.—I have not the date in my mind. The seal skins first went to China, and the exact date when they began to come to England we will ascertain.

The PRESIDENT.—Very likely later than all these.

Mr. PHELPS.—It is not in my mind at the moment.

The PRESIDENT.—It is not to be supposed that even London furriers were interested then in the Behring Sea fur industry.

Mr. PHELPS.—Mr. Foster suggests to me that it was a little before the concession to the United States that the market was transferred to London for these furs.

General FOSTER.—The correspondence of the Company shows that between 1850 and 1860 they began to send to London.

The PRESIDENT.—It seems very likely that it had no sort of effectual interest for the Americans or English to raise the question. That would account for it not having been raised at all.

Lord HANNEN.—What they were claiming was the general right of navigation in the high sea, with all that it carried with it.

Mr. PHELPS.—Exactly.

The PRESIDENT.—That refers us back to the question of general principle.

Mr. PHELPS.—Exactly. They never denied and they never interfered practically—their vessels did not go there, either from the United States or Great Britain. They did not at all interrupt the position on which we stand.

Now, Sir, let me for a single moment—(I have been drawn into saying more about this than I intended this morning)—consider the aspect of the case from the point of view of the question that the President suggested a little while ago, and suppose there was a misunderstanding. Suppose the case—not uncommon in the history of contracts—where a contract is signed with language that is ambiguous, that is to say, that

might admit of either of two constructions. One party honestly understands it one way, the other understands it the other way. What is the result? That provision of the contract fails. Whether that would carry with it, in the estimation of a Court of Justice, the setting aside of the whole contract, depends altogether on the place and importance of that feature in it. It might or might not; but to that extent there is not a contract.

Lord HANNEN.—Upon that hypothesis, our answer to the question ought to be, "We do not understand."

Mr. PHELPS.—By no means, my Lord. The answer must be in the negative, because if the language does not include it, it does not include it.

The PRESIDENT.—The question is, whether the language includes it or excludes it.

Mr. PHELPS.—I quite agree. Now on another branch of the case, I quite agree, as I have endeavoured to point out, that the language includes Behring Sea. I further insist that, whether the language does or not, the parties to it understood or intended the language. But I am now on the extreme hypothesis that, if neither the terms of the Treaty, nor any understanding or intention of the parties that was concurrent, make it operative, then, we are left where you would be left in a private contract.

Lord HANNEN.—I cannot forbear from saying that you have not referred to sbsequent passages in the *Counter projet* in which in effect it distinctly says that Behring Straits and the Pacific Ocean extends up to the Behring Straits.

Mr. PHELPS.—I have not read those passages.

Lord HANNEN.—I have called your attention to it before, or Mr. Carter's. It appears to me—I may be taking a mistaken view of it—that it is conclusive. It distinctly draws a distinction between the Pacific Ocean and the Frozen Ocean—I mean as co-terminous.

Mr. PHELPS.—But still you do not avoid the difficulty that half a dozen plain English words that would have settled that question were proposed on the one side and refused on the other.

Lord HANNEN.—That is begging the question. If there were words that carried that meaning it was not necessary to insist on it, if the Russians by what they said plainly intimated that they understood that the Pacific Ocean extended up to Behring Straits.

Mr. PHELPS.—Yes, but we still do not get over the point that notwithstanding this subsequent provision which was in the original projet as well—notwithstanding that they thought it material (as it seems to me that anybody who cared about that feature must think it material) to put in the very words that determine this question. And it was thought material on the other side to refuse. Now it would neither have been demanded or refused if the Treaty, in its other terms, had contained language to the same effect. If it had been declined it would have been said: "We have already said so; we need not say it again". You find the one Government insisting on that language; you find the other Government declining to adopt it; and you find my friends now insisting that the Treaty should read as if those words were put in, which were refused to be put in.

Senator MORGAN.—But which is the Frozen Ocean?

Mr. PHELPS.—It is the Arctic Ocean—Behring Straits.

Senator MORGAN.—Have they said so. Who is giving that definition to it?

Mr. PHELPS.—I suppose it is a general definition.

Senator MORGAN.—You have taken it for granted that the "Frozen Ocean" means the Arctic Ocean, and forgotten that Behring Sea is frozen for more than half the year?

Mr. PHELPS.—I have assumed that to be *a* definition; I do not vouch for its accuracy of course.

The PRESIDENT.—It has not been contended as yet that Behring Sea was part of the Frozen Ocean—I have never seen that.

Sir CHARLES RUSSELL.—No.

Senator MORGAN.—I do not know anything about contentions. I was trying to get some information about it. The term is used there; I do not know who has the right to define it.

Mr. PHELPS.—I had rather assumed that meaning, but without any authority of course to ascribe it.

The PRESIDENT.—You would not include Behring Sea in the Frozen Ocean?

Mr. PHELPS.—That had not been my construction of it, but of course it was not a point to which I had given special consideration.

Senator MORGAN.—There are only two oceans there—one is the Frozen Ocean, and the other is the Pacific Ocean, and the line of demarcation between those two Oceans might just as naturally run through Behring Sea as it would south of the Aleutian range.

Mr. PHELPS.—It might be so undoubtedly; but you are asked to read this Treaty as if the words had been in that were proposed to be put in, and were left out, and there is not any escape from that, and there is no ingenious reading of the other provisions of the Treaty that will escape it. You may add a new ambiguity and you may argue with ever so much ingenuity that the ambiguity is to have a particular construction, but you cannot escape the conclusive fact that the few words that would have settled the question were proposed on one side and rejected on the other. May I ask, Lord Hannen, to what provisions in the subsequent draft or treaty he refers to as determining this.

Lord HANNEN.—In the Sixth Article of the Russian Counter projet (at page 70 of the 2nd British Appendix) the Emperor of Russia consents that the liberty of navigation mentioned in the preceding Article—that is the navigation throughout the whole extent of the Pacific Ocean which you refer to. He consents that the liberty of navigation extends under the same conditions to Behring Straits and to the seas situated to the north of that strait. And then it goes on—"all Russian and British vessels navigating the Pacific Ocean and the sea above mentioned", which is the Sea beyond Behring Strait—if they are forced by tempest shall have the right of refuge. Now if the Pacific Ocean does not include Behring Sea, then the provision is that they shall have the right of refuge down below the Aleutians, and in what I have called the Frozen Ocean; but that there is no provision for their having any right of refuge in Behring Sea.

Mr. Justice HARLAN.—Before you answer Lord Hannen, let me ask you a question in that connection so as not to interrupt you. I have not the English translation of this Treaty here and that is the reason I ask you. I notice in Article VI, there is the word "navigation". Can you tell me whether, in the previous Article of this Russian projet there is any allusion (in addition to navigation) to fishing and trading?

Lord HANNEN.—Yes, there is a good deal about trading.

Mr. Justice HARLAN.—What I want to get at is: Do you lay any stress, and how much, on the fact that whereas some previous Articles refer to fishing and trading, besides navigation, Article VI that Lord Hannen just read seems to refer to navigation only?

Mr. PHELPS.—The first Article, Sir, of this Counter draft, as you will observe (at the last line of page 68) says:—On the north-west coast of America, as well as different points relative to commerce, navigation, and to the fisheries of their subjects in the Pacific Ocean?

Sir CHARLES RUSSELL.—Commerce, navigation, and fisheries.

Mr. PHELPS.—That is the preamble to the counter draft which gives character to these various provisions. Perhaps the same occurs in other Articles; but it is to be observed in respect of Article VI, as I was about to say, that if the previous article—

Sir CHARLES RUSSELL.—Article III refers to it.

Mr. PHELPS.—I was about to observe that in my apprehension, with much respect, Article VI is conclusive in this draft to show that the language in Article V was not understood as embracing Behring Sea, because if it was, Article VI becomes superfluous.

Sir CHARLES RUSSELL.—No.

The PRESIDENT.—Article VI applies to the Straits merely and to the sea beyond the straits—to the Northern Sea—to the Arctic Ocean.

Mr. PHELPS.—There was no dispute between these parties as to the right to navigate the Frozen Ocean or the Arctic Sea; and Behring Sea of course comprehended the right to go out of Behring Straits. Now if under the provisions of Article V the right was confirmed to go through that sea and through Behring straits, what do you want with Article VI in which it is said that the right of navigation shall extend through the Straits.

The PRESIDENT.—That is why England objected to this Article—she did not want to take that as a boon.

Mr. PHELPS.—Exactly; but we are now upon the construction of the meaning of the Article if you had accepted Article VI as an addition which the language of Article V requires.

The PRESIDENT.—Well, it might be said, Mr. Phelps, fairly, that "the Pacific Ocean", in Article V, means anything else but the Straits and the Northern Sea.

Mr. PHELPS.—Of course it does not mean the Northern Sea—but that had never been in question at all.

The PRESIDENT.—If "the Pacific Ocean" means all the sea southwards of the Straits and all the Northern Sea, the words "Pacific Ocean" in Article V may be construed virtually, in such a way as to mean the sea south of the Straits.

Mr. PHELPS.—Yes.

The PRESIDENT.—The *Straits* come in Article VI. It is all the sea that is not provided for in Article VI. In Article VI it provides merely for the Frozen Ocean; consequently Article V provides for all the remainder—Behring Sea, and the Pacific Ocean

Mr. PHELPS.—It is impossible. Either the language of Article V does include Behring Sea, or it does not.

Sir CHARLES RUSSELL.—It does.

The PRESIDENT.—That is what it seems to do.

Mr. PHELPS.—If it does, you do not need Article VI.

Sir CHARLES RUSSELL.—Yes.

Mr. PHELPS.—Because there never was any dispute about the right of navigating the Frozen Ocean.

The PRESIDENT.—Russia pretended to concede that—that is why England did not want to have it conceded as a *grant* but as a *right*. That was the despatch of Mr. Canning.

Mr. PHELPS.—It is a different question from the question of the construction of the language. Lord Hannen's suggestion was that Article

VI established the meaning of the language in Article V. The question whether England was willing to accept that navigation as a boon from anybody is another question, and stands quite by itself.

Lord HANNEN.—What I meant was, here we have almost contemporaneous documents—one leading to the Treaty; and what I was saying was, it strikes me—(and I confess you have not removed the impression from my mind yet)—that it can be ascertained from that, with certainty, that Russia when she spoke of the Pacific Ocean intended to include the Behring Sea.

Mr. PHELPS.—And the concluding clause of this very Article V which limits the right to the distance of two marine leagues from the possessions of both sides, shows that the protective quality of the Ukase so far as might be necessary, was not intended to be withdrawn.

Lord HANNEN.—It shrunk from 100 miles to two leagues.

Mr. PHELPS.—Yes, it shrunk from 100 miles to two leagues.

Senator MORGAN.—But still it did not shrink within the three mile limit?

Mr. PHELPS.—But still it did not shrink within the three mile limit—it was two leagues.

Senator MORGAN.—Now, Mr. Phelps, if you will allow me to suggest this far—I do not wish to disturb the line of your argument.

Mr. PHELPS.—It does not in the least interrupt me, Sir.

Senator MORGAN.—The proposition of Great Britain, as I understand it, was to concede to Russia the right to prohibit all ships within two leagues of the coast—that was a modification of the 100 mile limit. The 100 mile limit, and the proposition of Great Britain were both for the same purpose—for the protection of the industry, their commerce, and fur-seal hunting within Behring Sea as I understand it. Now the 100 mile limit was adopted by Russia in the Ukase of 1831 in consequence of facts set forth in the British Case. What are they? At page 22 of the British Case, they say:

> Bancroft sums up the situation about 1791 and 1792 in the following words:
>
> Affairs were assuming a serious aspect. Not only were the Shelikof men excluded from the greater part of the inlet [Cook Inlet], but they were opposed in their advance round Prince William Sound, which was also claimed by the Lebedef faction, though the Orekhof and other Companies were hunting there. . .
>
> Thus the history of Cook Inlet during the last decade of the eighteenth century is replete with romantic incidents—midnight raids, ambuscades, and open warfare—resembling the doings of mediæval *raubritters*, rather than the exploits of peaceable traders. . .
>
> Robbery and brutal outrages continued to be the order of the day, though now committed chiefly for the purpose of obtaining sole control of the inlet, to the neglect of legitimate pursuits.
>
> Again, in another place, the same author writes, with regard especially to the position of Baranoff, Governor of Sitka, when he took charge of the Shelikof Colony of Kadiak:
>
> Thus, on every side, rival establishments and traders were draining the country of the valuable staple upon which rested the very existence of the scheme of colonization. To the east and north there were Russians, but to the south-east the ships of Englishmen, Americans, and Frenchmen were already traversing the tortuous channels of the Alexander Archipelago, reaping rich harvests of sea-otter skins, in the very region where Baranoff had decided to extend Russian dominion in connection with Company sway.

Then on page 29 of the same Volume it says:

> In 1801, there were at least thirteen United States vessels on the north-west coast. These vessels exchanged with the natives of the coast for furs, parts of their cargoes, and, proceeding to China, returned to their respective countries with cargoes of teas, etc. Upwards of 18,000 sea-otter skins, besides other furs, were in 1801 collected by United States traders alone for the China market.
>
> In 1802, the Russian Establishment at Sitka was destroyed, and nearly all the Russians there were massacred by the natives. According to Lisiansky, the natives

were assisted by three deserters from a United States vessel, the "Jenny", which had called at Sitka not long before. Shortly afterwards, an English vessel, the "Unicorn," Captain Barber, arrived at Sitka, and two other vessels, reported by the Russian survivors as English, but one of these Bancroft believes to have been the United States vessel "Alert."

Hunting therefore, which was conducted with fire arms necessarily, was something that I suppose Russia for the peace of herself and the safety of the lives of her subjects desired to repress, hence their interposition of the 100 mile limit which Great Britain recognizing as being too large, was willing to reduce to two marine leagues.

That is my view of the progress of the matter, and that is my view of the reason why in the Treaties of 1824 and 1825 no mention was made of the 100 mile limit in the general settlement of it, but it was left to stand for the protection of the lives of Russian settlers against the raids of these Traders.

The PRESIDENT.—Do you mean to say, Mr. Senator, it meant to stand along the north-west coast? All you have been reading relates to the north-west coast. You do not mean to say that the 100 mile limit was applicable to the north-west coast, or to the Treaty?

Senator MORGAN.—Applicable to the 100 mile limit—applicable to the north-west coast,—by which I suppose the learned president means that portion of the Country that is occupied now chiefly by the British American possessions?

Sir CHARLES RUSSELL.—Oh no, no.

Senator MORGAN.—Whether it applies to that alone, or whether it applies to that and Behring Sea, the purpose is the same.

The PRESIDENT.—Yes.

Senator MORGAN.—That was, to keep ships—to keep these Traders—from going there supplying fire-arms, ammunition and whiskey to the settlers whereby they would probably keep down these massacres and raids.

Marquis VENOSTA.—So many questions have been put to you, Mr. Phelps, that I hardly like to ask you another.

Mr. PHELPS.—I am most happy to hear them, Sir.

Marquis VENOSTA.—I should like to ask you this: you have said that the British Government accepted the American interpretation of the treaty of 1824.

Mr. PHELPS.—Yes.

Marquis VENOSTA.—I remember there being some question between the United States and Russia concerning the sea of Okhote and the Behring Sea many years after the treaty and after the treaty of cession, namely, a question concerning the proclamation of the Russian consul in Japan and the question concerning the seizure of a vessel called the "Eliza".

Mr. PHELPS.—Yes—the "Loriot".

Marquis VENOSTA.—Do you not think that those questions had some bearing on your contention—that the inference is that there was an interpretation of the American Government accepting the interpretation proposed by Baron de Tuyll, and binding in some way the British Government?

Mr. PHELPS.—I was intending to allude to the case of the "Loriot", and after luncheon I shall be happy to endeavor to answer the question of the Marquis.

Marquis VENOSTA.—If you please.

The PRESIDENT.—Then if you please, Mr. Phelps, you will be good enough to answer the question after luncheon.

[The Tribunal here adjourned for a short time.]

Mr. PHELPS.—In reply to the question put by the Marquis Venosta before the adjournment, I read from the United States Counter Case, page 22 and following. It will be remembered that the Treaty of 1824, that we have been discussing, conferred upon the subjects of both Governments mutual rights for 10 years of trading with the settlements of the other. After that 10 years limitation expired, that is after 1834, the United States Government made an effort with Russia to get an extension of it, and that effort failed; and very soon after the expiration of the time, this American ship, the "Loriot", was arrested by the Russian Government, and I will ask Mr. Foster to be good enough to point out on the map where it was taken.

General FOSTER [*Pointing it out*].—It was about 54° 55′.

Mr. PHELPS.—It was on Russian territory, and it was seized by the Russian Government; the United States protested and asked for compensation; and Mr. Dallas claimed, in the correspondence which is referred to on a subsequent page of the Counter Case, that the right to do what the vessel engaged in was a general right, and did not depend upon the consent of Russia. In other words, Mr. Dallas's claim was substantially that the United States had the same rights there without the concession of the Treaty of 1824 that it had with them. It is not surprising that that claim of the United States failed entirely. It was rejected by the Russian Government, which, in the correspondence that ensued, pointed out what the objection was; and it was abandoned and dropped by the United States. No compensation was made for the vessel. The vessel was not given up. The right of the United States to go there and trade was not conceded, and an extension of the terms of the Treaty of 1824 was not made. Why? The nations were, as they always have been, perfectly friendly, and the same reasons existed for extending the treaty provisions 10 years longer that could have existed for making them in the first place. The reason was the mischief to the industries of Russia, which, as they claimed, inevitably followed the exercise of it. So they not only refused to extend them, but they seized and confiscated the vessel. It would not be useful for me to take up the time to read it, but a review of the correspondence (because it exactly expresses the views on one side and the other) will be found at pages 180 to 184 of the Counter Case of the United States, a summary, not the whole of it, and extracts from the correspondence.

Marquis VENOSTA.—I asked you for an elucidation of the question concerning not the "Loriot" case but the "Eliza" case. You will find that at pages 20, 21 and 22 of the Appendix to the British Case, volume 2.

Mr. PHELPS.—Yes; I did not quite understand your question, Sir. I thought it was restricted to the "Loriot" case.

The case of the "Eliza" was a vessel that was seized by the Russian Government in 1887; and it was seized for the breach of an order or regulation which took effect at the beginning of 1882. I will read from Mr. Lothrop's letter to Mr. Bayard, the Secretary of State. Mr. Lothrop was our Minister.

The Russian Government claims that she was seized and condemned under the provisions of an Order, or Regulation, which took effect at the beginning of 1882, and which absolutely prohibited every kind of trading, hunting and fishing on the Russian Pacific coast without a special licence from the Governor-General.

It is not claimed that the "Eliza" was engaged in seal fishing.

Marquis VENOSTA.—It is on that word that I asked for some explanation; because General Vlangaly wrote to the United States Minister, that the ship was confiscated not on the ground of seal-fishing in the

open sea, but on the ground of a violation of a territorial regulation in territorial waters.

Mr. PHELPS.—I perceive, Sir; I see the point, and I will read a little further to see what the facts were, and then I will consider that.

But that she was found actually engaged in trading with the natives with the contraband articles of arms and strong liquors.

She was condemned by a Commission sitting on the Imperial corvette "Rasbolnik", composed of the officers thereof. In this respect the case is precisely like that of the "Henrietta", mentioned on my last preceding despatch No. 95, and of this date.

It will be noticed that Mr. Spooner, the owner of the "Eliza", in his statement of his claim, declares that the "Eliza" was "on a trading voyage, engaged in bartering with the natives, and catching walrus, and as such did not come under the Notice of the Russian Government, which was directed against the capture of seals on Copper, Robbins, and Behring Islands.

It will be seen that Mr. Spooner either refers to an Order of the Russian Government different from the one mentioned by the Imperial Foreign Office, or he understood the latter in a very different sense.

Sir CHARLES RUSSELL.—Will you kindly read the next sentence of that letter which begins "I may add", and so on.

Mr. PHELPS.—Yes; but I have read it before:

I may add that the Russian Code of Prize Law of 1869, Article 21, and now in force, limits the jurisdictional waters of Russia to 3 miles from the shore.

And the next letter following, enclosed by Mr. Lothrop in that letter is one from the Government of Russia,—General Vlangaly to Mr. Lothrop, and he says, reading from the second paragraph of the letter:

This information is in substance to the effect that the "Eliza" was confiscated not for the fact of seal-hunting, but by virtue of an Administrative Regulation prohibiting, from the beginning of the year 1882, every kind of commercial act, of hunting, and of fishing on our coasts of the Pacific, without a special authorization from the Governor-General, and carrying with it, against those disregarding it, the penalty of the seizure of the ship as well as of the cargo.

The order referred to is the one issued by the Russian Consul at Yokohama, and is to be found on page 17 of the same book:

At the request of the local authorities of Behring and other islands, the undersigned hereby notifies that the Russian Imperial Government publishes, for general knowledge the following.

(1) Without a special permit or license from the Governor-General of Eastern Siberia, foreign vessels are not allowed to carry on trading, hunting, fishing, etc., on the Russian coast or islands in the Okhotsk and Behring Sea, or on the north-eastern coast of Asia, or within their sea-boundary line.

(2) For such permits or licenses, foreign vessels should apply to Vladivostok, exclusively.

(3) In the port of Petropaulovsk, through being the only port of entry in Kamschatka, such permits or licenses shall not be issued.

(4) No permits or licenses whatever shall be issued for hunting, fishing, or trading at or on the Commodore and Robben Islands.

(5) Foreign vessels found trading, fishing, hunting, etc., in Russian waters, without a license or permit from the Governor-General, and also those possessing a license or permit who may infringe the existing bye-laws on hunting, shall be confiscated, both vessels and cargoes, for the benefit of the Government. This enactment shall be enforced henceforth, commencing with A. D. 1882.

(6) The enforcement of the above will be intrusted to Russian men-of-war, and also to Russian merchant-vessels, which, for that purpose, will carry military detachments and be provided with proper instructions.

Now, under the force of that Regulation, three American vessels were successively seized and confiscated, and that confiscation was adopted by the Russian Government, and no satisfaction ever was made for it. For the first two, a letter of enquiry was addressed by the United States' Government, and on the facts being stated as given in Mr. Lothrop's letter, just now read, that claim of the United States was dropped or abandoned.

It does appear, however, that Mr. Dallas, as I have said before, made a claim in respect of the "Loriot", and that claim, though made the subject of correspondence, was subsequently abandoned.

Marquis VENOSTA.—The case of the "Loriot" has not very much to do with this.

Mr. PHELPS.—No, it has not. It is only in the same line.

Now what does all this prove. It proves what is the last thing I desire to say about this much vexed subject, and what is the only important thing, in my judgment, to the present enquiry, that the practical construction placed upon the Treaties of 1824 and 1825 by the parties to them, from the day of their date down to the time of the cession, and down to the present time, is exactly in accordance with what we say the true reading of the Treaty is, and the true understanding of the parties was. How can it be that if the Treaty of 1824 was understood as conveying to the United States these rights of trading, and of fishing, that in 1882 Russia should put forth such an order as I have just read, and how can it be that the United States would submit to it and permit their vessels to be captured; because if the Treaty of 1824 gives the rights which are claimed to the United States, then the issue of the order of 1882 was a gross infringement of the Treaty, and of the rights of the United States under the Treaty. It is not to be presumed that Russia would have attempted it, and still less is it to be presumed that the United States would have submitted to it; and that bears upon this great leading fact that from the time of the discovery of these islands down to 1867, when they were ceded to the United States, the possession and occupation by Russia of the seal and fur industry business was not only asserted, but was actually maintained; and not a seal, as far as we learn in the exhaustive examination of this case, was ever killed in those waters except by the permission and under the regulations of the Russian Government. So that the question which Mr. Blaine puts in this correspondence, in letters that have been read, is one that has not received an answer from my learned friends, and, I respectfully insist, cannot be answered. How comes it to pass that the Canadian vessels at this late period have acquired a right as against the interest of the United States, in that seal herd, which never was asserted or claimed by anybody so long as the Russian Government remained. You will remember, Sir, without wearying you with more reading on this tiresome branch of the case, that about 1840 a question arose. The Russian American Company addressed its Government on the subject of whaling vessels that came in there, and asked the Government to interfere; and something is cited from Bancroft, by the other side, to the effect that the spirit of the Treaty of 1825, between Great Britain and America, might be against it. It does not touch the fur animals, but when you pursue the author they cite, Bancroft, you will find this:

> The Government at length referred the matter to a committee composed of officials of the navy department, who reported that the cost of fitting out a cruiser for the protection of Behring Sea against foreign whalers would be 200,000 roubles in silver and the cost of maintaining such a craft 85,000 roubles a year. To this a recommendation was added that, if the company were willing to assume the expenditure, a cruiser should at once be placed at their disposal.

So that the failure, according to Bancroft, to protect Behring Sea, even against whalers, which is totally different from the question we are upon, was put upon the ground that the interest of the Company in it did not justify the expense that would be put upon them of fitting out the cruiser for the purpose.

Sir CHARLES RUSSELL.—In view of that statement Sir, I must ask leave to intervene.

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—There is a distinct statement by the Russian Foreign Office that they have no right to exclude foreign ships from that part of the great ocean which separates the eastern shore and Siberia from the western shore of America, or to make the payment of a sum of money a condition of allowing them to take whales.

Mr. PHELPS.—That is cited from Bancroft, I presume.

Sir CHARLES RUSSELL.—No, from the official papers.

Mr. PHELPS.—I understand that Bancroft the historian gives the additional facts as you will find in the Counter Case, page 25. It is part of the same declaration as that which my learned friend has alluded to. I should think myself that it was a very grave question, at least, whether the right of the whaler in navigating Behring Sea might not have been within what was conceded. I do not care to discuss that, because we have nothing to do with it. It may be so, or may not be so; I only meant by this allusion to show that on that extreme point—and it certainly would be extreme—the Russian Government had communications with the Russian American Company to which I have alluded.

Marquis VENOSTA.—Do you consider the book Teckmanieff a reliable document?

Mr. PHELPS.—That is a question that I am not able to answer. From the use that is made of it, I should think not, and from its exceeding facility for mistranslation, I should think not; but I really am not qualified and not sufficiently acquainted with the author or any other Russian literature to express an opinion on the subject. I notice that Professor Elliott refers frequently to him, and that the passages on which he depends generally turn out to have been mistranslated, and those are usually the circumstances under which the author makes his appearance in this case.

Marquis VENOSTA.—The book of Teckmanieff is an historical book, a printed book, but is not an official document and for that reason I have asked your opinion.

Mr. PHELPS.—That is an opinion I am not competent to express. The particular historian I was last alluding to is one cited on the other side—Bancroft, an American writer. There are two of those Russian writers—Teckmanieff, and Veniaminoff, and possibly I have confounded them in the observations I have made. If so, it arises from my own ignorance on that subject.

Mr. Justice HARLAN.—Teckmanieff is the man who wrote about the Russian American Company.

Mr. PHELPS.—Then this is what we claim and all we claim, and I have been drawn into saying more than I should have said on this subject in view of its relative importance to this case. We have attempted to establish—whether successfully or not—that the property interest which the United States Government has in this herd, which entitles it to protect it, derives a confirmation or a corroboration and a strength from a possession and an assertion on the part of Russia that was absolutely unbroken, so far as this seal industry was concerned, from the earliest discovery down to the present time.

Therefore, if you will permit me to read again what we have expressed in the United States Argument, at page 40, as the answers which we should respectfully submit should be made to the questions in the Treaty on this subject, I shall trouble you no further in respect

to it, except merely to commend to your recollection what is said on this subject of possession in the United States Counter Case, from page 24 where I was reading, and for several pages further:

The first four questions submitted to the Tribunal by the Treaty should, in the opinion of the undersigned, be answered as follows.

First. Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Behring Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1821,

(and it might have been said a period earlier than that),

Assert and enforce an exclusive right in the "seal fisheries" in said sea, and also asserted and enforced the right to protect her industries in said "fisheries" and her exclusive interests in other industries established and maintained by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her trade with her colonial establishments upon said islands and shores, by establishing prohibitive regulations interdicting all foreign vessels, except in certain specified instances, from approaching said islands and shores nearer than 100 miles.

Second. The claims of Russia above mentioned as to the "seal fisheries" in Behring Sea were at all times, from the first assertion thereof by Russia down to the time of the cession to the United States, recognized and acquiesced in by Great Britain.

Third. "The body of water now known as Behring Sea was not included in the phrase 'Pacific Ocean', as used in the treaty of 1825, between Great Britain and Russia"; and after that treaty Russia continued to hold and to exercise exclusively a property right in the fur-seals resorting to the Pribilof Islands, and to the fur-sealing and other industries established by her on the shores and islands above mentioned, and to all trade with her colonial establishments on said shores and islands, with the further right of protecting, by the exercise of necessary and reasonable force over Behring Sea, the said seals, industries, and colonial trade from any invasion by citizens of other nations tending to the destruction or injury thereof.

That is what we claim as the fair result of the whole evidence in this case in respect to the only part of the old historic claim of Russia that has anything whatever to do with this conference. And unless you, Sir, or some member of the Tribunal have any further suggestion to make about the topics I have discussed to-day, I shall leave that subject here and finally. I shall be most happy, I need not say, to attempt to reply to any suggestions that may be made.

The PRESIDENT.—I think we shall be pleased if you will go on.

Mr. PHELPS.—Now, Sir, having considered the title, and the confirmation of the title, so far as it is to be derived from previous occupation, I come to the second principal proposition that is set forth on the part of Great Britain. The first that I have tried to discuss was that these animals are *feræ naturæ*, the second being, that the killing of the seals is an incident of the freedom of the sea. It has, as I have had occasion to observe, been very emphatically put forth by all my learned friends, and repeatedly, that this subject involved a question of the freedom of the sea, and that in conceding any right of property, or any right of protection against this destruction you are in danger of invading the freedom of the sea. My learned friends have been good enough to caution members of the Tribunal against taking any step that could possibly be regarded as having an effect upon a right which they seem to regard as better than other rights, and that is the freedom of the sea.

Now nobody at this day contests that general proposition, least of all a maritime nation of the interests and extent of the United States Government; but the question is, what is the freedom of the sea? Does the conduct that we seek to protect ourselves against come within it, or is it excluded from it? Of course it must be said as must

be said of all freedom and of all liberty, it has limits. As Mr. Blaine has said, freedom of the sea is not lawlessness; it is not everything that can be done there: it stops somewhere, as all freedom stops. The liberty that is under the law is all the liberty that has ever proved beneficial to the human race,—whether all the liberty that is under the law has proved a blessing or not may be another question. What then is its history? Whence comes this idea of the freedom of the sea? When and where did it begin, how far did it ever extend, and where does it stop? Those are the questions that are involved in this discussion, very directly and immediately. I need not remind any person conversant with the history of maritime law, that the time is not very distant, historically speaking, when the idea of the freedom of the sea, first promulgated by Grotius, found its way into the law of the world. Before that, the doctrine was that of *mare clausum*, that is to say, just as far as the interests of any maritime nation appeared to require that it should assume dominion and sovereignty over the sea, it did assume it and all the world acquiesced.

If it were 100 years back, the claim of Russia that was so modestly suggested by M. de Poletica in 1822, that all the conditions that attend a closed sea existed on the part of Behring Sea, so that Russia might, as he said, have advanced that claim, although she did not intend to do it—if we had been 100 years further back it would not have been too late, as international law then stood, for Russia to have asserted that claim. In 1824, a distinguished author, Mr. Chitty, published a book on that subject in which he maintained the doctrine of *mare clausum*.

Senator MORGAN.—That is the doctrine now as to the Dardanelles and the Bosphorus.

Mr. PHELPS.—Yes; it may have its exceptions.

Sir CHARLES RUSSELL.—What book of Mr. Chitty's is that?

Mr. PHELPS.—I will give you the reference. It is Chitty's Commercial Law, and it was published in 1824.

Sir CHARLES RUSSELL. It was the *Quatuor Maria*, I think.

Mr. PHELPS. I do not refer to it, because I do not propose to maintain that in 1824 this was the settled law of the world at all. Grotius was earlier than that, and the doctrine *mare liberum* had made considerable advances; but it was not too late in 1824 for a very respectable writer to put forth his book in which he maintained the doctrine of *mare clausum*, that wherever the interests of the nation, and, as he argued, the interests of the world required, sovereignty should be extended over it. I refer to that as an illustration.

Lord HANNEN.—Can you give the page of Chitty?

Mr. PHELPS.—No, I cannot here, because the whole book is devoted, or at least a large share of the book, to the maintenance of that doctrine in contradistinction to the views put forth by Grotius. I refer to it only as an illustration, not with the view of taking up the contention of Mr. Chitty one way or the other.

Senator MORGAN.—Is not that the doctrine to-day, as announced here with reference to the Fjords of Norway, and the Chesapeake Bay, and the mouth of the Delaware.

Mr. PHELPS.—I am coming to those illustrations when I consider what are the remnants left in the world. That is one of them. I want to see how far that old doctrine of *mare clausum* prevailed without dispute in the world till Grotius attacked it.

The PRESIDENT.—I think the word "dispute" is going rather far.

Mr. PHELPS.—Well, perhaps, the word "dispute" is a little too strong. It might have been questioned, but I think till Grotius'

Treatise was put forward it certainly could not have been said to have been overthrown. Sir Henry Maine in his lecture on International Law at pages 75 and 77, cited in the United States Argument, page 141, considers this subject historically, and perhaps I may be excused for reading a very few words.

The first branch of our enquiry brings us to what, at the birth of international law, was one of the most bitterly disputed of all questions, the question of *mare clausum* and *mare liberum*—sea under the dominion of a particular power, or sea open to all—names identified with the great reputations of Grotius and Selden. In all probability the question would not have arisen but for the dictum of the institutional Roman writers that the sea was by nature common property. And the moot point was whether there was anything in nature, whatever that word might have meant, which either pointed to the community of sea or of rivers: and also what did history show to have been the actual practice of mankind, and whether it pointed in any definite way to a general sense of mankind on the subject. We do not know exactly what was in the mind of a Roman lawyer when he spoke of nature. Nor is it easy for us to form even a speculative opinion as to what can have been the actual condition of the sea in those primitive ages, somehow associated with the conception of nature. The slender evidence before us seems to suggest that the sea at first was common only in the sense of being universally open to depredation.

Whatever jurisdiction may have been asserted, probably did not spring from anything which may be called nature, but was perhaps a security against piracy. At all events, this is certain, that the earliest development of maritime law seems to have consisted in a movement from *mare liberum*, whatever that may have meant, to *mare clausum*—from navigation in waters over which nobody claimed authority, to waters under the control of a separate sovereign. The closing of seas meant delivery from violent depredation at the cost or by the exertion of some power or powers stronger than the rest. No doubt sovereignty over water began as a benefit to all navigators, and it ended in taking the form of protection.

And he cites, as you will find in a note on the same page, from Mr. Hall in his Treatise on International Law, which was an English treatise to a similar effect.

Sir Henry points out there that *mare clausum* was not the beginning of what may be called the law of the sea, if you dignify it with that name. It was preceded by *mare liberum*; it was preceded, before international law could be said to have had its birth, by a freedom of the sea, which is just what is contended for in this case,—a freedom for universal depredation; a freedom that had no limit; a freedom from which property was not safe and life was not safe. That was the early idea of the freedom of the sea; the doctrine of *mare clausum*, as these authors point out, very clearly came from the necessity of protection; and the world acquiesced in the adjacent maritime nation stretching its hand out over the waters of the sea and assuming a sovereignty over the sea as it did over the shore, because it was necessary to human protection. That is where the original doctrine of *mare clausum* comes from. It comes from necessity of protection against a form of freedom of the sea which was lawlessness.

When civilisation and commerce and the rudiments of international law had so far advanced that the assumption of such a sovereignty by a maritime nation was no longer necessary, and, could no longer be justified; when it was no longer necessary for Great Britain to assert a sovereignty over the Channel for the protection either of itself or of the world; or for Italy to extend a sovereignty over the Adriatic, or Denmark over the Baltic, then the new theory comes in; that is, the doctrine set forth by Grotius of a free sea, and that gradually came to be accomplished; and what is material, as I have said, is to find how far the nations then surrendered their sovereignty over the sea. They did surrender it to a large extent, unquestionably; they did give way to the advancing idea of the freedom of the sea. How far did they go?

Did they throw the sea open to consequences that were detrimental to themselves; or did they retain, have they always retained, and is the whole law of the sea based upon the principle of retaining in the maritime nation, all that is necessary to the protection of its rights?

Senator MORGAN.—Now, Mr. Phelps, if you will allow me, I wish to ask your opinion about this; whether, in throwing open a sea (as you have just described), it was thrown open to individuals operating upon their private account and without the authority of the flag, or the license of any nation; or was it thrown open to the sovereign nations of the world?

Mr. PHELPS.—That is a point I shall try to address myself to, Sir.

Now, let me state the proposition that I venture respectfully to assert with some confidence, as being the result of the whole law of the sea as it exists to day, and of all the application to human affairs it ever has had:—That the nations that formerly controlled the sea never surrendered the right of self-protection which extended to all their interests that were valuable enough to be protected, whether in peace or in war, whether industry, or commerce, or trade, and that the time never has been when an individual (which may perhaps meet the point of your question which you have just put)—the time has never been and the illustration is not to be found in any rule of law, when an individual could engage in any pursuit, for the purpose of gain on the high seas, that worked a serious injury to the interests of a maritime nation, even though the pursuit in itself and of itself, if it had not had such consequences, might have been unobjectionable; even if it is the pursuit of something on the sea from which a gain is to be realised, and which in and of itself does no harm. If the consequence of that is the serious injury or affection of a national interest, that nation never has surrendered the right to protect itself against that consequence, and for that business the sea is not free.

Then I go further; I have spoken of innocent occupation. If the thing that is sought to be done upon the sea is in itself wrong; inhuman, barbarous, immoral; if it violates those general principles of law that are enforced in all civilization; if its tendency is not merely to injure the interests of the nation, but to injure the interests of mankind, as in this case, by the extermination from the earth of a valuable animal; then that of itself renders such conduct unjustifiable, and any nation who is affected by it may resist it. No nation can constitute itself the censor of the morals of the world. No nation can go out upon the high seas upon the errand of enforcing the general laws of humanity, because it is not invested with that paramount authority over other nations; but the moment that conduct touches the interest of the nation—the moment it becomes, so to speak, the business of that nation to resist it; at such moment it can resist it. I shall try to make myself clear on this initial point, and I shall not have to refer to it again, that the proposition I venture to suggest in respect to the limit of the freedom of the sea rests upon two branches, each of which, standing alone would be sufficient, and both of which in this case concur. I say in the first place that a pursuit that is innocent of itself, but does have destructive or gravely injurious effects upon the interests of a maritime nation, may be prevented. I say, in the next place that instead of being innocent and unobjectionable, and something that nobody but the nation affected could object to—if it goes beyond that, and is indefensible in its moral character, in its humanity, and is destructive of the interests of the world, as well as of the interests of the nation, and violates those principles which all nations, as far as

their municipal jurisdiction extends, have adopted, it may be protested against and be defended.

Now, having given some reflection to this subject, and having tried to instruct myself by a reference to everything I could find of an authoritative character on the subject of international law, I venture to say that there is not a maritime right, there is not a single feature in what we may call the law of the sea, that does not come back and refer itself, and be seen to be founded upon this proposition. And that this loose talk that has prevailed—and, of course, I am not alluding to my learned friends in this observation—the loose talk that you find pervading the deliverances of a very different and much less instructed class of men, who begin to enlighten the world before they have found out the necessity of enlightening themselves,—this loose talk about the freedom of the sea that has been generated in newspapers, and in such sources of knowledge, the idea that the moment you get upon the sea you are exempt from all human law, except in some few special particulars that have become the subjects of special adjustment, and that unless you run against some such arbitrary rule which may have good grounds to stand on, or may not, but has become established, the freedom of the sea is a universal and unlimited thing, is utterly mistaken and destitute of foundation.

I say, on the other hand, the freedom of the sea—to state the converse of my proposition is to say the same thing over again in different words—is the right to do upon it every thing that is inoffensive and right in itself, and which works no injury to any maritime nation; no injury to anybody else; that it stops there, and that all these cases which my learned friends were struggling with, all the supposed cases to which we invited their consideration, of whether this may be done, or whether that may be done, or whether the other may be done, and in which they were struggling to find some particular answer to each case, or to find some escape from the necessity of answering the question by saying, "that question is not likely to arise", or "that might be settled by agreement", all of them are immediately answered when you bring them to that plain test: Is the conduct inoffensive, or is it injurious? May I be pardoned for alluding quite briefly, I hope, because I shall only read enough to state the point, to the judgment of judges, and writings of men whose authority is not questioned. Mr. Justice Story says in the case of the *Marianna Flora*, in the 11th Wheaton, Supreme Court Reports:

> Every ship sails there

that is, in the open sea: the context shows what he meant

> with the unquestionable right of pursuing her own lawful business without interruption, but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is *sic utere tuo ut alienum non lædas.*

Then Chancellor Kent says on page 27 of the 1st. Volume of his Commentaries.

> Every vessel in time of peace has a right to consult its own safety and convenience, and to pursue its own course and business without being disturbed, *when it does not violate the rights of others.*

Mr. Justice Amphlett says in the case of the *Queen* v. *Keyn* in the 2nd Exchequer which has been so often referred to in the course of this discussion:

> The freedom of the high seas for the inoffensive navigation of all nations is firmly Established.

Reading from the note on page 142 there is a passage cited from Grotius, the great authority on the freedom of the sea.

It is certain that he who would take possession of the sea by occupation could not prevent a *peaceful and innocent navigation*, since such a transit cannot be interdicted even on land, though ordinarily it would be less necessary and more dangerous.

Then the note at the bottom of page 142; Mr. Twiss in section 172 and 185 of his International Law says:

But this is not the case with the open sea upon which all persons may navigate without the least prejudice to any nation whatever, and without exposing any nation thereby to danger. It would *thus seem* that there is no natural warrant for any nation to seek to take possession of the open sea, or even to restrict the innocent use of it by other nations. * * * The right of fishing in the open sea or main ocean is common to all nations on the same principle which sanctions a common right of navigation, viz, *that he who fishes in the open sea does no injury to any one, and the products of the sea are, in this respect, inexhaustible and sufficient for all.*

The right of self defence and the right of jurisdiction have been referred to—they have no connection with each other—almost no relation with each other. Jurisdiction is sovereignty and is confined to territory—Self-defence is not confined except by the necessity and propriety of the case, and has nothing at all to do with jurisdiction.

Then to meet the exact point that Senator Morgan has just suggested. Besides the three-mile limit there is another extent of jurisdiction such as he referred to in the Fjords of Norway, the large bays where the headlands were more than 10 miles apart and embrace more water than the three mile limit or cannon-shot limit from the shore would cover, there the same principle has extended further and Chancellor Kent expresses it so well that I will read a few words from page 147 of the Argument which are quoted from pages 30 and 31 of his first Commentaries.

Considering, he says, the great extent of the line of the American Coasts we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts though included within lines stretching from quite distant headlands as for instance from Cape Ann to Cape Cod, and from Nantucket to Montauk Point and from that point to the capes of the Delaware and from the south cape of Florida to the Mississippi.

That is the point. That is an extent of jurisdiction beyond the cannon-shot line, beyond the three-mile line, and it results from exactly the same necessity. Chancellor Kent says that the necessity of exercising a control over waters to that extent is a general necessity; so that, instead of going out when the occasion requires to do the thing that the occasion requires, you extend the general jurisdiction.

The PRESIDENT.—Does the Government of the United States claim to extend the jurisdiction as propounded by Chancellor Kent?

Mr. PHELPS.—Yes.

Lord HANNEN.—In what way has it been claimed except otherwise than on the very high authority of Chancellor Kent?

Mr. PHELPS.—Practically.

Senator MORGAN.—It has never been disputed by any nation that I know of.

Mr. PHELPS.—I do not know of any question having arisen. The Bay of Fundy, I think, stands on the same ground.

Lord HANNEN.—But there it was not allowed. That question came before a tribunal before which I acted as advocate as you are doing now, and there it was decided against us by the umpire.

Mr. PHELPS.—I quite defer to your Lordship's better information, but I had the impression arising out of what had transpired in these

Fishery disputes that the right of Great Britain to extend jurisdiction over the Bay of Fundy as coming within its headlands had been asserted. I may be wrong.

Lord HANNEN.—It was asserted by Great Britain but overruled.

Senator MORGAN.—I understood it was overruled upon the ground that there was an American island in that Bay.

Mr. PHELPS.—I presume, if your Lordship had been umpire instead of Counsel, it would not have been overruled.

Lord HANNEN.—That is a left handed compliment.

Mr. PHELPS.—It is by no means so intended, my Lord. I mean only to say, if the Tribunal had had the advantage of your Lordship's judgment on that point they would have come to a different conclusion. This is aside: it is a mere illustration of what I was saying.

Sir Henry Maine speaks of the English rule, and he states it more perspicuously than I do. In the note at page 147 of the American argument will be found a quotation from Sir Henry Maine. He is speaking of these survivals. The whole chapter is on this subject. It is the last book our lamented friend ever wrote—he says on page 80:

Another survival of larger pretensions

that is to say, another survival of the old *mare clausum* idea which he is discussing,

is the English claim to exclusive authority over what were called the King's Chambers. These are portions of the sea cut off by lines drawn from one promontory of our coast to another as from Lands End to Milford Haven. The claim has been followed in America, and a jurisdiction of the like kind is asserted by the United States over Delaware Bay and other estuaries which enter into portions of their territory.

If all this was wrong and the jurisdiction did not survive, that does not affect my argument. I only use it as an illustration. Now to pursue the observation that I made before, this idea will be found to enter into the whole of the law of the sea wherever you touch it. It is the basis of every general restriction that is settled, and laid up among the maxims of international law.

Take, for instance, the subject of piracy. My learned friend, Sir Richard Webster, fell into the error, and unintentionally did me the injustice of supposing that my allusion to that subject was with a view of drawing a parallel between killing the seals and piracy. The parallel that exists between them every man may draw for himself; that was not my purpose. I allude to that principle in the law of nations which finds expression in giving jurisdiction to any nation to try a pirate and execute him. Now a man accused of a crime, even of piracy, has his well known rights. He is not guilty till he is found to be guilty. He is presumed innocent. And every man accused of a crime, where the common law prevails at least, has certain rights as well. He has a right to be tried in the district where the crime was committed, or if committed on a ship on the high seas to be tried in the country to which that ship belongs; so that if a man is charged with committing a murder on the high seas, which is all that can be said of him until he is convicted, he has a right to be tried in the jurisdiction of the country to which that ship appertains and forms a part, just as when committed on the shore he has the common law right to be tried in the district where the crime was committed, and nowhere else.

Why is that taken away in the case of piracy? In the case of murder, of robbery at sea, which is what piracy really is,—why may a man be taken into any port if the country chooses to exercise the jurisdiction, and be tried and condemned and executed? Simply because the

protection of nations requires it; simply because in the days when piracy was more frequent than it ever can be again owing to the improvements in navigation, it was necessary to the protection of the world and of maritime nations, whose ships were afloat upon the sea, that they should not be required to wait for the slow and possibly the reluctant process of the nation from whom the pirate came, to proceed and enforce it.

The same rule prevails about carrying a flag. What is the reason, pray, why I may not put to sea in a vessel of my own upon some honest and innocent pursuit without carrying the flag of my country or any other?

Senator MORGAN.—May you not?

Mr. PHELPS.—No; I may not. I understand it to be settled law that a vessel may be overhauled by the armed vessel of another nation unless it carries some known flag.

Senator MORGAN.—Overhauled by the armed vessel of any nation?

Mr. PHELPS.—Yes, unless it carries some known flag and hails from some known port.

Mr. Justice HARLAN.—Will you state the proposition again?

Mr. PHELPS.—That a vessel is required, or may be required, on the high sea, to sail under the flag of some nation which she is authorized to carry.

The PRESIDENT.—If there is a *proper* flag. It must be under the flag of its nation.

Mr. PHELPS.—Yes—so that she "hails", as the seamen say, from somewhere.

Lord HANNEN.—I think the Senator's doubt was one that passed across my mind—whether it was obligatory literally to carry a flag, which means a flag of some nation.

Mr. PHELPS.—I used the word "flag" figuratively. I mean to say it must be registered—legally set forth. When I say "carry" a flag, of course I do not mean that she would never be found at sea without a flag flying.

Senator MORGAN.—It must have a license.

Mr. PHELPS.—It must have a license—it must have a home—it must have papers.

The PRESIDENT.—Covered by the flag of the nation.

Mr. PHELPS.—Yes, having a nationality.

Senator MORGAN.—That is very different from the right of a man to go on the King's highway even in a foreign country.

Mr. PHELPS.—Then there is the other idea we have encountered before, which I only allude to now: A vessel may be pursued on the high sea for breaking a municipal regulation. That has become settled by many judicial decisions. It must be undoubtedly *fresh* pursuit, but a vessel that goes into the jurisdiction of a municipal regulation, and infringes it and takes to flight, may be pursued and arrested on the high sea. Those are specimens of what I may call the *general* restrictions of this 3 mile limit, the jurisdiction exercised over estuaries, bays, fjords and waters of that sort—the requirements of registering and nationality—the laws that apply to pirates.—Every one of the general restrictions that, irrespective of the requirements of a particular nation or a particular case, vessels are subject to on the high seas, are traceable to that. They come back to that. Those are some of the limits to the freedom of the sea, which have never been surrendered.

Then when we come to special laws, like those that have been indicated before—the Hovering laws of Great Britain and of the United

States by which vessels may be arrested outside of the three-mile line under certain circumstances—the French laws to the same effect—the quarantine laws—all that class of cases in which you find a statute stretching out beyond even the three-mile line and reaching a vessel on the open sea, where the sovereignty of the nation cannot reach, where even the qualified sovereignty that attends on the littoral sea cannot reach, come back to the same thing, the necessity of the special provision, the anticipatory provision in the particular case. Without now coming at all to the question of the special individual case, I am speaking of special restrictions which some nations enforce over some part of the high sea for certain purposes. All this class of enactments is perfectly reconcilable when attributed to the proper source; and the apparent puzzle that is sometimes set forth is answered: "How can you extend a statute to a distance of 12 miles from the French Coast or from the British Coast or from the United States Coast?" You can do it because a reasonable necessity of a certain class of cases—quarantine, revenue or whatever it may be—requires it; and the moment that takes place the assertion is made, and is accepted and acquiesced in everywhere. We find no contradiction of it.

Take the time of war. Belligerent rights mean nothing except the rights a nation has in time of war. With its enemy law is suspended; but with neutral nations not engaged in the war it acquires no additional rights of self-defence. It may acquire additional necessities; it does acquire certain necessities that do not exist in time of peace. Therefore a set of Regulations has grown up, and come to be settled so that they are no longer open to dispute, on the subject of the rights of a nation which happens to be at war, as against neutrals.

Take the familiar illustration about which there is no question: The breach of blockades. A nation blockades the port of its enemy. The citizens of another country are engaged in a legitimate trade with that port. To break up that trade may ruin the parties engaged in it,—parties whose all may be embarked in it.

What is the propriety of ruining that neutral in an innocent business the war finds him engaged in? It is exactly this idea, and it has been so stated by the writers on the subject—it has been placed on that very ground—that the right of the individual, although the thing that he is doing is proper enough in itself, must give way when it comes into collision with the interest of the nation which is carrying on war of which the blockade is one of the means. Perhaps before we adjourn, Sir, I may refer on that, and the analogous Regulations, to the reasons that are given by writers of authority, for such law as that. Mr. Manning (on page 162 of the American Argument and 252 of his book), states this principle:

> The greatest liberty which law should allow in civil government, is the power of doing everything that does not injure any other person, and the greatest liberty which justice among nations demands, is that every state may do anything that does not injure another state with which it is at amity. The freedom of commerce and the rights of war, both undoubted as long as no injustice results from them, become questionable as soon as their exercise is grievously injurious to any independent state, but the great difference of the interest concerned makes the trivial nature of the restriction that can justly be placed upon neutrals appear inconsiderable, when balanced against the magnitude of the national enterprises which unrestricted neutral trade might compromise. That some interference is justifiable will be obvious on the consideration that if a neutral had the power of unrestricted commerce, he might carry to a port blockaded and on the point of surrendering, provisions which should enable it to hold out and so change the whole issue of a war; and thus the vital interests of a nation might be sacrificed to augment the riches of a single individual.

Grotius, referring to the same right to trading in articles not usually contraband, says:

For, if I cannot defend myself without seizing articles of this nature which are being sent to my enemy, necessity gives me the right to seize them, as we have already explained elsewhere, under the obligation of restoring them unless there be some other reason supervening to prevent me.

That is while engaged in a trade which is proper enough in itself except that it supplies an enemy.

Mr. Wheaton, commenting upon this opinion of Grotius, points out that it is placed by that author entirely upon the ground of the right of self-defense, under the necessities of a particular case; that Grotius does not claim that the transportation of such property is illegal in itself, or exposes the vessel carrying it to capture; but that necessity nevertheless justifies in the case in which it actually arises, the seizure of the vessel as a measure of self-defense. And he shows by further reference that it was the opinion of Grotius that a necessity of that sort exempts a case from all general rules.

Mr. Manning, the author I cited before, at page 263 of his book, thus defines the rights of belligerents as against neutral commerce.

It consists merely in preventing vessels from interfering with the rights of belligerents, and seeking their own emolument at the direct expense of one party in the contest.

And Azuni (I am reading from the same page, p. 163 of the American Argument, where the reference to the page is given), says:

The truth of this theory (right of neutral trade) does not, however, deprive belligerents of the right of stopping the commerce of neutrals with the enemy when they deem it necessary for their own defense.

All those cases—the right to prohibit a vessel entering a port—the right to prohibit a vessel carrying what is called contraband of war—although that may be the subject of a pre-existing, regular, established, and proper trade—the right to prohibit vessels from carrying passengers if they are connected with the forces of belligerent, or carrying despatches—all that interference on the sea, in cases of war rights, with the plain and obvious rights of individuals, is reposed upon the idea that the right of the individual must give way, although what he is doing is not otherwise objectionable, when the consequence of it is to work an injury to the important interest of a maritime nation, that is, a nation able to protect itself upon the sea. These rights stand upon nothing else, and as I have said, while these illustrations apply to the time of war, (and I shall cite others that apply to the time of peace) it is only the difference in the necessity which the war creates, because the neutrals not parties to the war are in no way concerned with its relations.

Perhaps, Sir, you will permit me to cite the other illustrations tomorrow morning.

The PRESIDENT.—If you please.

[The tribunal adjourned accordingly till Wednesday the 5th July, at 11.30.]

FIFTIETH DAY, JULY 5TH, 1893.

Mr. PHELPS.—I was discussing yesterday, Sir, as you will remember, the general question of the extent of the freedom of the sea. I was endeavouring to point out that, in the progress of this subject from the days when *mare clausum* was the law of nations, to the time when the opposite doctrine prevails, restrictions had been made and preserved and universally recognized on that freedom which constitute its present limits; that it has limits, that it must have limits, will be universally conceded; the question is what are they and whence are they derived? I had stated this proposition, not as necessary to this case, because, as I shall proceed to show in the application of the law to the facts of this case, it is not necessary to go to any such length. I had stated it, because it appears to me to be the foundation of the true rule on the subject. That is, that the exact converse of the rule that obtains in municipal law is applicable in international concerns to questions between individuals and nations,—not between the individuals of one nation and the individuals of another, but between individuals and nations.

It is a familiar rule, that if a man is in the exercise of a legal right, no matter what he is doing, the consequences of his conduct to any other persons constitute no legal objection to the exercise of his right. The consequence may be destructive to others, but they have no legal right to complain, whatever moral grounds they may have for remonstrance. I claim the law to be the other way when the question arises between the individual pursuing on the high seas some object of his own, for gain, when the consequence becomes gravely injurious, not to say destructive, to some important national interest of a nation bordering upon the sea. That is the proposition. I have endeavoured to illustrate it as lying at the bottom of all these well-ascertained rules that apply in peace and in war,—one set that apply to the rights of belligerents, which do not, of course, arise in time of peace; another set which apply to cases that occur in times of peace; and to point out how many forms it seems to take in the reservation of territorial seas, in the operation of general statutes that apply all along the coast, in the operation of special statutes that apply to special cases, coming down to those occasions of the exercise of actual force which becomes necessary on the spur of the moment, and are not preceded by any previous exigency.

I have alluded to most of the belligerent rights that I care to refer to. But there is one which has been made the subject of so much observation on the other side, that while it has nothing to do with this case, except as an illustration of the argument, I want to refer to it very briefly, and that is, the right of search.

In this case we have nothing whatever to do with the right to search. If it was exercised in the case of these cruisers, it was exercised years ago, and that is a subject that may remain to be discussed between the two nations, but is not referred here. That is one of the belligerent

rights, and it is said, and said upon excellent authority frequently, that the right of search is confined to a time of war. It is remarked by Mr. Justice Story in one of the cases that have been referred to; it is remarked by other writers and judges which have been cited in the course of this discussion that the right of search is a war right.

The PRESIDENT.—Except where it is conceded by special convention.

Mr. PHELPS.—Yes, where it is exercised as a right independent of Treaty. Why is it a war right? Is the right of self-defence against neutrals any greater in time of war than in time of peace? Nobody could claim that. It is a war right because the necessity for it principally arises in time of war, because the cases are very rare indeed when in time of peace it can be regarded as necessary or reasonable to overhaul the vessel of a friendly nation and subject it to a search.

But suppose it became necessary, is there any principle upon which it can be denied in time of peace if you establish the necessity? In point of fact it has been affirmed and has been conceded by very high authority in time of peace but under another name. In a remarkable instance that is referred to in the United States Argument, where the discussion arose between Lord Aberdeen, who was then Minister of Foreign Affairs, and Mr. Webster, who was the Secretary of State of the United States—a certain right of visitation was asserted by Great Britain in time of peace, enough to answer the necessity of the case, and it was objected to by the United States. "Why", says Lord Aberdeen, "this is not the right of search. We are not claiming the right of search. We are claiming the right of visitation." If he was defining the term according to its technical meaning, as recognized by Courts of Justice in maritime cases, he was right. The right of search goes further. He pointed out that it was only the right which was made necessary in time of peace, and did not amount to the right of search. Mr. Webster, on the other hand was obliged to concede—he was the last man that could successfully argue the wrong side of a question, and one of the last men that had any disposition to do it—he was compelled to concede to Lord Aberdeen that to that extent the right existed, but he says it is after all the right of search; and in that he also was right. You are only modifying, reducing, the extent of the exercise of this right, because the extent of it is so much less in time of peace than in time of war. I read from page 162 of our Argument where the extracts are; the whole of it is here. This is taken from Mr. Webster's works. My friends, I believe, have referred to the same correspondence from the British official sources. Lord Aberdeen says:

> That it—
>
> (that is the British Government)
>
> still maintains, and would exercise when necessary its own right to ascertain the genuineness of any flag which a suspected vessel might bear: that if in the exercise of this right, either from involuntary error or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded, but that it should entertain for a single instant the notion of abandoning the right itself would be quite impossible.

That is the position of Great Britain in regard to the right of visitation in time of peace—enough, at least, to ascertain the true nationality of the vessel.

Mr. Webster denies that right in that case upon the ground that it is not necessary, but what does he say about the general rule?

That there is no right to visit in time of peace except in the execution of revenue laws or other municipal regulations, in which cases the right is usually exercised near the coast or within the marine league, or where the vessel is justly suspected of violating the law of nations by piratical aggression; but wherever exercised, it is a right of search.

And that is where the question was left. That is the kernel of that whole discussion, extracted from despatches that are voluminous and will be interesting to be read by anybody who desires to pursue this subject further than it is at all necessary for me to pursue it. Lord Aberdeen says: We do not claim the right of search in time of peace, but we do claim the right of visitation and going on board and searching for the necessary facts. In other words, we only claim in time of peace the right of going as far as is necessary. Mr. Webster replies: While you have not that right in this case, I admit that in time of peace, you may visit when it is necessary, when there is a revenue law or any aggression of regulations; that is generally exercised near the shore; but it is a right of search wherever it is exercised.

He was far too clear in his legal principles not to see that the moment you set foot upon the vessel of the other nation in the exercise of a claim of right that was a right of search, and that the definition of the term was not to be limited by the enquiry whether you search the deck, or the cabin, or the hold; that to board it at all for the purpose of ascertaining facts was a right of search—a limited right, of course, but limited by the necessity of the case.

The case of the Trent has been alluded to in this connexion, and I pass rapidly over these illustrations. There was a discussion between Great Britain and the United States arising out of the taking by a naval vessel of the United States of the ambassadors of the Confederate States who were on their way to a European country out of a British vessel. That vessel was overhauled, and they were taken out. Great Britain demanded that they should be released; and a discussion took place. How did that come out? I have no time to wade through it; it is not useful. The precedent arises from what was conceded, not from what was claimed on one side or the other. Mr. Seward gave up those men, upon the ground that if the United States had a right to intercept them at all, it must, according to the established usage of nations, have captured the vessel. That if the vessel was engaged in such conveyance of contraband of war as the United States had a right to object to, the rule on that subject had become settled and established in international law, and the only way was to capture the vessel. Of course, if the occasion was not one that the United States had a right to object to, then she could not interfere at all, and on that ground you will find, if you pursue that somewhat interesting correspondence, the men were given up. But a point that was mad and discussed then remains unsettled. It was asserted on the one side and denied on the other, and there was no concession, and there was no settlement, and that was whether ambassadors come within the rule that excludes a neutral vessel from conveying the military and naval officers of one belligerent. It is quite well settled that a vessel exposes itself to capture if it is made the means of transporting military or naval officers for any State. Now it was said on the part of the United States, this is equally within the spirit of the rule. Those ambassadors, though not officers, either military or naval, were on their way across the sea to negotiate an alliance or a recognition of the war. Their business was directly in aid of the rebellion, and, if it succeeded,

might turn the scale and make the rebellion succeed. That was Mr. Seward's argument. It was said on the other hand, that the rule has never been extended to civilians; that it stops at military and naval officers, and if you go away from that, you get into such secondary and indirect consequences that there is no possible limit to the cases that can be cited where a vessel is carrying passengers that are really in aid of the war. But the controversy came to an end when Mr. Seward conceded that if he was right in classing ambassadors with military and naval officers and bringing them within the operation of established rules, then he should have seized the vessel. Therefore, in no event, could he board the vessel and take certain persons out of it.

The PRESIDENT.—It must be judged and go to a Prize Court.

Mr. PHELPS.—Yes: if he seizes the vessel and brings it in, then the parties have a right to be heard and they are to be heard upon the truth of the assertion. They may show if they please, that the men were not ambassadors, but ordinary passengers, or whatever the fact was, but if you board the vessel and take the men out there is no judicial proceeding. And that is the point on which the Supreme Court of the United States divided in the case of *Rose* v. *Himely*, where a capture was made by a French cruiser of a vessel she was entitled to capture, but it was not carried into port. The majority of the Court thought the capture could not be sustained, but Justice Johnson thought otherwise. The case of the United States as presented by Mr. Seward comes still further within the principles of the objection to the capture in the case of *Rose* v. *Himely*. That is all there was in the "Trent" case.

We have stated many other instances in the argument: I need not go over them: I am sure the Tribunal have read what we have undertaken to say on that subject; and if they have, they do not require it to be repeated. Take the case of St. Helena, where Great Britain prohibited vessels from coming within 12 leagues; quite outside the territorial waters—virtually excluded them from coming there at all. Suppose a neutral vessel, not a French or a British vessel, but an American vessel, engaged in the transportation of passengers on the high seas, no war then existing, because the war was over with the final surrender of Napoleon. What is to hinder a vessel on the high seas, away from territorial waters, from carrying a passenger for hire? It is a perfectly legitimate and lawful business. Why was it prohibited? Now into the necessity of that prohibition, or the propriety of it upon the facts, I do not enter. That is a question that it is unnecessary to revive at this date. Whether the Emperor should have been imprisoned, or whether he should have been retained there, or whether any of these measures were necessary and proper on the facts of the case, are questions of fact; but supposing that we concede the premises which the British Government asserted—suppose it was true that the necessity of their self-defence required this measure, then what is to be said of it as matter of law? Can anybody challenge it? I could go on referring to cases of that sort, and referring to supposed cases; an eminent writer has well remarked, in a passage cited here, that where cases may be supposed, there cases may exist; that which may be fairly and reasonably supposed may come to pass. I respectfully invite any lawyer, any publicist, who desires to occupy his mind with the consideration of this question, to set his imagination at work, and see if he can state any case, in which the pursuit, for profit or gain by an individual, of some purpose or business, upon the high sea, comes in con-

tact to a gravely injurious extent with an important national interest, in which that nation has not the right to protect itself; whether there is any case in which the right of the individual, which would otherwise be inoffensive and unobjectionable, must not give way; whether it is in time of peace or in time of war; whether it applies to one national interest or another; whether it is an industry, a commerce or a trade; wherever it is any interest that can be dignified with the name of a national interest important to be maintained, and which is injuriously assailed.

What was the history of all the warfare between England and the continental countries which figures so prominently in the diplomatic and general history of the world of those days, the early years of this century? When this was incidentally alluded to, the President remarked that it did not begin on the side of France or Napoleon; it began with Prussia. It was Prussia, in the first place, in the year 1806, that put forth a decree closing ports of that country on the North Sea and the rivers to English shipping, a nation with which they were at peace. I do not discuss the necessity or the propriety of that at all; I should be inclined to conclude at this day that there was no justification for it. By way of retaliation, the British Government gave notice that they established a sort of paper blockade from the Elbe to Brest, where they had no force, with certain restrictions that I need not go into. That was their response. Then Napoleon came out with his Berlin Decree, and declared the British Islands to be under blockade and commerce with them as well.

Mr. Justice HARLAN.—Where do you refer to for that?

Mr. PHELPS.—I was referring to Woolsey's International Law for the convenience of the dates, at page 352. There is a very clear statement of the history. Then in 1807 came the Orders in Council from Great Britain declaring that no vessel should be permitted to sail from one port to another (I am now quoting from the Order) both of which ports should belong to, or be in the possession of France or her Allies or be so far under their control that British vessels might not trade. A second Order in Council declared that all the ports of France, her Allies and Colonies, and also States at peace with Great Britain, and yet excluding her flag, should be under the same restriction as to peace and commerce as if blockaded by British forces. It was an assertion by those nations of the right to extend the principle of blockade far beyond any limit it had ever reached before. Instead of confining it, as established rules confine it, to those ports which are blockaded by the presence of an effectual force, they assumed the right to declare a blockade on paper as against neutrals. What was done against their adversaries, has nothing to do with these questions; they are simply acts of war. As against neutrals, they excluded from ports not blockaded honest, legitimate commerce. Here, again, I shall not occupy myself at all with the discussion of the necessity of those things on the part of any of those countries,—on the part of Prussia, in the first place, on the part of England in the second place, on the part of France in the third place, and, finally, of the United States who were drawn into it by the embargo they established, and the bitterness that came from that was only quenched in the War of 1812. The principle was, and that great lawyer, Lord Stowell, affirms it in the clearest manner, that all those things, extreme as they were, were within the right of the nation, *if the necessity of the case required it.* We have cited some of these cases. It is always agreeable to refer to the language of so great a lawyer as Lord Stowell on any subject, and, granting him his

premises of fact, the law that he laid down is not to be doubted and never has been doubted. There is not a case to be found that I know of, there is not a writer to be found, with whose writings I am familiar, that ever undertook to say that Lord Stowell was wrong. Many have been found to say that the facts did not give rise to the necessity that was claimed; many have been found to criticise the action of these nations, but upon what ground? That they were wrong in their law? No; that they were wrong in their facts. This judgment of Lord Stowell, was on the condemnation of a vessel; it was not an abstract or *obiter* opinion; it was when a vessel of a neutral Power was captured on the high seas by British cruisers for attempting to carry on a legitimate and proper commerce with ports, where there was no blockading force, in violation of the paper blockade, that the question came up for Lord Stowell's decision. He says in the case of the "Success" in the 1st Dodsons' Report at page 133:

> The blockade thus imposed is certainly of a new and extended kind, but has arisen necessarily out of the extraordinary decrees issued by the ruler of France against the commerce of this country, and subsists, therefore, in the apprehension of the court at least, in perfect justice.

He did not say it was an act of war; it could not be an act of war; it was the seizing of a vessel of a nation with whom they were not at war—a neutral vessel.

In the case of "The Fox", in the 1st Edwards' Reports, page 314, he says:

> When the state, in consequence of gross outrages upon the laws of nations committed by its adversary, was compelled by a necessity which it laments, to resort to measures which it otherwise condemns, it pledged itself to the revocation of those measures as soon as the necessity ceases?

stating in the clearest manner the principle upon which they rest.

In the case of "The Snipe", which is also in Edward's Reports, he says, referring to these measures:

> In that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communication of independent states is usually governed.

That Judge had not made the discovery, for which we are indebted to my learned friend, that justice did not make international law in new cases between nations, but that you must find the previous sanction of the established usage of the world before you can execute the justice that lies plainly in your way. He proceeds upon the ground that in that absolutely new case, when the idea of blockade rights as against neutrals was carried far beyond any assertion that ever had been made before, if the necessity was such that the rules of natural justice made it right and made it applicable, then, it was within the principles of that international law, on which alone there could be a judgment of condemnation against neutral vessels not engaged in carrying contraband of war, but simply engaged in legitimate commerce with ports that were not blockaded.

Now, suppose a set of cases to which the attention of my learned friends has been invited; and the failure of the attempt of lawyers of the first rank from whom everything is to be expected that their side of the question admits of, to give an intelligent answer to these enquiries is a stronger argument in favour of the propositions we advanced than we can make. If they could be answered, surely no men in the world are better qualified to do it than my three learned friends who have addressed the Court.

I am sure the Tribunal could not have failed to observe, as we passed along through some of these historic instances, the various supposed cases that were made. We will go back to Mr. Blaine's illustration put forth in the correspondence. Here are the Newfoundland Fisheries belonging to Great Britain or its province, the source of a valuable industry, a great means of subsistence to its people, carried on for a very long time, and protected by the laws of that province. That they have any property in the fish, which does not attach to the shore, outside of the 3 mile line, they do not claim. None of the conditions upon which we have claimed the property in the seals attach to them.

Now suppose vessels go there, keeping outside the territorial waters, and proceed to destroy those fish by dynamite or other explosive processes by which they can be brought to the surface and availed of wholesale, and out of which a profit can be made, the necessary result of which is the destruction of the fishery, and extermination of the fish. We put the question: Is Great Britain remediless? Have they to submit to that destruction at the instance of a few fishermen from Cape Cod who can make a profit for a year or two in that way before the last fish disappears? What does my learned friend say to that? He says that would be malicious. He apparently feels that he touches bottom there. There is an element of malice. Well, let us see; I do not suppose the case where an expedition is fitted out to go there for the mere purpose of destroying the fishery. I suppose the case where the Nantucket fishermen can make a satisfactory profit out of the business for a year or two, and that is what they go there for. If, then, malice is the express intent to work an injury to a person for the sake of working an injury, it does not apply to that case. These men are there to make money, regardless of the destruction they are working.

Now, I agree with my learned friend that it would be malicious in the true definition of that term; not malicious because it is pure malice, but malicious because wanton, reckless destruction is always malicious, and it is not to be redeemed by the fact that a man can make a profit out of doing it. If I fire my gun out of the window into the street without taking any particular aim and destroy somebody's life, I am not to be heard to say, "I did not mean to kill that man; I had no quarrel with him." "Why then did you fire that gun out of the window?" "Because somebody told me he would give me £5 if I would. That is what I did it for. I had no wish to injure anybody. I could make a profit out of it." Does that exonerate me from that malice which to a certain extent must always exist to make a man criminally liable? It may not be murder, it may be modified to the degree of manslaughter, but that I should be criminally responsible for the act in some degree of the law of homicide is plain enough; it is not in the least modified by the gain.

Now in that case, my learned friends do not undertake to say that Great Britain has no right, that all she could do would be to go and invite the United States to enter into a treaty by which she would keep her people at home. They may not be subject to the jurisdiction of the United States. They may be wanderers of the sea, subject to no particular jurisdiction, like some of the bands of renegades that were broken up by President Monroe and another President in the cases we have cited. It is not piracy. As my learned friends well argue, it does not come within the definition of piracy, to destroy fish by dynamite. Is there then any right of defence or protection, or must the Government sit down and permit the fishery to be destroyed? Apply that to the business of quarantine. Quarantine laws are in force within the terri-

torial limits, and territorial limits are usually sufficient for the purpose. There is usually no necessity to go out on the high sea to intercept a vessel to enforce quarantine regulations. But suppose it became necessary: suppose a vessel coming from some plague-stricken port, laden with contagion which would ravage a whole continent, cannot be met effectually within the three-mile limit, and it is necessary to intercept her outside, is there any right to do it? Great Britain has asserted that right by statutes that are on her Statute Book yet, and which are mentioned with approbation by writers and Judges. Suppose the case of the cable to which my learned friend's attention was invited. Suppose two nations established a cable and there is a party who, by oyster-dredging or some industry at the bottom of the sea, that is well enough in itself, if it did not interrupt the operations of the cable, is interrupting its operations and is threatening its destruction, and the man says, "I am on the high seas; I am fishing. Fishing is a right on the high seas. If it interrupts your cable, I cannot help that. You must take care of yourself." Is there any remedy? My learned friend says, "Yes, you have a treaty. We have a treaty to prevent that very thing, showing that my illustration is not very far fetched. We anticipate that by a treaty". With whom? All the nations of the earth? No, that is practically impossible; if one nation is left out of the treaty, that one may go and engage in the very operations that endanger this cable. There is no obligation on the part of any nation to enter into any treaty unless she pleases. Suppose any country is invited by the United States to join in a convention for the protection of a cable between Newfoundland and Ireland, which is a Government work; the nation says, just as some of the countries replied to Mr. Bayard's invitation to join in a convention for the preservation of the seals, "There is no objection to it, but it does not interest us. We do not care to go into it". The only nations that responded to Mr. Bayard favorably were Russia, Japan, and Great Britain. All the rest said it did not matter, and put it aside; was a thing they had no interest in. Now suppose that nation refuses to enter into a convention, or suppose what is inevitable, that it is found impossible to extend it to every sea-going nation on the face of the earth, or suppose in this case, as I have supposed in the case of the dynamite, the parties engaged in the fishing are not under the special control of any nation, or are a parcel of renegades from various nations. The question is, has the Government a right to protect that valuable and important industry, or at the instance of this gang of adventurers, must it submit to have it destroyed. My learned friends have no answer to that, except to say, there is a treaty. It does not meet the point. The treaty does not show that there would be no rights if there were no treaty.

Suppose we have a light house out in the sea, more than three miles, and somebody engages in an industry, or pursuit that endangers the lighthouse, or perhaps entirely or largely obscures the light, so that the vessels of the country that established it are deprived of the benefit of the light,—what is my learned friend's answer to that? He says the lighthouse is a part of the territory of the country. But on what principle is a lighthouse part of the territory of the country 10 miles out at sea? Upon what principle has a nation a right, if they are correct in these theories, to put a light-house out there and say, "It is part of our territory?" Why none whatever. And even granting it is a part of the territory, suppose you say, "This structure we have erected at our own instance in a part of the sea which is the highway of nations and common to all the world is part of our territory"—

"Very well; we do not interfere with your territory; we carry on a legitimate industry"—"But you are obscuring the light and rendering the lighthouse in a great measure valueless." They reply; "We cannot help that; we are in the exercise of our right." And there is not one of these cases that my learned friend can answer, because each case, as it stares you in the face, shows the impossibility of establishing any principle of law that justifies a class of outrages of that description; much less can you cite any case in the history of the world in which anything of that nature ever was submitted to.

Now I have discussed, as I said in my opening observations this morning, this proposition of law on the basis of the theory that the objectionable business or industry was innocent in itself,—was fishing, was doing anything which in and of itself, if you could look at it aside from its consequences, could not be objected to upon moral, legal, or any grounds; and I have tried to show, and the more this proposition is reflected upon, the clearer it becomes to any mind I think that is capable of clear thought, that even there, where the question is between the individual and the nation, he must forego the small gain that he would make by the destruction of an important national interest.

But what is this case? It is a case where the pursuit, which is claimed as of right, exterminates the race of animals, as well as destroys the industry. So far as it destroys the industry, so far as that consequence alone is concerned, it would come within the proposition I have been dealing with. It might destroy the industry, but still be in other respects an innocent pursuit in itself. Then would come the question, whether the rule I have cited, is the true rule? But this case is nothing of the sort. It is the extermination off the world of a valuable race of animals, the last of their species; and it is doing that in a manner, in the first place, that violates all the law that is administered everywhere for the protection of such animals. In the second place, it is so inhuman and barbarous that it would be indictable in any country under the head of cruelty to animals if it brought no extermination. There are things that the owners of animals may not do. You may slaughter your domestic animals if you please; that is an incident to the right of property, and is one of the uses to which they are put: You may put them to death because they are no longer serviceable, or for the purpose of making use of their flesh or their skins; but there are methods of putting them to death that the law of no civilised nation will allow. There are ways of disposing of your ox and your ass that would subject you to indictment, although it is your own and on your own premises, under the law of any country that I know anything about or desire to know anything about. Barbarism and inhumanity to the humbler creation of the Almighty is as much prohibited by the law as the infringement of property rights.

There is a class of people who seem to think, if you may judge by what they say, that gain is the only foundation of right in regard to anything which can be called property; that dollars and cents are all there is of it; that the principal function of men on this earth is to trade and to vote, and when those are answered, the function of law is at an end. I do not so regard it. I say that this business,—I assume now for the purpose of my argument what I expect to demonstrate from this evidence,—I say that the conduct which is claimed here to be a part of the freedom of the sea, instead of being something which, if it had no particular consequence, would be innocent and lawful and inoffensive as well as profitable—I say that it has a double curse upon it: first, that it is exterminating from the world the race of animals, in

which we alone are not concerned; in which all civilization is concerned; in which Great Britain is concerned, in respect of its particular industries, as much as we are; in which France is concerned and other nations, and in which all civilization, I repeat, is concerned to a greater or less extent;—I say, in the second place, that if it were not exterminating the race, this conduct offends the moral sense in its manner, is so barbarous, so inhuman, so shocking—too shocking to be talked about here or to have the evidence read in its revolting details—and that by such conduct in such a manner, these people are destroying this industry of the United States Government, not its only resource by a great many, but in respect of which, as I reminded you so long ago that it may well have been forgotten, the law would have been the same if this poor province of Alaska had been an independent State, and this fur-sealing industry was every resource it had for the subsistence of the people or for deriving its national expenses. There is not one law for the large State and another for the small one, unless it is the law of the strong hand.

That is the question with which this Tribunal is concerned, and which would have induced me, if I had pursued my own individual judgment, to have argued this case, so far as I had anything to say about it, in two hours; because I deny—I respectfully deny—that after this concrete case which is to be determined by the Tribunal, is stripped of its adjuncts, its superfluities, its connections, and its unnecessary analysis,—when it is brought down to its elements, it presents that proposition and that is enough to determine it. Many others that we have tried to discuss, with more or less success, may legitimately be presented.

The title of the United States Government to this territory is not questioned. The industry which they built up there is not controverted. Its value and importance are not doubted. That it is the means of such civilization as is being successfully introduced there in the place of the savage condition that prevailed is not questioned. That the operations of these euphemistically termed pelagic sealers are of the character that I have described and have the consequence that I have described, will not be doubted, (if it is doubted now), before we have done with this case; and the question is: Is a Government obliged to sit down and suffer conduct at this expense, and for the benefit of my learned friend Mr. Robinson's particular clients, or have they the right of protection in themselves, and for the world, against it? It is unnecessary to carry this case in my humble judgment a single step beyond that enquiry. They stand upon the freedom of the sea. Very well. You have the right to stand upon the freedom of the sea so far as it goes, and till you get to the limit of it. Is this within the freedom of the sea? If it is, why then there are no limits. Then the sea becomes not merely the highway of nations—not merely the element upon which all nations are equal—it becomes the only element on the face of the earth in which conduct which is universally repressed by criminal law can be perpetrated with impunity, as against the nation that is gravely injured by the consequences of it. Of course, in order for a nation to assert itself against such conduct, it must be brought into such relation to it that arises from sustaining a serious injury. In that respect, it differs from the law of piracy. The title of the United States to interfere rises out of the right and the necessity of self defence.

Now, Sir, a few words more, and but a few words on this point. I remarked that I accepted my friend's suggestion that the destruction of the Newfoundland fish by dynamite would be malicious. Extermi-

nating cruelty, barbarity, constitutes all the malice that is necessary. There is express malice, and there is implied malice. Like many other terms it has a broad acceptation, and the legal acceptation is not necessarily always the popular acceptation. I care not to add this element of malice—it is not my argument—it is not the ground that I have put this case upon. I say, if that is malicious, this is; and in the sense that is, undoubtedly this is. Now take the suggestion made in the course of this argument by Senator Morgan. Suppose instead of cruising about the sea generally, giving these animals what they please to call a "sporting chance"—suppose these sealers were to establish a cordon of vessels just outside of the 3 mile line, and take every seal that came out in the very first season, and bring the whole business to an end: Is that malicious? If this pursuit is not malicious, is that? Why, if in that case, not in this?

They say: "We have no malice toward the United States people. We are after the skins of the seals, and we are making this profitable"; and they would be making it profitable. There is, no doubt at all that any fleet that would go and surround these islands so closely, if the fleet was all owned by one party—I mean by one sealers' association—as to get all the seals the very first year, old and young, male and female, it would be profitable. Is that malicious? It is no more malicious than the killing of the seals, as now. It is no more extermination than it is if they kill them in the way they are doing now. Extermination is extermination, whether you exterminate them all at once, or whether you exterminate them in a period that runs over three or four years. We shall see, from the history of all the resorts that these seals ever had, how long the process of extermination takes. Now, I enquire is it any less extermination, because it is spread over three or four years than if it was spread over three or four months? Is it any more malicious when it is done for gain in three or four months than when it is done for gain in three or four years?

When you come to look at the cases that have existed before, we find they are every one met by the prompt exercise, by the Government affected, of this right of self defence; and we know perfectly well that there is not a country in this world, that has any of this marine or semi-marine property which is the foundation of an industry upon its shores—except the United States, that would permit foreigners to go there and participate in it unless under the Regulations which are established for it. But is there another country that would permit this extermination, even though not accompanied by circumstances of particular inhumanity or barbarity?

We have cited, Sir, quite a number of cases in the argument, which at this late stage I shall take no time to remark upon—I merely advert to them in support of a corollary of this general proposition, as I have confined what I have said on the right of self defence to the high seas.

We have assembled instances enough, and cases enough, to show that the right of defence extends likewise to the territory of friendly nations if it is a necessity. Take the case of the "Caroline" in which Great Britain came to the Niagara River, entered a port of the United States (a nation with whom they were at peace, and where the law was in full effect), took a vessel out, burnt it, and ran it over the Falls. There again the question of the necessity became the debatable question. It is not easy for me to see that it was necessary—any more necessary than it is always necessary for a nation that is at war, or has a rebellion, to pursue its enemy into foreign ports. But the debate

that ensued between Mr. Webster and the English Government on that subject is set forth, and there again the law that the British Government invoked was conceded if the act was necessary to their defence in what I could hardly call war—it was a little insignificant rebellion that came to nothing—that might almost have been put down by the police. But whatever you call it, if it was necessary to do this act, their right to invade even the friendly territory of the United States was conceded. The same in regard to these Mexican cases—the Amelia Island case—several of those cases cited in our printed argument—where the Government of the United States asserted a right to go over into foreign territory and break up nests of criminals—of marauders—which the country had failed to do either because it was not strong enough, or probably because it was not active enough. In the diplomatic correspondence that ensued the right to do that was not only asserted, but was conceded, and no satisfaction ever was made or demanded. I might say on that subject of the "Caroline" case before leaving it, that the only outcome was the indictment of the British captain. Captain McLeod, who commanded that expedition, went into the American port and cut out the vessel, and in doing so a person was killed on American soil. He was arrested and brought to trial in the United States Circuit Court, and he was acquitted. He was tried before a very able Judge, and I have never heard the propriety of that acquittal doubted. Of course he had commanded an expedition that had killed a man, and there was no war between his country and that to which this person belonged or where the offence was committed; but he was acting under the orders of his Government, and the Government was acting under the justification of what they claimed to be a necessity; and if that necessity did not exist, that was a matter that must be discussed between the nations, and for which this officer could not be made responsible; and therefore his acquittal not only took place, but, so far as I know, it has always been agreed it was a proper acquittal. I am well warranted in saying that if the jury had been so far carried away by popular excitement as to have convicted that man under the circumstances, and if the learned Court before whom he was arraigned had approved the conviction and affirmed it, the United States Government would have interposed and pardoned him upon the grounds I have stated.

I do not refer specially to what my learned friends have said about these various cases, because they do not touch the only point upon which they stand, the exercise of self-defence. I take leave of the general proposition in support of which this evidence is advanced, as well as for its uses upon other branches and topics of the case, by repeating that it presents to my mind the crucial, the final, the determinative enquiry on this subject of the freedom of the sea: whether or not conduct of that character, and with those consequences, is conduct to which a nation must submit at the instance of individuals, or against which it has a right of reasonable protection? The means by which that protection is to be enforced is a question not addressed to this Tribunal at all. You are not asked to say by what means any right which the United States Government have here, shall be enforced. If regulations, which stand upon no right—which are the result of the concurrent agreement of the nations—if those are adopted, then, of course, means must be adopted as a part of the regulations by which they can be carried into effect; because if the regulations are not a matter of right, then the enforcement of them would not be a matter of right, except so far as the agreement on which they were founded gave

the right. In other words, the right to enforce them would stand upon the agreement, as the agreement would stand upon the award; but if the judgment of the Tribunal should be that this right of protection of its property, of its interest, of all that it has there, resides in the United States, my friend has well said, there is no question about the enforcement of that right. In the first place, because the question is not submitted to the Tribunal. In the second place, because Great Britain has agreed in this Treaty to abide by and enforce the award; and it is not to be assumed for a moment that that country would fail to observe its agreement in that respect. Furthermore, suppose it did not—if I am at liberty to state a supposition, the very statement of which might otherwise be regarded as injurious, the right being declared it is supposed and presumed either that, if it is not acceded to, the nation which possesses the right knows how (in accordance with the usuage of nations), to enforce it; and if, in attempting to enforce it should overstep the limit of necessity and propriety, the country that is injured, on the other hand, by that excess would know how to obtain redress. That whole subject about which my learned friends have had so many alarming prognostications, about the right of search, the right of this, and the right of that, raises questions, which I respectfully say, as far as regards this claim of right, the Tribunal has nothing at all to do with.

Now to come, Sir, as fast as I can to the particular facts that belong to the application of this obvious and universal rule to this case. I have assumed what I have said to be true. I have asserted those conditions in trying to ascertain what the rule of law was—I have asserted the conditions that are necessary to make the rule applicable. It is one thing to establish a rule as an abstract one upon a hypothetical case; it is quite another thing to apply that rule to the particular case by proving that the conditions on which the rule rests are germain and belong to the case under consideration.

Let me clear away two or three points that are brief. In the first place this is a national interest—an interest that belongs to the Government of the United States as a government, and not to its people, except so far as some of its citizens may enter into a contract with the Government to engage in it. The islands were purchased from Russia. By an Act of Congress they are set apart for the home of this herd of seals. They are neither sold as the Government lands are generally sold, nor are they made open to entry of settlers, as lands have been largely opened in the United States, under certain conditions. They are reserved. Acts of Congress have been passed which my friend took the trouble to go through and to point out to the Tribunal—a series of Acts of Congress for the protection of the industry; for allowing Superintendents and officers appointed by the Government and paid by the Government to reside there; making the killing of female seals criminal, or the killing of any seals by fire-arms; restricting the number which the lessees of the Government might take; empowering the Secretary of the Treasury from time to time to reduce that number as far as the interests of the preservation of the herd might require: fixing a Revenue for the Government derived out of the proceeds of the industry, directly or indirectly, which is quite large. The Revenue derived by the Government under the normal condition of things under the present leases and present arrangements, is a million and a quarter dollars. What the lessees make out of it is made by prosecuting the industry as other employés do; and what the poor Indians make out of it, is a better subsistence than they have had before.

And now it is said, in the vast variety of things not material that have been said, that this does not amount to much. It amounts to all that there is of this case. It is the case which the Treaty submits, whether it is great or small. It has the importance that I have stated. It is quite of as much importance to the United States, to which it is a prominent industry, as it can be to these sealers, to whom it is a very temporary and speculative industry.

It is said "the United States did not regard the seals particularly in the purchase of the islands: They had their eye upon something else, and the seal industry was unimportant". What else did they have their eyes on? They have owned it now for 26 years.

The capacity of the American people to find out what profit there is in any part of their possessions, and to pursue it, is not a quality that is open to much doubt. What have they made out of Alaska yet? If I had time to entertain the Tribunal, I should refer to a report of a Governor who was sent there to govern Alaska, and who came out with a report (which I have no doubt he was quite at leisure to write, for he did not have much else to do), in which he undertook to demonstrate the great resources of Alaska. And if one goes through it, it might be imagined to have been written as a burlesque—he so completely fails to make out, that, within sight of anybody that is now born, there is anything there in particular except the fur-seal industry, that nothing could add to the clearness of it. It is all there is, except a quarrel with Great Britain—I hope it may never be a quarrel—but a dispute with Great Britain about the boundary line.

I want to refer to a little evidence (and I shall not be long upon the point) to shew that at the time of its purchase, while some rose-colored views were entertained by Mr. Sumner which have never been realized about its other resources—the things that may be discovered there—it is very plain from Mr. Sumner's speech, as well as from other references, not only that the fur-seal business was all that was then tangible, but that the purchase of Alaska itself was originally set on foot and brought about and came to pass for the purpose of realizing the profits of this business. It is not merely that it was considered and estimated in the purchase—it was absolutely the foundation of the purchase.

Mr. Sumner, in his speech from which my friends quote, and which is quite long, cites statistics on page 79 of the 1st volume of the Appendix to the British Case. They are those I referred to yesterday. He then says on page 81:

> The *seal*, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company—

who, as we see, had the monopoly of it under Russia. It is stated in the Case what the revenue of that Company was.

I read from Mr. Blaine's letter in page 266 of the first American Appendix showing what the value of this had been to the Russian American Company. Mr. Blaine says:

> Its affairs were kept secret for a long time, but are now accurately known. The money advanced for the capital stock of the Company at its opening in 1799 amounted to 1,238,746 roubles.
>
> The gross sales of furs and skins by the Company at Kodiak and Canton from that date up to 1820 amounted to 20,024,698 roubles. The net profit was 7,685,000 roubles for the 21 years—over 620 per cent for the whole period, or nearly 30 per cent *per annum*.
>
> Reviewing these facts, Bancroft, in his History of Alaska, a standard work of exhaustive research, says: We find this powerful *monopoly* firmly established in the favour of the Imperial Government, many nobles of high rank and several members of the Royal Family being among the stockholders.

He cites those figures for a different purpose—a purpose for which I referred to some of them yesterday—as shewing the extreme improbability that Russia would have thrown open to the world that monopoly without being invited. That is down to 1820. But 47 years more elapsed before the country was purchased by the Government of the United States? From 1821 to 1841 the gross revenue was 61 millions of roubles, of which the net profits were 8,500,000 roubles. From 1842 to 1862, five years before the cession, the gross revenue was 75,770,000 roubles, and the net profits were 10,210,000 roubles. It thus appears that the profits were not only enormous, the dividends enormous, but that it appreciated all the way through down to a time within five years of the purchase; under the first lease the stockholders made 30 per cent per annum profit, under the second lease 55 per cent per annum; under the third lease 45 per cent per annum. I was incorrect in saying it appreciated all the time.

The PRESIDENT.—Was that gross profit, or net?

Mr. PHELPS.—Net profit.

The PRESIDENT.—After having paid the Government dues?

Mr. PHELPS.—Yes. That is the business we purchased; and as I said when you contrast it with everything else we have ever done there since, with all the resources and ingenuity and enterprise of American people, there is nothing at all.

I have said (and this is all I desire to call attention to; I cannot dwell too long upon this), the way that it came to pass that the American Government bought this, was by an enterprise set on foot by certain Americans to have the Government acquire it for the sake of getting an interest in this important business. Perhaps, Sir, as the last words before the adjournment, and as I shall not read much, I may read this from the 1st volume of the Appendix to the British case, page 49.

Shortly afterwards

speaking of a memorial to the President which was referred to the Secretary of State, by whom it was communicated to M. de Stœckl, with remarks on the subject:

Shortly afterwards another influence was felt. Mr. Cole, who had been recently elected to the Senate from California, acting in behalf of certain persons in that State, sought to obtain from the Russian Government a license or franchise to gather furs in a portion of its American possessions.

Mr. Cole evidently was not aware that he had taken all these furs without any license.

The Charter of the Russian-American Company was about to expire. This Company had already underlet to the Hudson Bay Company all its franchise on the mainland between 54° 40′ and Mount-St-Elias; and now it was proposed that an American Company, holding direct from the Russian Government, should be substituted for the latter. The mighty Hudson Bay Company, with its head-quarters in London, was to give way to an American Company, with its head quarters in California. Among the letters on this subject addressed to Mr. Cole, and now before me, is one dated at San-Francisco, the 10th April, 1866, in which this scheme is developed as follows.

There is at the present time a good chance to organize a Fur Trading Company to trade between the United States and the Russian possessions in America, and as the Charter formerly granted to the Hudson Bay Company has expired this would be the opportune moment to start in.

. . . . . .

I should think that by a little management this Charter could be obtained from the Russian Government for ourselves, as I do not think they are very willing to renew the Charter of the Hudson Bay Company, and I think they would give the preference to an American Company, especially if the Company should pay to the Russian Government 5 per cent. on the gross proceeds of their transactions, and also

aid in civilizing and ameliorating the condition of the Indians by employing missionaries, if required by the Russian Government. For the faithful performance of the above we ask a Charter for the term of twenty-five years.

Senator MORGAN.—What is the date of that?

Mr. PHELPS.—That is dated in 1866.

The PRESIDENT.—It is from Mr. Sumner's speech I understand.

Mr. PHELPS.—It is taken from Mr. Sumner's speech; but the letter that I referred to was the 10th April, 1866, and is cited by Mr. Sumner.

Then a little farther down there is this:

Another correspondent of Mr. Cole, under date of San Francisco, the 17th September, 1866, wrote as follows:

I have talked with a man who has been on the coast and in the trade for ten years past, and he says it is much more valuable than I have supposed, and I think it very important to obtain it if possible.

The Russian Minister at Washington, whom Mr. Cole saw repeatedly upon this subject, was not authorized to act, and the latter, after conference with the Department of State, was induced to address Mr. Clay, Minister of the United States at St.-Petersburgh, who laid the application before the Russian Government. This was an important step. A letter from Mr. Clay, dated at St-Petersburgh as late as the 1st February, 1867, makes the following revelation:

"The Russian Government has already ceded away its rights in Russian America for a term of years, and the Russo-American Company has also ceded the same to the Hudson Bay Company. This lease expires in June next, and the President of the Russo-American Company tells me that they have been in correspondence with the Hudson Bay Company about a renewal of the lease for another term of twenty-five or thirty years. Until he receives a definite answer he cannot enter into negotiations with you or your California Company. My opinion is that if he can get off with the Hudson Bay Company he will do so, when we can make some arrangements with the Russo-American Company."

Some time had elapsed since the original attempt of Mr. Gwin, also a Senator from California, and it is probable that the Russian Government had obtained information which enabled it to see its way more clearly.

He then proceeds to give, following on the same page, p. 50, the history of that. It is not very long and I will read it:

It will be remembered that Prince Gortschakow had promised an inquiry, and it is known that in 1861 Captain-Lieutenant Golowin, of the Russian Navy, made a detailed Report on these possessions. Mr. Cole had the advantage of his predecessor. There is reason to believe, also, that the administration of the Fur Company had not been entirely satisfactory, so that there were well-founded hesitations with regard to the renewal of its franchise. Meanwhile, in October 1866, M. de Stoeckl, who had long been the Russian Minister at Washington, and enjoyed in a high degree the confidence of our Government, returned home on a leave of absence, promising his best exertions to promote good relations between the two countries.

As is suggested to me, he is the one to whom Mr. Cole first applied.

While he was in St-Petersburgh the applications from the United States were under consideration; but the Russian Government was disinclined to any minor arrangement of the character proposed.

That is to execute a lease to the American parties who wanted it.

Obviously something like a crisis was at hand with regard to these possessions. The existing government was not adequate. The franchises granted there were about to terminate. Something must be done. As Mr. de Stoeckl was leaving in February to return to his post, the Archduke Constantine, the brother and chief adviser of the Emperor, handed him a map with the lines in our Treaty marked upon it, and told him he might treat for this cession. The Minister arrived in Washington early in March. A negociation was opened at once with our Government. Final instructions were received by the Atlantic cable from St-Petersburgh on the 29th March, and at 4 o'clock on the morning of the 30th March this important Treaty was signed by Mr Seward on the part of the United States, and by M. de Stoeckl on the part of Russia.

In the Treaty, as you will remember, the United States gave 7,200,000 dollars; and the returns which they have received since that from their purchase, are very much beyond, as you will see from the statement I

made a little while ago, the original purchase price; this means that the whole idea, and the whole negotiation which subsequently resulted in the transfer of these islands to the United States, was started in California by the party of Americans who first set out to get a contract or charter or lease or something of that kind from the Russian Company to enable them to take the profits of this industry; and pressing that home to the Russian Company, it finally ripened into a proposition to cede the whole country to the United States, which was carried into effect. Therefore the fur-seal industry was not only all that gave that province any value then, or has given it any value since—it was the main inducement and the real origin of the entire purchase.

[The Tribunal here adjourned for a short time.]

Mr. PHELPS.—I cannot help saying, sir, although it does no good to say it that I know of, that I feel very sensibly how wearisome and fatiguing the prolongation of this discussion must be to gentlemen who have been so long absorbed with it, who have listened to so much, and who may well be supposed to be as tired of this business as I am, and it is impossible that they could be more so. Still, there are facts in this case that I am not at liberty to pass over; I should be glad to consult the feelings of the Tribunal, and I should be glad to consult my own: but I must deal with them to some extent, because they have been the subject of several weeks animadversion on the other side, and we do not feel that we are justified in leaving them without observation and reply.

My learned friend desires me to say, sir, or suggested to me that I should say that, in the figures which I addressed to you this morning just before the adjournment showing the value of this business to the Russian American Company, the fur business there included all the fur-bearing animals as well as fur-seals. That is quite true and I cheerfully make the qualification, but it should be added that there was certainly of late years very little of the furbearing industry except the fur-seal, though at a very early period there were a good many other animals.

Now, I want very briefly, having pointed out what this industry is and who it belongs to, on the part of the United States Government to notice who are the parties with whom we are contending? Who are the pelagic sealers? Like so many other questions in this case, it is easy to say that it is of no consequence, and perhaps it is a minor point, but it has been of sufficient importance to be presented with considerable force and effect by my learned friend, Mr. Robinson. We call this an International Arbitration; and it is an International Arbitration so far as the parties to it are concerned? What is it in its object and its effect? Are we contending with Great Britain? Not at all. We should have settled this in the very outset with Great Britain; and the business interests of Great Britain concerned in the preservation of this seal herd. There are 10,000 people there that are engaged in the manufacture of these furs. It is the head quarters for the sale of the furs all over the world; the commerce of the country is largely engaged in it. You have heard the remonstrances against the destruction of the seal addressed by leading men engaged in this business before this controversy arose—before the United States approached it. Then what is our dispute with Great Britain? When you come to Canada, what quarrel have we with Canada, that great and abounding Province,—perhaps the largest territory in the world under one Government, if you take its dimensions? What have we in dispute really with our neighbour,—the Province of Canada, with whom it is not only

our interest to be at peace, but the interest of mankind that we should be at peace? Why, it is one place; one little town, Victoria, that is concerned in this business. I do not see that the rest of Canada has any interest in it. Here is a little knot of people in Victoria who have gone into this business,—a casual, a speculative, a temporary business, in which the investment is small, the business is small, the profits are precarious, sometimes large but still precarious, as all such pursuits must be, and which is inevitably, if we are right about its being destructive, temporary.

In the American case, page 284, there are a few words I wish to read because the authority for them is given there:

> Consul Myers, in a report to the State Department, gives the occupation of seventy-one owners of sealing vessels hailing from the port of Victoria. Of these only fourteen may be said to be dependent on sealing, and twelve others who are employed in maritime enterprises. The remainder are composed of individuals engaged in various pursuits. Among the list may be found several public officials, seven grocers, a druggist, an auctioneer, a farmer, three saloon keepers, a plasterer, an insurance agent, two iron founders, three real estate agents, a carriage manufacturer, a tanner, two women, a machinist, and others of different pursuits.

That is the statement, and I refer the Tribunal to peruse, what I cannot take time to peruse, the authority itself for this statement.

Lord HANNEN.—I suppose those are the shareholders of the ships. That is just the same thing which would happen in England.

Mr. PHELPS.—I was not aware that it was incorporated.

Lord HANNEN.—No, not at all, but they are the shareholders in the ships.

Mr. PHELPS.—Well, call them shareholders or what you please. They are the owners of this investment. They are the persons who either under the name of shareholders or something else are prosecuting what my learned friends call this industry. I say it is perfectly speculative. It is not a legitimate industry—it is speculative, in which various persons take a hand as they would buy stock in a railroad or a steamboat company, or buy a lottery ticket. In the light of what I said this morning, of the principles that cover this subject, I ask attention to the persons that are engaged in it.

Then the amount of the investment is gone into there. That is shown in the same book. It is said in the Case—and nothing is said for which authority is not cited:

> It is very questionable, however, whether there is any real investment in Canada in pelagic sealing. The vessels are all common vessels, the guns common guns, and the boats common boats, which can all be used in some other industry, excepting, perhaps, the old and unseaworthy vessels.
>
> But admitting the validity of the investment, it can be questioned whether those embarking therein as a rule pay the expenses incurred out of the sum realized on the catch. An examination of the table of sealing vessels and their respective catches, as given by the Canadian Fishery Reports, shows that the number of seals taken by a vessel varies to a great extent. Thus in 1889 several vessels took less than three hundred seals each; one schooner, with a crew of twenty-nine men, took but one hundred and sixty-four seals, while another, with a crew of twenty-two men, took over three thousand. In 1890 the same variation may be seen. In 1889 the average selling price of skins in Victoria was $7.65. On the catch of one hundred and sixty-four seals, therefore, the total received would be $1,254.60, of which at least $400 would have to be paid to the hunters.

This is pursued through several pages further and I do not take up your time to read it. I just ask attention to it.

Now, another thing appears and I cannot pass it without referring to it; and that is the extent, which would have come before you on the claim of damages that was originally submitted in the British Case if it was not withdrawn, to which these vessels are owned in whole and

in part, by the persons I have stated,—and the extent to which they are owned by Americans, who could not pursue this business lawfully, so far as Behring Sea is concerned, at any rate, without being criminally liable and having, therefore, to get vessels registered in the names of British subjects so that they can engage in this business.

This evidence was brought together in the United States Counter Case in answer to the claim for damages. That was gone into, in order to show that of the vessels for which the British Government demanded compensation, a considerable share were owned by Americans and the facts that are brought out in that I will briefly refer to.

The vessels that I refer to are the "Hornton", the "Grace", the "Anna Beck", and the "Dolphin", which are steam schooners; the "Sayward", the "Caroline", the "Path Finder", the "Alfred Adams", the "Black Diamond", and the "Lily". Those were in whole or in part—you will find this referred to at page 130 of the Counter Case of the United States—the property of citizens of the United States.

The steam schooners *Thornton*, *Grace*, *Anna Beck*, and *Dolphin* and one-half of the schooner *Sayward* were owned by one Joseph Boscowitz, a citizen of the United States; that James Douglas Warren, in whose name the claim is made as to the steam schooner *Thornton*, had no real interest therein, but that the same was mortgaged to her full value to Joseph Boscowitz, who was in fact the real owner; and that Thomas H. Cooper, in whose name the claims growing out of the seizures of the schooner *W.-P. Sayward* and of the steam schooners *Grace*, *Dolphin*, and *Anna Beck* are made, had in fact no interest therein and has in no respect been demnified or sustained loss by the seizures thereof, either as owner of these schooners and steam schooners, their outfits, or their catches, the same being mortgaged to their full value to Joseph Boscowitz, above referred to, and having been conveyed to Thomas H. Cooper, without consideration, for the sole purpose of giving them a registry as British vessels.

It is also insisted by the United States that the schooners *Caroline* and *Pathfinder* were in fact at the time of the time of their seizure owned by one A.-J. Bechtel, then a citizen of the United States, and that William Munsie and Frederick Carne in whose names the claims for damages growing out of the seizures of these schooners are made, had in fact no interest in the schooners or their outfits and catches; that the schooners *Alfred Adams*, *Black Diamond*, and *Lily*, for the seizures of which claims are made in the schedule, were in fact, at the time they were seized, owned by one A. Frank, who was then a citizen of the United States; that Gutman, in whose name the schooner "Alfred Adams" was registered, was not the actual owner of the schooner, her outfit—

The PRESIDENT.—You argue that only as a moral consideration. It does not change the legal point of view.

Mr. PHELPS.—It does not change the legal point of view as to the general propositions that have been advanced, but it does, I respectfully submit, enter into the general character of this act, when it is weighed, as a part of the freedom of the sea.

Senator MORGAN.—Suppose the Government of Great Britain expressly authorized these things to be done by American citizens under their law, would that be a moral consideration or legal consideration.

The PRESIDENT.—Here is no question of special authorization. It is the natural operation of laws.

Senator MORGAN.—It might well be a case of special consideration, or special authorization, as to be justified under the general law or general relations between the two Governments.

Mr. PHELPS.—These only relate to the seized vessels. We have had no opportunity or occasion to enter into the details of those not seized. The evidence in support of what I have read, which I do not take time to refer to, is cited at the pages I have read, and is all contained in the Appendix, and it completely supports what is said about those vessels. It has been asked by my learned friend why the United States have not prohibited the taking of these female seals or sealing

at the improper time of the year in the North Pacific as well as in Behring Sea. The reason is because it is impossible to go into a parliamentary, or Congressional Assembly and propose the passage of a law that should exclude American citizens from the profits of pelagic sealing so long as it was thrown open to the rest of the world. That is the reason. No Government could propose such a measure as that with the expectation that it would be carried. Who would vote for that? If by voting for it you can preserve the seal from extermination it is worth while, but to say that the seal shall be exterminated and nobody shall participate in the profit except a foreigner would be futile.

The PRESIDENT.—Is this a criticism in Parliamentary Government?

Mr. PHELPS.—Well it is better than some criticisms; it is true. It would be idle to propose it and it would be equally unjust. But Congress, as soon as there was a prospect of the preservation of the seal herd, passed a statute in 1892, an Act intitled an Act to extend to the North Pacific Ocean the provisions of the Statute for the protection of the fur seals and other fur-bearing animals.

Senator MORGAN.—I hope you will put it on record. I have not a copy of that.

Mr. PHELPS.—It is very recent—just as we were coming here it was passed through Congress. And now in order to seal in the North Pacific as well as in the Behring Sea it will be necessary for that class of American citizens who want to go into that business to get their vessels registered in Canada, or sail under another flag.

Senator MORGAN.—I suppose it would be as well to say that Congress was not aware until a recent period that citizens of the United States were obstructing the policy of their own country by putting their money under the British flag in order to seal on this herd.

Mr. PHELPS.—The investigations that have been made in this case, Sir, have thrown more light upon every branch and portion of this subject than ever had been known before.

Now what is the consequence of all this? I have done with the parties to it. We say it is extermination. What do they say on the other side? What is the ground they take in respect to this great underlying fact that what they call pelagic sealing is necessarily and at no distant date a complete extermination.

That is our assertion.

What is theirs? No Member of this Tribunal can undertake to state; it is not denied, but it is not conceded. It is talked about. They say there are other reasons why the herd is being exterminated—that it is the fault of the management of the Islands, all of which I shall come to in due time if I go on with the discussion of this case. Aside from any conduct good or bad, anything that may be expected from an intelligent nation in the struggle to preserve this industry that belongs to it—aside from all that, what do they say is the consequence of pelagic sealing in and of itself?

I repeat, no Member of this Tribunal can undertake to formulate the proposition of the other side. They admit killing in the water to be indiscriminate, and it must be—for nobody killing seals in the sea can undertake to discriminate about sex or age. Unless they are very young animals and very small there can be no discrimination. Well, then, what follows? If this trade were in its normal condition, half of the seals to be found in the sea would be females—more than half probably, because, while everybody concedes that of those born into the world half are male and half are female, it is not the normal condition of any herd of polygamous animals that as many males survive as

females. If they did, the constant war would prevent the increase of the herd at all, and therefore, if it were possible to take the census of this herd as it was when Russia discovered the Pribilof Islands where from the time of the creation there had been no human interference with sex, it would not have been found there were as many males as females. Suppose there were in the sea as many females as males, so that, indiscriminately shooting, 50 per cent of all that were killed were females, I should like to know, in the light of common sense and common experience and the knowledge that is derived from the propagation of all animals of this class, what the result of that would be. It is a mere question of speed. In the business of extermination, the fewer females they kill, the longer they retard the result, but that it comes is just as certain from a slaughter of half of the females, as it would if they killed a greater number. But we do not stop there. We do not concede that to be the case. We say that the evidence in this case completely demonstrates that the proportion of all the seals that are taken in pelagic sealing from one year to another is at least 85 per cent. It is taken at 75 per cent as a minimum, and it is stated at 95 per cent and even higher than that in the specific evidence I will call attention to, because this is a fact so important that it needs to be exactly understood. The evidence that converges from various different points, that are independent of each other, completely establishes that of all this pelagic sealing, at least 85 per cent are females.

In the first place I want to call attention to what the American Commissioners say. I have only one word to say about that report, and any one who has read it through will not require that word to be said, because it will have occurred to him. It is the work of a couple of men whose authority and reputation as naturalists is not questioned. We have no persons in America more competent to speak on this subject, if they speak honestly, than they. A perusal of the report will show whether it is or is not a partizan document, on one side of the case, made for a purpose, or whether it is or is not a perfectly fair, candid, truthful, and scientific treatment of the subject. It would not make it so if it were not so, for me to assert that it was. It does not deprive it of that quality to assert that it is not. I respectfully commend that report, every word of it, to the perusal of the Tribunal, if it has not already engaged their careful perusal, in view of the question whether it is to be taken as fair and just, and I leave it without any eulogy or observations of my own to that candid scrutiny. They give a table which contains the approximate result of pelagic sealing and the note states where they get their information from, which is the best they could get. Then they say:

> It cannot be denied that in pelagic sealing there can be no selective killing, as far as individual seals are concerned, and only in a limited degree by restricting it as to place and time. It necessarily follows that female seals must be killed and seals whose skins owing to age and condition are much less desirable. As a matter of fact, there is sufficient evidence to convince us that by far the greater part of the seals taken at sea are females; indeed, we have yet to meet with any evidence to the contrary. The statements of those who have had occasion to examine the catch of pelagic sealers might be quoted to almost any extent to the effect that at least eighty per cent of the seals thus taken are females. On one occasion we examined a pile of skins picked out at random, and which we have every reason to believe was a part of a pelagic catch, and found them nearly all females. When the sealers themselves are not influenced by the feeling that they are testifying against their own interests they give similar testimony. The master of the sealing schooner "J. G. Swan" declared that in the catch of 1890, when he secured several hundred seals, the proportion of females to males was about four to one, and on one occasion in a lot of sixty seals, as a matter of curiosity he counted the number of females with young, finding forty-seven.

They pursue that subject, and I do not read by any means all they say. How far that is undertaken to be contradicted on the specific point what the proportion of the female seals killed is, by the British Commissioners, I refer you to their Report to ascertain, in order to see what they say on that subject, and to see which of these Reports is sustained and confirmed by the evidence in the Case.

(Mr. Phelps here reviewed all the evidence in the case on both sides bearing upon the question of the slaughter of pregnant females on their way to the islands.

On the first point he claimed that the evidence from all sources and from many independent sources proved that of the seals killed on the way to the islands from 85 to 90 per cent were females, a large proportion of which were pregnant and about to be delivered immediately on their arrival. In support of this he considered—

(*a*) The common understanding of naturalists and all concerned in or familiar with the seal life, or who were led to investigate it before this controversy arose in 1886, and referred to a letter to the British Government written by Lampson & Co., the leading house in the fur trade in London.

A despatch of Admiral Hotham of the British Navy to his Government when commanding the Pacific Squadron.

Reports of the British Columbia Inspector of Fisheries in 1886 and 1888.

Another letter from Messrs. Lampson to the British Government in 1888.

Mr. Bayard's letter to the American minister in 1888, laid before the British Government, going fully into the facts and citing evidence.

A Review of the Fur-Seal Fisheries of the World, by Mr. Clark.

A memorandum from the Russian minister to the British Government in 1888.

A report of the Committee on Fisheries to the United States House of Representatives after an exhaustive investigation, in which a great amount of evidence was taken.

A report of the Secretary of the Treasury of the United States in 1889 made to Congress.

A letter from Sir George Baden-Powell, afterwards one of the British Commissioners, written in 1889, published in the London Times.

A letter from Prof. F. Damon, the eminent English naturalist, published in the London Times of December 3, 1889.

And other documents and publications to the same effect.

All which state the facts in regard to this question as they are claimed by the United States, and enlarge upon their importance and inevitable consequences.

And Mr. Phelps pointed out that until the creation of this arbitration these facts had never been questioned or denied.

(*b*) The testimony of British, French, and American dealers in and manufacturers of fur-seal skins. Of these there were examined on the part of the United States, thirty-one. Eight British, doing business in London; two French, trading in Paris; nineteen American, resident in New York, in Albany, and in San Francisco. Among these are the oldest and largest dealers in the world, and through their hands pass all the seal skins taken from the Alaskan herd, and from that on the Commander Islands. In the trade these skins are divided into three classes: "Alaskan," embracing those taken on the Pribyloff Islands; "Russian," being those taken on the Commander Islands, and "Northwest," which are those taken in the sea by what is known as

"pelagic sealing." They uniformly testify that the male and female skins are easily distinguishable; that the "Northwest" skins are in large proportion females, and command consequently a lower price. And the different witnesses state this proportion all the way from seventy-five per cent, which is the lowest, to ninety per cent. Some of them without giving a percentage in figures, say "mostly" or "mainly" or "almost exclusively" females.

Several of the London witnesses have been reexamined on the part of Great Britain, but do not modify their original statement on this point.

Nor is any other dealer or manufacturer of seal skins produced by Great Britain to testify to the contrary.

(*c*) The evidence derived from an examination of all the sealing vessels that have been seized, or were otherwise in a situation to have their cargoes examined, after being engaged in pelagic sealing. This evidence relates to the contents of twenty different vessels examined at different times and places, and a large number of skins taken from other seized sealers, not named, but examined at the Commander Islands by the Russian authorities. And the average result of all these examinations was that the slain were eighty-eight per cent females.

(*d*) The testimony of hunters and seamen actually engaged in pelagic sealing.

Of these witnesses there are one hundred and thirty-six who testify on behalf of the United States, made up as follows:

Of masters and mates of vessels, twenty-nine—five British and twenty-four American; officers of the United States Navy or Revenue Marine, four; officers resident on the islands, two; seamen and hunters able to write, forty-eight—nine British and thirty-nine American; seamen and hunters illiterate, five British and nine American; Indian hunters, thirty-one. These witnesses state the proportion of females taken in pelagic sealing at various figures from seventy-five to ninety-five per cent. Some of them who give no figures say "nearly all," "mostly," "a large proportion," "the great majority," "principally" females, or use other words of similar import.

The average of the proportion given by all the evidence of the United States is: Of the British fur dealers, eighty-two per cent; of the American, eighty-five and a half per cent; of the contents of vessels examined, eighty-eight per cent; of the sealers and officials, eighty-three per cent. All the American evidence on this point was printed as a part of the original Case of the United States, and was therefore fully open to reply by British evidence.

The only testimony offered on the subject on the part of Great Britain was the testimony of men engaged in the business of pelagic sealing, brought forward in the Counter Case, so that no opportunity to reply to it was afforded to the United States.

The witnesses thus produced number one hundred and twenty-two. Of these fourteen fully supported the contention of the United States, using such expressions as these to indicate the proportion of females in the pelagic catch: "Four-fifths," "two-thirds," "three-fifths," "sixty-five per cent," "eighty per cent," "chiefly female." One witness, Capt. Lavender, states it thus: "Over one-third females; nearest the islands, mostly females."

Twenty-two other witnesses, including five captains of Canadian vessels, state the percentage of females as "more than half," without saying how much more. They were not pressed to be more specific by the

agents of Great Britain, though the examination was *ex parte*, and it is therefore fair to presume that if pressed further the replies would not have been favorable to that side. Three Indians also testify in the same terms, "more than half," and were not enquired of more specifically. Forty-five other witnesses in stating the proportion say: "Half," "about half," "a little more than half."

The remaining thirty-eight witnesses testify that the large proportion, or the larger proportion, of the pelagic catch consists of male seals.)

[The Tribunal thereupon adjourned till Thursday the 6th July 1893 at 11.30 a. m.]

FIFTY-FIRST DAY, JULY 6TH, 1893.

Mr. PHELPS.—Near the close of the argument yesterday, Mr. President, you put to me a question in respect to the point I was discussing in bringing forward the evidence to show the very great percentage of females that were embraced in the pelagic catch,—whether or not that might be attributed to the fact that there were so few, comparatively, of young males; in other words, whether this great preponderance was a preponderance of the females or a scarcity of the males.

I propose to answer that question this morning very briefly, and I think very effectively by referring to certain testimony in the case, which shows that this great preponderance of females in the pelagic catch was just as noticeable years ago when pelagic sealing first began as it is at the present day after the effects of it, and the effects of anything else in the management of the Islands, have transpired. In the year of 1868, when pelagic sealing first began, Mr. Fraser, of the firm of Lampson and Company in London, in his deposition which is in the 2nd Volume of the United States Appendix, page 557, from which this is an extract, says:

> This fact, that the north west skins are so largely the skins of females, is further evidenced by the fact that in many of the early sales of such skins they are classified in Deponent's books as the skins of females.

It was so noticeable in 1868 and afterwards, according to his deposition, that the whole catch was put down in the book as females. Mr. McIntyre, the special Agent of the United States, whose evidence is prominently in the case on many points in his Official Report to the Government in 1869 and which will be found in the United States Counter Case, page 84, uses this language in support of this supposition—

> That nearly all the 5,000 seals annually caught on the British Columbian coast are pregnant females taken in the waters about the 1st of June, while apparently proceeding northward to the Pribilof Group.

Then Captain Bryant, a witness on whose testimony they rely on the other side on several points, as we rely upon it, is also quoted in the United States Counter Case at page 84, when writing of the year 1870 says:

> Formerly in March and April the natives of Puget Sound took large numbers of pregnant females.

In August 1886, Rear-Admiral Culme Seymour of the British Navy, addressing the Admiralty—this will be found in the Appendix to Great Britain's Case, vol. 3, United States, No. 2, 1890, page 1—says:

> The British Columbian seal schooners seized [by] United States Revenue cruizer Corwin, Behring Straits, seaward 70 miles from off the land [? in the execution of] killing female seals, and using fire-arms to do it, which they have done for three years without interference, although in company with Corwin.

The same year Mr. Mowat, the Inspector of the Fisheries of Canada, British Columbia—and this is taken from the 3rd volume of the Appendix to the British Case, page 173,—reports:

> There were killed this year so far from 40,000 to 50,000 fur-seals which have been taken by schooners from San Francisco and Victoria. The greater number were killed in Behring Sea, and were nearly all cows or female seals.

In 1892, Captain Shepard of the United States Revenue Marine—and this is taken from the 2nd volume of the United States Appendix, page 189—says in his depositions:

> I examined skins from the sealing vessels seized in 1887 and 1889, over 12,000 skins, and of these at least two thirds or three-fourths were the skins of females.

This is selected evidence out of much more to the same effect. It comes from men of the highest standing and position, in the majority of cases British, and in the majority of cases official; and if this is true, it becomes apparent that the proportion of females taken in the pelagic catch in these years before any of the causes that are suggested by my learned friends for the diminution in the number of males had at all taken effect. These observations are in reply to your very pertinent and proper question which I was very glad to have put. They form my reply, and when I come to deal with that part of the case, we shall utterly and completely refute upon the evidence in the Case the suggestion that any such consequence came from any mismanagement of the Islands. We shall show to begin with that it depends on nothing that is reliable, and shall show, in the next place that it is over-whelmingly contradicted by the evidence.

But still dealing for a moment longer with the President's enquiry, the pelagic sealing near the Russian Islands is a new business. The Islands never have been harrassed by pelagic sealing before. How new it is will be apparent at a future stage of this case, when we come to consider how much the Russians have made out of the zone they have exacted from Great Britain where the seals are taken now. I only say now that this was sealing where no pretence had ever arisen of a scarcity of males, or of any cause which could produce a scarcity of males, and yet, on these vessels, the average of females taken in the pelagic catch by these schooners comes fully up to this.

The PRESIDENT.—Is there not an explanation to be made as to seasons and places of the catches in connexion with the sexes?

Mr. PHELPS.—No, I shall show you, when we come to Regulations, where the seals are taken.

The PRESIDENT.—But we are told that the females went in a herd together separate from the bulls and even from the young ones, and passed through certain places at certain seasons, and consequently were not at other places in the same seasons or not at those places at other seasons.

Mr. PHELPS.—For this reason, if we confined our evidence to particular times or particular ships, it would be open to the inference that possibly those ships were to some extent exceptional. Our evidence goes to the entire pelagic sealing—all that takes place at any period when the weather allows, and goes to show that the percentage of female seals principally pregnant, while the herd are on their way to the Island, is the same percentage of nursing females after they get to Behring Sea. The evidence covers the whole business, every month in the year in which it takes place; it covers all vessels engaged in it, as far as we can reach them, and all places in which seals are taken in the sea in the whole year.

I cannot stop to criticise the British evidence particulary, or to go through the evidence of each of these witnesses to show the explanation that might be found in the testimony consistent with truth. They are sealers, of course, swearing on behalf of their own craft. Their testimony is necessarily *ex parte*, as all the evidence is. It is taken in such a way that we cannot reply to it, or explain it in any way. But let it stand without any criticism at all as the testimony of 38 hunters and sealers who come here and tell you the greater proportion of pelagic sealing is males, if that is the real purport of their evidence,—it will be seen in many cases they are referring to particular voyages and particular ships,—these 38 men constitute all the evidence there is in this case, giving them their utmost effect, as against the mass of evidence from all sources that we have brought to bear, from these numerous British witnesses who swear the other way, the British subjects examined by us who swear the other way, and the array of officers, officials, hunters and seamen, four times as many, in addition to the conclusive evidence of the furriers, and the equally conclusive evidence afforded by the vessels that were searched.

Here is a question of fact that must be decided upon the evidence. There is no other way to decide it. Members of the Tribunal know nothing about it except what they derive from the evidence. I have fairly laid before you, for I have had my own calculations carefully revised, and I speak with confidence about their accuracy, the result of the evidence on this point. To find against the contention of the United States, you must take this scattered array of witnesses I have alluded to, and which is open to all sorts of criticism, if I had time to make it, as showing to what period and occasion their evidence alludes, and balance that against the whole mass of the testimony.

One remark more. The least reflection will show that our calculation must be true. They are killing seals at sea, where they cannot discriminate and do not attempt to. In the normal condition of the herd there would be at least as many females as males, as I remarked yesterday, probably more. Ever since 1847, when the system of discriminating killing was introduced by Russia on these islands, they have been making this considerable draft of young males on the islands. What must then be the greater proportion of seals in the sea in these later years after all that period. We have some tables that, in another connection, where they more properly belong, I shall lay before you, in which we have made the general observation that I have just made the basis of an actual calculation. I dismiss that subject for the present.

Now to come to another point which I propose to treat in the same way and to get over as rapidly as possible. I have spoken of the proportion of females. Now what proportion of the females in the Spring catch, in the Pacific Ocean catch—not now referring to Behring Sea—what proportion of them are actually pregnant when they are taken.

This is not a very important question for this reason. The destruction of a female affects the herd not so much by the young she is about to produce that year—that can only be one—it is the future production of the animal going on in a geometrical progression that is so destructive. It is of no consequence to say that the female that was killed this year was not pregnant. What if she was not? Is she not going to be pregnant in all the successive years of her available life hereafter.

Mr. Justice HARLAN.—And that is increased if the pup that is killed is a female also.

Mr. PHELPS.—Yes, I have made that the subject of calculation. I have said that it is a question of geometrical progression; if a female

is killed who would have had 8 or 10 pups, or whatever the number may be, according to her age, half of those would be females, and of that half that are females the same ratio of progression would go on if they survived to become productive themselves. As I suggest, it is a great deal worse for the herd, not speaking of humanity, to kill a young female that is not pregnant than it is to kill an old female that is actually pregnant. They destroy more young ones in one case than in the other. It is only the inhumanity that distinguishes it. They may kill a pregnant female that never would have another pup, or more than one or two, or they may kill a young female with her whole life before her, that would have 10, 12, or 14. But still this point is made, and I do not mean to pass over any issue of fact that has been made, because one thing I claim to be perfectly clear, whatever the decision of the Tribunal may be in respect of this case in any of its points or in any of its results, that there is not an allegation of fact which the Government of the United States have put forward in their case—not one—that is not perfectly demonstrated to be true by the evidence.

Now, on the subject of pregnant females, it is conceded that the period of gestation is 11 to 12 months, undoubtedly 12 lunar months; because that is the analogy with other such animals. The witnesses speak of it as being 11 to 12 months; and I suppose that it is; and also that the young are all born in June. The testimony agrees about that with a very few exceptions,—some witnesses say in the very early July; they are born at the latest in June and the early July. There is no proof of any young coming into the world on these Islands, and certainly not anywhere else later than that. I am reminded that is the British Commissioners' figure,—from the 15th of June to the 15th of July, but, really, there is no divergence of testimony on that subject.

Then, all the pregnant females that are in the herd are necessarily on their way, through the sea; and they are exposed, how much exposed we shall point out. Of course, without any evidence you would see that there must be a large number pregnant. Of course also, the proper proportion of the females who are 2 years of age only, or yearlings, and are not pregnant, as they do not produce young until the third year,—in the loose statements that some witnesses have made about barren females, are included; but the evidence on this subject is this; and from general considerations we show, before you look at the evidence, what the evidence must be if it is true. The United States have examined Revenue Officers, sea captains and fur-dealers, and I mean by that fur-dealers who are there and know the facts personally. This does not come from the examination of the London fur-dealers, but from fur-dealers on the Pacific Coast who know the business. Aside from that, we have examined 7 Captains, Captain Cantwell, Captain Shephard, Captain Scammon, Captain Douglass, Captain Hays, Liebs, the fur-dealer, and a Missionary of the name of Duncan. These witnesses say "75 per cent;" "95 per cent;" "a majority of all;" "nearly all of catch;" 95 per cent of all;" "nearly all of catch;" "nearly all of catch;" are pregnant females. We have examined of Sealing Captains, Mates and Owners, following the same qualification, and putting those by themselves who can write as somewhat superior to the common men, 25; 4 of these are British subjects and 21 American. The testimony of these 25 men is this; "the greater number;" "90 per cent;" "99 per cent;" "75 per cent of all;" "the majority;" "most;" "all;" "85 per cent;" "nearly all of catch;" "75 to 80 of all;" "all of catch;" "four-fifths of the cows;" "nearly all;" "mostly all,"—a repetition of those words or of exactly the same significance, stating

it from the lowest "75" up to several witnesses who say "all," which is probably rather a strong, though perhaps natural statement of witnesses who do not attempt to be particularly critical.

Then we have examined hunters and seamen, not officers of vessels, 62:21 of them are British subjects, and 41 American subjects, and the language of those witnesses is just the same. It would be a repetition for me to read down these two or three columns. The lowest that is stated, I believe—I think some few of these witnesses say—is 60 per cent. They are very few. Most of them use these expressions that I have read: "Most"; "a large majority"; "mostly all"; "two-thirds"; "nearly all"; "almost exclusively"; "most of the females"; "the majority"; and to the same effect. I think there is not a witness, except two or three that speak of 75 per cent, who falls short of that. That, you see, shows how it came to pass that Mr. Lampson in keeping his books classified these as female skins, because the exceptions were too small to take account of. Then we have examined Indian hunters and Indians, but not the less truthful on that account. They have not acquired yet all the virtues of civilization, and their testimony is to the same effect. There are of these witnesses 74, and I have given here the names and pages on which their testimony is found, and the point or substance of their testimony. It is an exact repetition of what I have already said. There are a few of these witnesses that say "about a half", and they do not go as far as the others. "About a half"; "fully a half"; "one half". There are a small number who say that, and the great majority use the stronger language that I have given. I find a more specific recapitulation than that. 28 of these witnesses say "one half"; "about a half"; "nearly a half"; "a little over a half". Two say "less than half"; and one of them says "a third"; and one says "three out of ten"; which, of course, would be less than a third. All the others say what they do say in the language I have referred to.

Now what is the British evidence on this point? They have examined apparently a large body of men—I should say really a large body of men. There are 25 of their witnesses who sustain the United States Case, who use the same language that our witnesses do;—"the greater number", "most of the females", "about two-thirds", "most of the females", "three out of five", "about two-thirds", "females for the most part", "cows for the most part". Then one says: "75 per cent", "four out of six", "two out of three". One says he did not get any this year that had no pups. "I do not remember having got an old cow that had no milk: one hunter says, I never saw an old cow along coast without pups", and so on. I do not read it all. There are thus 25 British witnesses that cannot be distinguished in their testimony from ours. Then there is another class of 14 of their witnesses who are called to contradict our evidence, and they do not contradict it. They do not specifically sustain it, but they do not contradict it. They say, the proportion of pregnant females is "about half", "fully half", "or not more than half". There are three more who use these expressions—"many of the cows", "a good many", "quite a number". Then here are six witnesses in all of this array of evidence on the British side who testify affirmatively, that the number and proportion of pregnant cows in this catch was small—and they say "about 25 per cent", "about a quarter", "in a total catch of 119 only 30", in a catch of 202 only 65". These refer to particular catches. "Half I got this year females, mostly young cows, only four or five". Then another witness says, "out of 300 not more than 100". That was in one catch. Then one witness—an Indian, I judge, says "lots of them are old cows

without pups". Then there are two others who decline to express an opinion. One of them, a witness named Shafter, says, he cannot say what proportion, and I find one added at the bottom to those 25 I gave before on the British side who support the American Case. There you see where this evidence comes out. There is another class of witnesses however, it is only right to say, in attempting to deal with the whole of this evidence, in which this is put in another way, not how many, not what proportion of the cows are pregnant, but what proportion of barren females are found in the catch. As I have explained, that means all who are not in a condition of pregnancy, who are not gravid.

Of these British witnesses, 8 testify to finding very few barren females; they say, "2 out of 90"; "not noticeable"; "not any"; "not seen any"; have only seen few"; "they are generally two years old, and travel with young seals"; and one witness gives the explanation that he has seen a few older females that were barren,—"got a few barren females this year"; "2 out of 90 seals"; "a few barren females"; and another witness says, "We cannot tell in the sea whether the cow is barren or not"; and another "we always find a few barren females".

Then there are 10 who testify to finding a great many barren females. Ten of these sealers testify strongly the other way. In 64 seals "20 or 25". Another says, "quite a number". "By barren females, I mean one that has no young". Then by another witness, "a good many barren females this year"; "a great many"; "almost half barren; the other half cows and pups". Then, "Less than half, about a quarter". That is the evidence on this subject.

I next enquire what proportion of the females taken in Behring Sea are nursing mothers, who have young upon the islands.

(Upon this point Mr. Phelps reviewed all the evidence upon both sides. He pointed out that on the part of the United States had been examined four officers and Government officials, eight captains, owners, and mates of vessels engaged in the sealing business, thirty-six hunters and seamen, white men, and nine Indian hunters engaged in the same pursuit, fifty-nine witnesses in all. That the statement of those among this number who attempted to give a numerical proportion of nursing females killed, fixed it variously at from seventy-five to eighty per cent of the whole Behring Sea catch. That the other witnesses testified the nursing females formed "the large proportion," "nearly all," "the greater part" of the catch, and other equivalent expressions, except that three of them gave no opinion upon this point, but only stated the distances from the islands at which nursing seals were found.

He showed that the British Commissioners in their report stated that no nursing females were killed in the early part of the season, and but few later in the summer, but remarked that in this, as in every other disputed fact in the case, without exception, the statement of the British Commissioners was overwhelmingly refuted by the evidence.

He pointed out that upon this question there had been examined on the part of Great Britain twelve captains of vessels, twenty-three hunters and sealers, and ten Indian hunters—forty-five witnesses in all; that of these nineteen sustained the American contention that the greater part of the Behring Sea catch were nursing females, using the same language, as to the proportion, employed by the witnesses on the American side; that fourteen of the others did not contradict the American witnesses, expressing no opinion upon the point and not being pressed to express any, although their means of knowledge were ample; and only eleven witnesses supported the British contention, stating that the nursing mothers killed in the Behring Sea were "few," "very few,"

or "none." So that irrespective of the American evidence, the great weight of the British testimony went to establish the fact claimed by the United States to be true and stated by the American Commissioners.

He further remarked that from the nature of the case, upon the undisputed account of the habits of the seals, it could not be otherwise than that the greater part of the seals taken in the Behring Sea must be nursing mothers, since, at the time when the catch in that sea was in progress, very few other seals left the islands, and the mothers of the pups just born were compelled to go out and did go out, sometimes to long distances, for sustenance.)

Mr. Phelps proceeded: I pass on to another subject, the effect on the young on the Islands of the death of these nursing mothers. We have had the extraordinary suggestion made that the young may be left without nourishment, and are going to live somehow or other, and that the destruction of the mothers does not make any difference.—Perhaps some other mother will nurse them—that is one theory. Another is, that they do not need any nursing—that they come down to the shore and forage on the sea-wrack, and so forth. But what is the evidence? In the first place, the evidence on that subject of the great number of dead pups that are found on the rookeries is not denied and cannot be denied. I need not refer you again to it, because that is not in dispute; but other reasons are given or attempted to be given for the mortality.

It is said by my learned friends that there were no dead pups seen on the rookery in any great numbers up to 1891, and they say if pelagic sealing was destroying the nursing females in the previous years, how comes it to pass that young were not found dead on the rookery till 1891? Then they say the mortality in 1891 was confined to St. Paul's Island, one of the Pribiloffs, and did not extend to the other; and to two rookeries on that Island. Then they say that the mortality appeared again in 1892 upon the same rookeries, although, under the *modus vivendi*, there was no sealing in Behring Sea to destroy the nursing-mothers; and they say that no unusual number of dead pups was seen on the Commander Islands in 1892, notwithstanding that pelagic sealing had begun there.

Now, all these propositions, if true, would constitute a complete and conclusive answer to the charge that the pups starved to death by the destruction of their mothers during the suckling period. In what extraordinary manner Providence provided for their surviving would still be left a matter of astonishment; but it would dispose of the fact that death was owing to the destruction of mothers.

The difficulty with those propositions is that there is not one of them that is true. They are assumptions not supported by evidence, and are utterly disproved.

In the first place, as to the proposition that there were no dead pups prior to 1891 seen on the rookery in any great numbers. That is their proposition—there is no evidence to show it.

I will call attention to the testimony on this subject as rapidly as I can; not all of it—there is a great deal more. It will be found between pages 466 and 481 of the Appendix to the American Argument—the Collated Testimony. The full depositions are in all cases referred to in the margin, so that by turning to the 2nd United States Appendix—another book—you see the whole of the statements. There is a great deal more testimony as I say between the pages I have mentioned.

Mr. Clark, who was four years on St. George, from 1884 to 1889, says:

Dead "pup" seals, which seem to have starved to death, grew very numerous on the rookeries these latter years; and I noticed when driving the bachelor seals for killing, as we started them up from the beach, that many small "pups", half starved, apparently motherless, had wandered away from the breeding grounds and became mixed with the killable seals. The natives called my attention to these waifs, saying that it did not use to be so, and that the mothers were dead, otherwise they would be upon the breeding grounds.

Mr. Hansson, a sealer, was five years on St. Paul island—from 1886 to 1891: I do not stop to give the page of these particular ones,—it is all between the pages I have given, and I must save all the time I can. Mr. Hansson says:

There were a good many dead pups on the rookeries every year I was on the island, and they seemed to grow more numerous from year to year. There may not in fact, have been more of them because rookeries were all the time growing smaller, and the dead pups in the latter years were more numerous in proportion to the live ones.

Mr. McIntyre, whose name has become quite familiar to you, was on the Islands from 1870 to 1882, and from 1886 to 1889. He says:

The seals were apparently subject to no diseases; the pups were always fat and healthy, and dead ones very rarely seen on or about the rookeries prior to 1884. Upon my return to the islands, in 1886, I was told by my assistants and the natives that a very large number of pups had perished the preceding season, a part of them dying upon the islands, and others being washed ashore all seeming to have starved to death; the same thing occurred in 1886, and in each of the following years, to and including 1889. Even before I left the islands in August 1886, 1887 and 1888, I saw hundreds of half starved, bleating emaciated pups, wandering aimlessly about in search of their dams, and presenting a most pitiable appearance.

Mr. Morgan, who was 13 years on St. George as the Agent of the lessees from 1874 to 1887, says:

But facts came under my observation that soon led me to what I believe to be the true cause of destruction.

For instance, during the period of my residence on St. George Island down to the period of 1884, there were always a number of dead pups, the number of which I cannot give exactly, as it varied from year to year, and was dependent upon accidents or the destructiveness of storms. Young seals do not know how to swim from birth, nor do they learn how for six weeks or two months after birth, and therefore are at the mercy of the waves during stormy weather. But from the year 1884 down to the period when I left St. George Island (1887) there was a marked increase in the number of dead pup seals, amounting perhaps to a trebling of the number observed in former years, so that I would estimate the number of dead pups in the year 1887 at about five or seven thousand as a maximum. I also noticed during my last two or three years among the number of dead pups an increase of at least 70 per cent. of those which were emaciated and poor, and in my judgment they died from want of nourishment, their mothers having been killed while away from the island feeding, because it is a fact that pups drowned or killed by accidents were almost invariably fat.

Mr. Loud, Government Agent from 1885 to 1889, states the same thing. He says:

I am unable to make a statement as to the number of dead pups on the rookeries in that year,

That is 1885:

but in 1886 I saw a large number of dead pups lying about. These pups were very much emaciated and evidently had been starved to death... In 1887 the number of dead pups was much larger than in 1886. In 1888 there was a less number than in 1887 or in 1889, owing, as I believe, to a decrease of seals killed in Behring Sea that year, but in 1889 the increase again showed itself. I believe the number of dead pups increased in about the same ratio as the number of seals taken in Behring Sea by pelagic sealers.

Mr. Goff, who was Treasury Agent from 1889 to 1890, testifies in this manner:

Another fact I have gained from reliable sources is that the great majority of the seals taken in the open sea are pregnant females or females in milk. It is an unquestionable fact that the killing of these females destroys the pups they are carrying or nursing. The result is that this destruction of pups takes about equally from the male and female increase of the herd, and when so many male pups are killed in this manner, besides the 100,000 taken on the islands, it necessarily affects the number of killable seals. In 1889 this drain upon male life showed itself on the islands, and this in my opinion accounts for the necessity of the lessees taking so many young seals that year to fill out their quota.

Mr. Palmer is a witness introduced by the British Government. He went with Mr. Loud. He is an ornithologist—a man employed in the Smithsonian Institute to stuff birds. He says:

The greater number of the seals captured in the waters of Behring Sea are females which are on their way to or have left their young on the rookeries while they are seeking food. As it is a well-known fact that a mother seal will only suckle its own young, and that the young seal is unable until it is several months old to procure its own food, it necessarily obtains that the death of the pup follows that of its mother in a short time. The numbers of dead pups about the shores of St. Paul's began to attract my attention about the middle of July last year.

That was 1890:

On Aug. 2 I stood on Zoltoi Beach and counted 17 dead pups within ten feet of me, and *a line of them stretched the whole length of the beach.* Many of them starve to death on the rookeries, but by far the greater number sink in the deep water along the margin of the rookeries.

Now in 1888—(I have nearly done with this but I want to be done with it effectually)—an examination, as you have learned was made by a Congressional Committee at Washington, and the Report has been put into this case; and from the testimony there given before that Committee—(not for the purposes of this case)—we extract two or three witnesses.

Dr McIntyre, whose testimony I have read before in this case, said:

And I would say further that if cows are killed late in the season, say in August after the pups are born, the latter are left upon the islands deprived of the mother's care, and of course perish. The effect is the same whether the cows are killed before or after the pups are dropped. The young perish in either case.

Mr. McIntyre's great familiarity with the subject, and the candid manner in which he has testified, and his large experience, are already known to you.

At page 255 of that Report, Mr. Moulton, the United States Treasury Agent at the islands from 1877 to 1885 testifies as follows. He is asked:

Q. When a female is nursing her young and goes out for food and is killed or wounded, that results also in the death of her young?—A. Yes, sir. As her young does not go into the water, it does not do anything for some time, and cannot swim and has to be taught.

Mr. Tupper, my friend on the other side, knew that as early as 1888 the United States claimed that the pups died when the mother was killed; because on page 443 of volume III of the Appendix to the British case, referring to the testimony just quoted, he says:

The opinions of the gentlemen given before the Congressional Committee in 1888 for the most part, though sometimes contradictory, are in favour of the undermentioned theories.

1. That the female seals while nursing their young go great distances in search of food;

2. When out a great distance, female seals are shot, and the pups on shore are lost for want of their mothers' care.

I shall read no more. The subject can be pursued upon the reference that I have given to the Collated Testimony, and the full testi-

mony, of which there is a great deal more. Now is there any testimony to the contrary? Is there any witness brought here to say: "I knew those islands prior to 1891; in all those years there were no dead pups there"? Not a witness! What brought my friends into the error of saying, as they have said in the course of the argument, that this first appearance of starved pups was in the year 1891?

Then they say, the mortality in 1891 was confined to St. Paul Island, and to two of the rookeries on that island, namely Tolstoi and Polavina. That when you come to 1891 instead of its being diffused all over those islands, as the mothers from both were equally killed, it is confined to two rookeries on one island. That again would be extremely important, if it were true. The difficulty of that proposition is that it is not supported by evidence and is overthrown by evidence.

I will allude, as briefly as I possibly can, to a few witnesses on that point. Mr. Stanley Brown testifies in the United States Appendix, Volume II, page 19:

From a careful examination of *every rookery* upon the *two islands* made by me in August and September (1891) I place the minimum estimate of the dead pups to be 15,000, and that some number between that and 30,000 would represent more nearly a true statement of the facts.

Lieutenant Cantwell, of the United States Revenue Marine, at page 408 of the same book, says:

During the month of September of that year (1891) in company with Mr. J. Stanley Brown, I visited the Starry Arteel and Eastern rookeries on St. George Islan'

—that is the island where they say the mortality did not reach—

and saw more than the average number of dead pups, and a great many dying pups, evidently in very poor condition.

Captain Coulson of the Revenue Marine, on duty there, at page 415 of the same book, says:

No mention was ever made of any unusual dead pups upon the rookeries having been noticed at any time prior to my visit in 1870, but when I again visited the islands in 1890, I found it a subject of much solicitude by those interested in the perpetuation (of the seals), and in 1891 it had assumed such proportions as to cause serious alarm. The natives making the drives first discovered this trouble, then special agents took note, and later on I think almost every one who was allowed to visit *the rookeries* could not close their eyes or nostrils to the great number of dead pups to be seen on all sides.

Now this is the particular point:

In company with special Agent Murray, Captain Hooper, and engineer Brerton of the Corwin, I visited the *Reef* and *Garbotch rookeries*, St. Paul Islands, in August 1891,

Lord HANNEN.—On St. Paul Islands?

Mr. PHELPS.—Yes.

Lord HANNEN.—I thought the object of your observation was to show that pups were also dead on St. George's Island.

Mr. PHELPS.—Yes, but it was said on that Island it was confined to *two* rookeries, and this witness testifies to visiting other rookeries on that island—to visiting the Reef and the Garbotch rookeries which are different.

Mr. CARTER.—Tolstoi and Polavina are said to be the ones.

Mr. PHELPS.—Their proposition is that this is confined to Tolstoi and Polavina. This witness whilst on the same island visited 2 other rookeries. He continues thus:

and saw one of the most pitiable sights that I have ever witnessed. Thousands of dead and dying pups were scattered over the rookeries while the shores were lined with hungry, emaciated little fellows with their eyes turned towards the sea uttering plaintive cries for their mothers which were destined never to return.

Dr. Akerly was a resident physician on St. Paul in 1891, and at page 95 will be found his testimony. It is so long bearing on this point, although it is interesting and very much to the point, that I will only read a line or two here and there. But it is just touching this particular point, without going over his evidence in support of the general fact that is not denied. He says:

During my stay on the island I made frequent visits to the different seal rookeries.

That is on St. Paul. Then he says:

One thing which attracted my attention was the immense number of dead young seals; another was the presence of quite a number of young seals on *all the rookeries* in an emaciated and apparently very weak condition. I was requested by the Government Agent to examine some of the carcasses for the purpose of determining the cause or causes of their death. *I visited and walked over all the rookeries.* On *all* dead seals were to be found in immense numbers. Their number was more apparent on those rookeries, the water sides of which were on smooth ground, and the eye could glance over patches of ground, hundreds of feet in extent, which were thickly strewn with carcasses. Where the water side of the rookeries, as at Northeast Point and the Reef (south of the village) were on rocky ground, the immense number of dead was not so apparent, but a closer examination showed that the dead were there in equally great numbers, scattered among the rocks. In some localities, the ground was so thickly strewn with the dead that one had to pick his way carefully in order to avoid stepping on the carcasses. The great mass of dead in all cases was within a short distance of the water's edge. The patches of dead would commence at the water's edge, and stretch in a wide swarth up into the rookery. Amongst the immense masses of dead were seldom to be found the carcasses of full grown seals, but the carcasses were those of pups or young seals born that year. I can give no idea of the exact number of dead, but I believe that they could only be numbered by the thousands *on each rookery*. Along the water's edge, and scattered amongst the dead, were quite a number of live pups which were in an emaciated condition.

and so forth. His whole testimony should be read.

The last Witness I shall refer to from page 152, is Mr. J.-C. Redpath, who says:

Excepting a few pups killed by the surf occasionally, it has been demonstrated that all the pups found dead are poor and starved, and when examined, their stomachs are found to be without a sign of food of any sort. In 1891, the rookeries on St. Paul Island were covered, in places, with dead pups, all of which had every symptom of having died of hunger, and on opening several of them, the stomachs were found to be empty.

The British Commissioners themselves have not denied that there were pups on other rookeries than Tolstoi and Polavina, because in section 355 of their Report they say:

The mortality was at first entirely local, and though later a certain number of dead pups were found on various rookeries examined, nothing of a character comparable with that on Tolstoi rookery was discovered.

They were there for 12 days, and Dr Akerly has explained the difference.

Now, Sir, that is my answer to this proposition. What is the warrant for the claim that the mortality of these pups was confined to special rookeries on one Island?

Then it is said by my learned friend that the mortality appeared again in 1892 on the same rookeries when pelagic sealing was repressed by the *modus vivendi* in Behring Sea? How far it was repressed is a matter of conjecture; but that it was intended to be repressed is undoubted. Of course, of sealing that evaded the *modus*, we have no account here.

The PRESIDENT.—Have you any reason to suppose that Behring Sea was not quite closed to sealing?

Mr. PHELPS.—I have no reason to suppose it, founded upon any evidence or information; I am not to be understood as saying so. The *modus vivendi* closed that sea. That it was attempted to be enforced by both Governments in good faith is unquestionable—there is no doubt about that.

Mr. Justice HARLAN.—It was stated in the argument that some got into Behring Sea, before they got notice of the *modus vivendi*.

Mr. PHELPS.—Yes there is some evidence of that kind.

The PRESIDENT.—In 1891?

Mr. Justice HARLAN.—1891.

Sir CHARLES RUSSELL.—The figures (that I did not know were disputed) show that the entire number taken the year 1892 was 500.

Mr. PHELPS.—I am making no statement on that subject because I shall make no statement that is not founded upon evidence; and therefore I do not say that any sealer got in, or that any seal was killed in Behring Sea; I only say that is like the raids on the Island, and to what extent in that foggy, tempestuous region the *modus vivendi* was evaded, I do not know and I do not undertake to say. My friend may be quite right in the figures of the number of skins he gives, for aught I know. In that year 1892 the number of dead pups declined rapidly and there were none seen except on these two rookeries of Tolstoï and Polavina. Mr. Macoun in the British Counter Case, and Mr. Stanley Brown in the United States Counter Case, and Mr. Lavender and Mr. Murray, all show that the mortality of 1892 was confined to those rookeries, and that evidence undoubtedly may have misled my friends, and they have carried the conclusion that was applicable to that time to an anterior period. Now what does that show? It shows that the mortality of 1891 and of the previous year everywhere else except on those rookeries, must have been due to pelagic sealing, unless you ascribe it to some cause that no ingenuity has been able to suggest, much less to prove.

The evidence is not agreed as to whether the mortality in those two rookeries was or was not as great as that which was noticed in the same rookeries in 1891; but the evidence that we rely upon—the evidence of Mr. Murray, the assistant Treasury agent, and the evidence of Mr. Brown in the United States Case are both very explicit to the point that the mortality on those rookeries in 1892 was much less than on the same rookeries in 1891. Colonel Murray says:

> I went over the rookeries carefully, looking for dead pups. The largest number on any rookery occurred on Tolstoi, but here, as on the rookeries generally, but few of them were to be seen as compared with last year.

In his deposition in the case he testifies to having seen about 3,000 dead pups in 1891. Then he goes on to say:

> This was the first time in my four seasons residence on the islands, that the number of dead pups was not greater than could be accounted for by natural causes.

Then Mr. Stanley Brown says at page 388 of the United States Counter Case:

> Dead pups were as conspicuous by their infrequency in 1892 as by their numerousness in 1891. In no instance was there to be noted an unusual number of dead pups, except on the breeding grounds of Tolstoi, the position, character and size of which gave prominence to the carcasses. Here the mortality, while in no way approaching that of the previous season, was still beyond the normal, as indicated by the deaths upon the other breeding grounds.

The evidence on the other side is solely, as far as I know, that of the observation of Mr. Macoun, as stated in his Report, and an affidavit by Mr. Maynard which is referred to by Mr. Macoun. Now Mr. Macoun,

speaking of Polavina rookery, does not himself state there were as many dead pups on Polavina in 1892 as in 1891, because it does not appear that he was on Polavina in 1891 at all, and he could not make any comparison; but he takes a native with him to the rookery, and he quotes the native if he properly understood him (or, rather, if the native properly understood Mr. Macoun), to the effect that there never had been before so many dead pups in the rookeries. As to Tolstoi rookery, Mr. Macoun is the only witness who saw a greater number of dead on Tolstoi in 1892 than there were in 1891. He was on Tolstoi in the previous year, and he took a native along with him to corroborate his opinion of 1892 and he quotes from the latter's statement. The photographer was asked to verify a statement of the native, and the language of the photographer, whatever was meant, is: "When asked"—that is when the native was asked—"When asked whether there were *as many seals* (not dead pups) in 1892 as in 1891, he replied "more; more than ever I saw before". Mr. Macoun undoubtedly misunderstood him, because he gives it as supporting the claim that there were more dead pups in 1892 than in 1891; but the language that is given would seem to indicate that the native did not so understand the statement that he was making. It would be very plain that the native says no such thing if it were not that Mr. Macoun cites him, evidently understanding that that was what he meant to say. Mr. Maynard says in the course of his affidavit:

We walked to that part of Tolstoi rookery on which dead pups were lying in great numbers, and while we were standing within a few yards of the limit of the ground on which these dead pups were, Mr. Macoun asked Anton Melovedoff—

that is the native—

whether he thought there were as many of *them* as there were last year, to which he replied, "More; more than I ever saw before".

I make that observation upon the evidence for what it is worth. It is not conclusive by any means. It is an observation that is fair to make upon the language of the witness.

It is only fair, as I am dealing with the whole of this evidence, to read something from Mr. Macoun's report.

Mr. Macoun, at page 146 of his Report, which is in the 1st volume of the Appendix to the British Counter Case says:

Dead pups were first noticed by me on Tolstoi rookery the 19th of August, though photographs taken by Mr. Maynard on the 8th of August while I was on St. George Island, show that at that date there were nearly, if not quite as many of them on this rookery as there were ten days later. At the time I first noticed the dead pups I counted over four thousand (4,000)... The pups, when I first saw them, appeared to have been dead not more than two weeks, and nearly all seem to have died about the same time... This rookery was revisited on the 21st of August. At this time an estimate was again made of the number of dead pups. A large band of holluschickie on their way from the water to the hauling ground at the back of Tolstoi rookery, had stopped to rest on the ground on which the pups were lying, and hid a part of them; so that on this occasion a few less than 3,800 were counted... My last visit to Tolstoi rookery was made on the 11th of September. No living seals were to be seen on that part of the rookery ground on which the dead pups were, and it was now apparent that they extended further to the left than is shown in the photographs taken of them.

Sir CHARLES RUSSELL.—You are not reading Mr. Macoun's Report continuously?

Mr. PHELPS.—No; I skip a passage,—I am reading an extract given me. He goes on:

That is to say, a part of the ground on which seals are taken in these photographs had dead pups on it, which at that time could not be seen; this would add several

hundred to my former estimate of their number. No pups that had died recently were to be seen anywhere. It seems reasonably certain that all the dead pups seen on this part of Tolstoi rookery died at about the same time...

Of course, I do not read the whole of Mr. Macoun's observations,—I do not propose to. That shows, however, that when Mr. Stanley Brown left the Island, the mortality on the Tolstoi rookery was over, so that his testimony, which I have before read, on this subject, was made with full knowledge and observation of all the facts there were.

Just one other observation on this subject of dead pups. Of course, it is not to be denied that in 1892 while the *modus vivendi* prevailed, and while the number of nursing-mothers that were killed must in all probability have been small, there was a mortality on two rookeries of the Islands greater or less—Mr. Macoun states it a good deal higher than Mr. Murray and Stanley Brown state it. They are all witnesses entitled to attention. Their testimony differs only to that extent; but the decisive point has already been alluded to, that it was only on those rookeries that any mortality of dead pups that was noticeable was to be seen in 1892. Our witnesses testify that, as compared with former years, it was very small. Mr. Macoun's testimony is different.

Now then, the decisive point is, what was the cause of the death? The evidence completely makes out, I think I am authorized in saying, that in all the previous years the death of these pups was due to starvation, because I do not understand that there is any contradiction of the numerous statements that have been made before, that the pups were in an emaciated condition, and that in numerous instances when they were dissected, and their stomachs opened, they were found to be without any nourishment. In 1892 the dead pups were generally in good condition, and not indicating death by starvation, and the testimony of Mr. Macoun himself establishes that. He says this in his report at page 147 of the same Appendix:

> That their deaths were not caused by starvation was very evident, as they were, with few exceptions, large and well developed, not small and emaciated, as is almost invariably the case with those that are known to have wandered away from the breeding grounds and died of starvation.

Now, Sir, by the testimony of Mr. Macoun himself, who very fairly gives his observation on that point, it is plain that the seals that died on these rookeries in 1892, did not die of starvation. It is not attributable to pelagic sealing. It is equally plain upon the evidence of many witnesses, which is not contradicted, that in previous years on all the islands and all the rookeries they did die of starvation. Now what these pups died of on these two rookeries in 1892, it is quite out of my power to tell—the evidence does not inform me.

I leave that subject and I leave it with the observation that with the exception of the difference which I have tried to state fairly between Mr. Stanley Brown and Mr. Murray, on the one hand, and Mr. Macoun on the other, as to the relative proportion of the dead pups in these two rookeries, there is no contradiction. Their evidence must speak for itself and I cannot assist the Tribunal to reconcile it. And as I am now coming to a new topic, although it is a few minutes before the adjournment, perhaps you will allow me, Sir, to stop here for the moment.

[The Tribunal then adjourned for a short time.]

Mr. PHELPS.—I thought I had done, Sir, with the subject of dead pups; but there is one other suggestion from the other side that I want to answer briefly, if you will permit me to recur to it. The suggestion is that on the Commander Islands no dead pups were seen in 1892, which is the year when the pelagic sealing went over to the vicinity of

those Islands in consequence of the *modus vivendi*. That, again, is inaccurate. Mr. Macoun says, in his statement in the British Counter Case at page 148.

Special inquiry was made by me at the Commander Island during the first week in September as to whether young seals had been found dead in 1892 in larger numbers than usual, and several of the eldest natives were questioned by me on this point. I was told by them that none had been seen there but a few that had been killed by the surf or had wandered away from the rookery ground.

This is not Mr. Macoun's observation, but what he learned from some of the natives, and is in direct opposition to the testimony of a very much higher character than that of the natives. Either the natives misunderstood him, or he misunderstood them, or he enquired of men who did not understand what they were talking about.

Mr. Grebnitzki, whom, you will remember, was the Governor for 15 years, in the United States Counter Case at page 366, says:

There are always a few dead pups to be found on the rookeries whose death is not due to that of their mothers, but during the last year or two a greater number of dead pups have been actually noticed than heretofore, and have attracted the attention of all persons on the islands who are at all familiar with seal life. It cannot be successfully contended that they all died of natural causes. There is no disease among the Commander Island seals; and while a certain number of young pups are always exposed to the danger of being crushed to death... or of being drowned by the surf, yet these causes of death will not account for the greater mortality of pups which took place during the past summer. Besides the bodies of the dead pups I refer to are those of starved animals, being greatly emaciated.

Mr. Malowansky says under oath, in regard to this subject in the United States Counter Case, page 374,—he is the Superintendent of the Russian Government on those islands:

After the pups have learned to swim a number of dead pups have been reported killed along the shore by the surf, but the number was always inconsiderable. These pups were always grey pups, their bodies were always near the water's edge, and never back on the rookeries. Within the last two years, the natives noticed however, another class of dead pups on the islands. These were always black pups which were too small to have learned to swim, and were found on the breeding grounds two hundred yards from the water. Such dead pups have been observed since the sealing vessels began to take seals about the island. This year (1892), the numbers became so great that the latter was commonly talked about on the islands, and the natives made complaint to the Governor. It was my opinion and the universal opinion of all on the islands that these deaths were caused by starvation, which resulted from the mothers having been killed by the sealing schooners while out feeding. This was also the opinion of the natives and others on the islands during all of last season (1891). The matter was discussed with the British Behring Sea Commissioners, who were at Behring Island for about a day and a half in September of that year. Snigeroff told them about it, and I acted as the interpreter at the time. The grey pups heretofore mentioned as having been killed were always plump and in good condition, while these black pups were in all cases very thin and emaciated, showing evident signs of starvation.

And you will remember, to conclude, the passage that I read a day or two ago from the letter of Mr. Chichkine, the Russian Foreign Minister, in the correspondence with the British Government, about their seizing vessels, where, in stating his case, and the reasons for his seizure, he stated these facts, including the fact that the pups died on the islands on account of the loss of their mothers.

Now I come to another question. What is the consequence of all this? We say the consequence is the inevitable extermination of the animal. We say that the reduction in the numbers of the seal herd, which the Commissioners, acting jointly, agreed had taken place—it was the only point upon which they did agree—and that it was attributable to the act of man, is owing to this indiscriminate killing; and we say the necessary and inevitable consequence of it will be the extermination

of the seal herd. On that point perhaps you will bear with me while I at first, consider very briefly, if General Foster will be so kind as to assist me by pointing out, what has taken place elsewhere. The islands marked in red, on the map now before the Tribunal, were islands which the testimony says were once populous; where the seals were as numerous as they are on the Pribilof Islands, and were obtained in great numbers. What has become of them? Except I believe on the Lobos Islands where some measures have been taken to prevent indiscriminate killing some years ago, where there are a few left, though hardly enough to be commercially important, they are gone from every one of them; so that with the small exception of what there are on the Lobos Islands, there are no seals in the world—fur-seals, I mean. Except on the Pribilof Islands, and the Commander Islands, in Behring Sea, they are all gone. When the sealers first visited the Island of Mas-a-Fuero, off the coast of Chili, in 1797, there were estimated to be 2,000,000 or 3,000,000 on the islands. More than 3,000,000 were killed, and the skins carried to Canton in seven years thereafter. In 1807 they were almost exterminated, and in 1891 Captain Gaffney visited the islands and saw 300 or 400, killing a few. All this is from the evidence in the Case.

Juan Fernandez is a few miles eastward of Mas-a-Fuero. Dampier, who visited this island in 1683, says that seals swarm as thick about the island of Juan Fernandez, as if they had no other place in the world to live in. There is not a bay or rock that one can get ashore on but is full of them. There the unrestrained taking of the seals on the land began in 1797, and in the year 1800 there were no seals to be found on any part of it. In 1891, the island was visited, and a few fur seals were seen, but very few.

The coast of Chili has the same history. I need not read the story over again. The same about Cape Horn and the Falkland Islands. There they are not quite gone, because the British since 1881 have put an Ordinance in force which was presented to the Tribunal in another connexion, and they are gradually increasing, but as yet assume no commercial importance. On the South Georgia Islands and Sandwich Land 300 miles east of Cape Horn, when first discovered, fur-seals existed in very great numbers. In 1800 a single vessel took 57,000 skins. 16 vessels visited South Georgia that year, and in a few years not less than 1,500,000 were taken from the Islands. In 1822, they were reported as almost extinct. In 1874, after many years' rest, the Islands were visited, and 1,450 skins were taken. In 1875, five vessels secured 600, and in 1876, four vessels could only obtain 110.

In 1892 Captain Budington found the seals in that region practically extinct, only a few straggling ones being seen.

The South Shetland Islands is another place. The first sealing vessels in 1819 readily obtained cargoes of very fine skins. The news of the discovery was quickly spread and by the end of the next year a fleet of 30 vessels reached the region to gather the valuable pelts. Captain Weddell gives this account:

> The quantity of seals taken off these Islands by vessels from different parts during the years 1821 and 1822 may be computed at 320,000 and the quantity of sea-elephant oil at 960 tons. This valuable animal, the fur-seal, might, by a law similar to that which restrains fishermen in the size of the mesh of their nets, have been spared to render annually 100,000 fur-seals for many years to come. This would have followed from not killing the mothers until the young were able to take the water and even then only those which appeared to be old together with a proportion of the males thereby diminishing their total number but in slow progression. This system is practised at the River la Plata. The Island of Lobos at the mouth of that river contains a quantity of seals.

And he refers to that where there is a similar ordinance or provision. He says:

The system of extermination was practised, however, at the South Shetlands; for whenever a seal reached the beach, of whatever denomination, he was immediately killed and his skin taken, and by this means at the end of the second year the animals became nearly extinct. The young, having lost their mothers when only three or four days old, of course died, which at the lowest calculation exceeded 100,000.

Mr. Williams, in a Report to a Committee of the Congress of the United States, speaking of the Shetland Islands says:

In 1872, fifty years after the slaughter at the Shetland Islands, the localities before mentioned were all revisited by another generation of hunters, and in the sixteen years that have elapsed they have searched every beach and gleaned every rock known to their predecessors and found a few secluded and inhospitable places before unknown; and the nett result of all their toil and daring for these years scarcely amounted to 45,000 skins; and now not even a remnant remains save on the rocks off the pitch of Cape Horn. The last vessel at South Shetland this year of 1888, after hunting all the group, found only 35 skins, and the last, at Kerguelan Land, only 61, including pups.

The Island of Tristan d'Acunha and Gough Islands, midway between Capes Horn and Good Hope, were formerly abundantly occupied, and in 1887 Captain Comer, on a sealing voyage, left six men on Gough Island, where they remained nine months, taking only about 50 skins.

On the west coast of South Africa, the same history is true. The immense number of seals in this locality, on the islands and along the coast, were vigorously hunted, beginning about 1790, and large quantities were taken by sealing vessels at intervals up to 1830, when, owing to the diminished number, sealing became unprofitable.

The Islands south-east of the Cape of Good Hope was another place once covered with a multitude of seals; so that Captain Cox, who visited there in 1789, says:

On first landing, we found the shore covered with such multitude of seals, that we were obliged to disperse them before we got out of the boat.

But, on all these Islands, only a few straggling seals are found, in numbers so small as to make their pursuit unprofitable.

In Australia and New Zealand at the beginning of the present century, fur-seals in considerable numbers were found along the south-west coast of Australia and in the vicinity of Tasmania. Stimulated by these reports, the adventurous sealers discovered an apparently inexhaustible supply of these animals on the numerous small islands south of New Zealand. In 1803 a single vessel took away from the island of Antipodes 60,000 prime fur-seal skins. Macquarie Island was discovered in 1811 by a sealer, who procured a cargo of 80,000 skins. Sealing on these islands was at its height from 1810 to 1820. In two years 300,000 skins were obtained, one vessel carrying away 100,000. Now Morrell, who visited those regions in 1830, reported that the sealers had made such complete destruction "as scarcely to leave a breed, not one fur-seal" being found by him. A few, however, survived the general slaughter, and, in recent years, under the protection of the Government of New Zealand, a small annual catch of from one to two thousand fur-seals is now taken.

There is the history of the whole of the world, as far as these animals are known to exist in it. My learned friend says these animals were not killed in the sea; they were killed on the islands. That is true undoubtedly. They were killed on land and water. It is not the killing of a seal in the water that exterminates the race. The same seal may be killed in the water as well as on land without affecting the

duration of the race. The only difference would be that in killing in the water, they do not save so many of those you kill. But that is not the point. It is the indiscriminate killing by which the females are destroyed and breeding stopped.

That is what destroys the race. If we were engaged on the part of the United States in killing the female seals on the Islands, and the pelagic sealers were engaged in killing the male seals at sea, this case would be exactly reversed. I mean killing the same seals. If they were doing on the sea what we are doing on the Islands, or if we were doing on the Islands what they were doing at sea, then the preservation of the fur-seal race would, of course, require the cessation on the Islands and not at sea. It is the indiscriminate killing by which the stock is destroyed.

I want to refer—I hope not tediously—to Vol. 1 of the United States Appendix, at page 411. We have collected there letters from many of the most distinguished and leading naturalists in the world, from many countries on this subject. I cannot afford the time to read to you aloud, what I should be so glad to read, all these letters, but I may just advert to some passages in some of them, and I will respectfully ask, if these letters have not already engaged the attention of the Members of the Tribunal,—and, of course, in this vast mass of material, I cannot tell what has been read and what not—I would respectfully ask the perusal of these pages after page 411. The first statement is by Professor Huxley, and this is not in response to any enquiry—some of the other letters are. He says, at the bottom of page 411.—

> In the case of the fur-seal fisheries, the destructive agency of man is prepotent on the Pribilof Islands. It is obvious that the seals might be destroyed and driven away completely in two or three seasons. Moreover, as the number of bachelors, in any given season is easily ascertained, it is possible to keep down the take to such a percentage as shall do no harm to the stock. The condition for efficient regulations are here quite ideal. But in Behring Sea and on the north-west coast the case is totally altered. In order to get rid of all complications, let it be supposed that western North America, from Behring Straits to California is in the possession of one Power, and that we have only to consider the question of regulations which that Power should make and enforce in order to preserve the fur-seal fisheries. Suppose, further, that the authority of that Power extended over Behring Sea, and over all the north-west Pacific, east of a line drawn from the Shumagin Islands to California.
>
> Under such conditions I should say (looking at nothing but the preservation of the seals) that the best course would be to prohibit the taking of the fur-seals, anywhere except on the Pribilof Islands, and to limit the take to such percentage as experience proved to be consistent with the preservation of a good average stock. The furs would be in the best order, the waste of life would be least, and if the system were honestly worked, there could be no danger of over-fishing.

Sir CHARLES RUSSELL.—Would you read the next passage.

Mr. PHELPS.—I really have not the time or I should be glad to oblige my learned friend. He proceeds to point out what he conceives to be the legal difficulties in the way.

Sir CHARLES RUSSELL.—He says what he calls the ideal arrangement is impracticable.

Mr. PHELPS.—He says it is impracticable because he assumes there are legal objections—not that it is impracticable in fact: finally, he says, and I will read his conclusion. (As I have said in reading any passage of these letters, I do it in the hope that the whole context will be read.)

> Finally, I venture to remark that there are only two alternative courses worth pursuing.
>
> One is to let the fur-seals be extirpated. Mankind will not suffer much if the ladies are obliged to do without seal skin jackets.

That is one.

The other course is to tread down all merely personal and trade interest in pursuit of an arrangement that will work and be fair all round; and to sink all the stupidities of national vanity and political self-seeking along with them.

Sir CHARLES RUSSELL.—That refers to a scheme for making the Pribilof Islands an international concern.

Mr. PHELPS.—No.

Sir CHARLES RUSSELL.—I assure you, yes.

Mr. PHELPS.—Now I cannot read all these letters, but in every one of them that I shall notice I hope the context will be read, and it will be of no avail for me to select passages.

Dr. Sclater, Secretary of the Zoological Society of London, has given an affidavit in which he says:

1. Unless proper measures are taken to restrict the indiscriminate capture of the fur-seal in the North Pacific he is of opinion that the extermination of this species will take place in a few years as it has already done in the case of other species of the same group in other parts of the world.

2. It seems to him that the proper way of proceeding would be to stop the killing of females and young of the fur-seal altogether, or as far as possible, and to restrict the killing of the males to a certain number in each year.

3. The only way he can imagine by which these rules could be carried out is by killing the seals only in the islands at the breeding time (at which time it appears that the young males keep apart from the females and old males), and by preventing altogether as far as possible, the destruction of the fur-seals at all other times and in other places.

I commend to the attention of the Tribunal an article which this gentleman, of his own motion, published in "The Nineteenth Century" magazine, of London, since this argument commenced. It is in the June number, entitled "A Naturalist's View of the Fur-Seal Question," in which he says he has read this evidence, and he comes out with his views. It is not in the Case, and I have not time to read it, but I quite commend that to the attention of the Tribunal, as I did venture, on a question of law, to commend an article by Mr. Tracy, in "The North American Review," who is a very eminent lawyer in the United States. Mr. Merriam addressed a circular letter of enquiry to various distinguished naturalists in different parts of the world, in which he gave them, as a foundation, certain statements in regard to the nature and habits of the fur-seal, and the conditions of pelagic sealing.

These occupy several pages, and in order fairly to understand the answer of these naturalists it would be but fair to be first acquainted with the facts that were presented in the letter of enquiry, because if those facts have misled these gentlemen, then their opinion would be good for nothing. I must not stop to read that, but I submit, with great confidence, it will be found to be a correct statement of facts. On page 419, there is a letter in French, and a translation of Mr. Milne Edwards, of Paris. He is the director of the museum of natural history. This is but an extract and he refers to the extermination that has taken place everywhere, and he goes on and says,

It will soon be thus with the *callorhinus ursinus* in the North Pacific Ocean, and it is time to ensure to these animals a security which may allow them regular reproduction. I have followed with much attention the investigations which have been made by the Government of the United States on this subject. The reports of the Commissioners sent to the Pribilof Islands have made known to naturalists a very large number of facts of great scientific interest, and have demonstrated that a regulated system of killing may be safely applied in the case of these herds of seals when there is a superfluity of males. What might be called a tax on celibacy was applied in this way in the most satisfactory manner, and the indefinite preservation of the species would have been assured if the emigrants on their way back to their breeding places had not been attacked and pursued in every way.

Dr. Bhering of Berlin, Professor of Zoology in the Royal Agricultural College, writes a letter which will be found at the bottom of page 420; and reading only an extract here, he says:

I am, like yourself, of the opinion that the remarkable decrease of fur-seals on the rookeries of the Pribilof Islands, which has of late years become more and more evident, is to be attributed mainly or perhaps exclusively to the unreasonable destruction caused by the sealers who ply their avocation in the open sea. The only rational method of taking the fur-seal and the only one that is not likely to result in the extermination of this valuable animal is the one which has hitherto been employed on the Pribilof Islands under the supervision of the Government. Any other method of taking the northern fur-seal should, in my opinion, be prohibited by international agreement. I should, at furthest, approve a local pursuit of the fur-seal where it as destructive of the fisheries in its southern winter quarters. I regard pelagic fur-sealing as very unwise; it must soon lead to a decrease, bordering on extermination of the fur-seal.

Professor Collett, of the University of Christiania, in Norway, says:

It would be a very easy reply to your highly interesting treatise of the fur-seal, which you have been kind enough to send us, when I only answered you that I agree with you entirely in all points. No doubt it would be the greatest value for the rookeries on the Pribilof Islands, as well as for the preservation of the existence of the seal, if it would be possible to stop the sealing at sea at all. But that will no doubt be very difficult, when so many nations partake in the sealing and how that is to go about I cannot know. My own countrymen are killing every year many thousands of seals and *cystophoræ* on the ice barrier between Spitzbergen and Greenland, but never females with young; either the old ones caught, or, and that is the greatest number, the young seals. But there is a close time, accepted by the different nations, just to prohibit the killing of the females with young. Perhaps a similar close-time could be accepted in the Behring Sea.

Dr. Hartlaub writes a letter, and you will notice that the original as well as the translation, from which I read, is printed. He says:

I am far from attributing to myself a competent judgment regarding this matter, but considering all facts which you have so clearly and convincingly combined and expressed, it seems to me that the measures you propose in order to prohibit the threatening decay of the northern fur-seal are *the only correct ones promising an effective result.*

Professor Salvadori, from Turin, gives a letter.

Dr. Leopold von Schrenck, of the Imperial Academy of Science, St. Petersburg, gives another letter.

Then I take Dr. Giglioli, the Director of the Zoological Museum, Royal Superior Institute in Florence. That is a long and full letter. I wish I could read it all, but I will read from the bottom of page 424.

Having conclusively shown that the lamented decrease in the herd of fur-seals resorting to the Pribilof Islands can in no way be accounted for by the selective killing of *non-breeding males for commercial* purposes, which takes place on those islands under special rules and active surveillance, we must look elsewhere for its cause; and I can see it nowhere but in the *indiscriminate slaughter,* principally practised on breeding or pregnant females, as most clearly shown in your condensed Report, by pelagic sealers.

In any case, all who are competent in the matter will admit that no method of capture could be more uselessly destructive in the case of Pinnipedia than that called "pelagic sealing," not only any kind of selection of the victims is impossible, but it is admitting much to assert that out of *three* destroyed *one* is secured and utilized, and this for obvious and well-known reasons. In the case of the North Pacific Fur Seal, this mode of capture and destruction is doubly to be condemned, because the destruction falls nearly exclusively on those, the nursing or pregnant females, which ought on no account to be killed. It is greatly to be deplored that any civilized nation possessing fishery laws and regulations should allow such indiscriminate waste and destruction. The statistical *data* you give are painfully eloquent, and when we come to the conclusion that the 62,500 skins secured by pelagic sealing in 1891 represent at a minimum one-sixth of the Fur seals destroyed, namely 375,000,—that is, calculating one in three secured and each of the three suckling a pup or big with young,—we most undoubtedly need not look elsewhere to account for the rapid

decrease in the rookeries on the Pribiloff Islands; and I quite agree with you in retaining that unless the malpractice of pelagic sealing be prevented or greatly checked, both in the North Pacific and in the Behring Sea, the economic extermination of *Callorhinus ursinus* is merely the matter of a few years.

The rest of the letter is equally interesting.

The next letter is from Dr. Raphaël Blanchard of Paris, Professor of the Faculty of Medicine and General Secretary of the Zoological Society of France. It is to the same effect, and I only call attention to it.

Then the letter from Dr. William Lilljeborg, of Upsala, Sweden, and Professor Nordenskiold, of the Academy of Sciences, Stockholm, is a joint letter; and I will read an extract from that:

We do not, therefore, hesitate to declare that the facts about the life and habits of the Fur Seal, stated by you in your said letter under 1-20, should serve as a base for the regulations necessary to preserve this gregarious animal from its threatened extinction in a comparatively short time.

These regulations may be divided into two categories, namely, firstly, Regulations for the killing, etc., of the Fur Seals on the rookeries in order to prevent the gradual diminution of the stock; Secondly, Regulations for the Pelagic Sealing or for the hunting of the Seals swimming in the ocean in large herds to and from the rookeries, or around the rookeries during the time when the females are suckling the pups on land.

Then the last paragraph:

As to the Pelagic Sealing, it is evident that a systematic hunting of the Seals in the open sea on the way to and from or around the rookeries, will very soon cause the complete extinction of this valuable, and from a scientific point of view, so extremely interesting and important animal, especially as a great number of the animals killed in this manner are pregnant "cows," or "cows" temporarily separated from their pups while seeking food in the vicinity of the rookery. Every one having some experience in Seal-hunting can also attest that only a relatively small part of the Seals killed or seriously wounded in the open sea can in this manner be caught. We are, therefore, persuaded that a prohibition of Pelagic Sealing is a necessary condition for the prevention of the total extermination of the Fur-Seal.

There are other letters, with which I must not detain you, from gentlemen of eminence in various countries of scientific position and high repute.

Now this is scientific testimony; these are not seal-hunters or superintendents. This is the scientific branch of the case; on the other hand we have a great mass of testimony that I cannot stop to review. There is a vast amount of evidence in the case from practical men. In the Collated Testimony appended to the American Argument from pages 306 to 312 you will find the testimony of 174 practical sealers; 25 of them are masters of vessels, 30 are seamen, 86 are Indian hunters, 8 others are intelligent observers from those resident on the Islands. I shall not read a word of their testimony. I refer you to it. It is all concurrent.

It is nothing but a repetition of the statement that in their judgment the decrease that has taken place is owing to this destruction of females and young, and that the extermination of the seal will be the consequence. They come to the exact conclusion from their practical point of view that the scientific men do from theirs. These witnesses are no more scientific men than those scientific men are practical sealers, and the concurrence of their judgment is extraordinary.

What is there on the other side? Among all the scientific men of eminence in this world, even including those in England like Professor Sclater, Professor Huxley and Professor Flower, whose letter was read the other day, where is the man who comes to contradict the testimony of these gentlemen and to express any different view? Where is the practical evidence to the contrary? What is it that my learned friends

say about this? Do they say that you can go on killing females in these increasing proportions, for you have not failed to observe that the business of pelagic sealing has grown in respect to the number of vessels with great rapidity—do they assert that? No. They attempt to parry it only by saying, "Well, you exaggerate it". You might as well say we exaggerate mathematics. That we exaggerate a demonstration of geometry. It is a result that comes mathematically;—certainly, by natural laws from certain premises. Nobody can exaggerate it. It does not need any exaggeration.

They undertake, however, to say this is not the only factor in extermination. This is not all there is, they say; you are responsible for some of it; there is a decrease that is alarming and portentous, but it is not all our fault. It is partially yours. Now, I propose to examine that question; not because it is really material, but because, so far as time allows, I do not propose to leave any suggestion that my learned friends think important enough to make, and to rely upon, to be disregarded. We will meet them on their own ground on all these points.

Let me first, however, call your attention to the conclusive mathematics that result from this evidence. I said a little while ago, in opening the question of the proportion of females, that reflection would show, without any figures, that this business of killing the males ever since 1847 and sparing the females, till pelagic sealing prevented them, must result in a preponderance. My learned associates have prepared for my use a statement. It is in reply to the calculation that my learned friend Sir Charles Russell presented, based on the diagrams of the American Commissioners which are given in connection with their Report; and he arrives at a conclusion which certainly leads me to think that he is not so much my superior in mathematics as he is in everything else. He arrives at the conclusion that the diminution caused by pelagic sealing on the statistics in this case is inconsiderable; or figuring it out it is not large enough ever to exterminate the herd. How does he reach that conclusion? Simply by leaving out the most important factor in his sum. He treats these females as individuals, and takes no account of their productive faculty. He does not take into account the geometrical progression from year to year. If the same mathematics were true in the increase of the human race we should not be here. We should long ago have perished off the earth. It is the reproductive power of the female sex which has kept the human race in its rapid progression in number, even though the ratio of increase in humanity is, of course, from many and obvious reasons, very much slower than the progression of many animals of a lower grade.

In reply to this suggestion my learned friends on our side have prepared some tables, which are nothing new. They are simply figures which we make upon the evidence, in reply to his figures; but I cannot make them understood without you have the kindness to glance at the Report. They introduce, as I say, nothing new. They are only figures based on the evidence in the case, and I shall be able to point out what there is of them, very briefly. They can be compared in their results with the result that my learned friend has arrived at with his figures.

The assumption of these tables should be first stated, in order that they may be understood. We assume that the seals born in any year decrease annually at the several rates indicated in the diagrams of the United States Commissioners.

(See the United States Case, page 353.) That is from natural causes, of course; that they decrease aside from anything that men do; and it struck me that the ratio allotted by the Commissioners of

decrease from natural causes was too large; but my opinion on that question is worthless; and there is no evidence by which it can be ascertained. They evidently undertook to make a very liberal allowance for the death of the young by natural causes; and they work out, I believe, that half of all that are born perish the first year; and then in a proportionate ratio they continue to perish from merely natural causes, even if they were left alone. Then we assume that each breeding female has a breeding life of 18 years. That is the result of the best evidence there is in this case: that each breeding female gives birth annually, from and including her third year, to one pup, and that half of these pups are females. That, I believe, is conceded. Of course, these are assumptions, but they are the best assumptions that the evidence warrants as to the breeding age of the seals, the number of pups that they produce. Then a calculation is made in this way; and we will take Table A. We take 1,000 females. By way of hypothesis we divide them into 4 classes: 3 years old, 4 years old, 5 years old, 6 years old, which are all breeding ages. Then if you refer to the first column of Table A, the left-hand column, the figures at the top give the numbers of the years from one to 18. In column one, the 4 lower figures of 250 each represent these 1,000 fur-seals of 3, 4, 5 and 6 years of age. Now those seals will produce that year 500 female pups, upon the assumption that, if they produce 1,000 young, 500 will be females. You add, therefore, to that 1,000, the first year, 500; and you have now 1,500 females of whom the 500 are just born.

Now go to the second year, and the 500 females, that were born the year before, shrink, by natural causes, to 250 who attained their second year, and that 250 is the second figure in the column. Then the 1,000 breeding seals, with which you begin, shrink, the one class to 208, the next to 225, the next to 236, and the last to 220. Those are the figures resulting from the ratio of decrease given by the Commissioners. That number of seals, thus shrunk from the former year, produces that year 444 females, which you will find is the figure at the head of the column, and the number of female seals has increased that year, the net increase, to 1,583. Now if you follow that table down, noticing that the corresponding figure in each column is one step lower down, you find what becomes of that original 1,000 that you started with. In the sixteenth year they are all gone; that is to say, if not dead they are past the breeding time, and that 1,000 with which you started has gradually disappeared from the herd, and is gone.

You will see what the successive birth in each successive year is after they get to be old enough for the seals that are born in each successive year to breed, and you will see at the head of the column under each successive year the females that will be born during that year. They are carried forward with their increase after they get to be three years old, and I think with this explanation I can add nothing that renders the tables any clearer. They are quite clear as they stand and you see the result in the 18 years; at the end of that time 1,000 females have become 2,117, as a net result after deducting all that have died from natural causes either by being killed in earlier years or from outliving their usefulness and so disappearing.

Unless some question should be suggested about these tables I will turn to Table B though I should be happy to try to answer any question that may be put.

Table B shows the number of females that would have been alive in 1882 except for pelagic sealing and which would have appeared on the breeding grounds in 1884, calculating from Table B.

This table begins with the year 1872 and ends with the year 1882. That covers 11 years therefore. It assumes the theoretical calculation of the last table. It gives the catch for each year as derived from actual figures in the evidence the tables given by the American Commissioners of the pelagic catch, and it figures out upon that basis the net loss to the herd by the destruction of the number of females which the table shows were actually taken.

That requires a word of explanation before leaving it. We have assumed that for the purpose of this table, all the seals shown to have been taken by pelagic sealing are females. Of course, that might at the threshold be challenged. We do it for this reason: In the first place 85 per cent are proved to be females. Then it is shown by a great body of evidence what common sense indicates sufficiently without any evidence, that a great many more seals are necessarily destroyed by shooting in the water than can possibly be saved, and that of the proportion of seals that are lost, the same proportion are females as among those that are saved, so that if 85 per cent of the seals saved are females, 85 of those lost are females, and when you add a very small percentage to what the evidence shows is the actual loss, it is a very moderate assumption that the number of seals destroyed, wasted and lost is equal to the entire number of seals saved, male and female. Therefore we have felt it right—and the figures sustain us—in treating the pelagic product that is saved as all of them being females.

Now what is the result? The result is that the number of females killed in those ten years, because although 11 years are covered, in one year, namely, that of 1873, the catch is not given—the number of females lost to the herd aside from those perishing from natural consequences is 137,624. That is the actual result; that is at the end of 1882. Now if you will kindly turn over the leaf to table C, this is carried forward, so as to show the number of females which would have been alive in 1889 except for pelagic sealing, and which would have appeared on the breeding grounds in 1891, three years later. It is a carrying forward of the same figures with the addition of the catch in the years subsequent to 1882—from 1882 to 1889; and on the same basis of calculation you find as the result of these figures, that the female seals on the breeding grounds in the year 1891, in consequence of the ascertained pelagic catch, would be 483,420, in round numbers, 500,000 of female breeding seals destroyed by the pelagic catch, and by nothing else: I respectfully invite attention to those figures.

Lord HANNEN.—You have invited a question upon this table, I believe.

Mr. PHELPS.—Certainly, my Lord.

Lord HANNEN.—Does that take account of any female born to replace those supposed to be used?

Mr. PHELPS.—Yes.

Lord HANNEN.—It does take that into account.

Mr. PHELPS.—Yes, it takes an account of the perpetual birth-rate as well as the decrease. In the first table that is made very plain by adding every year the increment and deducting the loss from natural causes. Those are figures that are applied to the pelagic catch, and the consequence of the figures is, that the loss from the pelagic catch to the herd is in round numbers 500,000 breeding females—not quite that. Mr. Carter has suggested a correction, that naturally enough escaped me, that this 483,420 is subject to one deduction that is not made in the table. It is a little too large. It is subject to the deduction of those who would have died between 1889 and 1891, from natural causes.

Mr. CARTER.—It is not too large for 1889.

Mr. PHELPS.—No. The table is right as it is headed. It shows the loss in 1889, but when you come to carry that forward, 3 years longer, to 1891, you must take into account the deaths from natural causes of these young seals maturing during that period. That figure has not been made, but it would not change the result.

On the other hand the killings of 1890 and 1891 are not included, which would more than balance, because if they are not included then the number of females would be increased rather than diminished.

Now this is Table D, the last one, which shows the loss in the number of female seals which would be effected by 10 years of pelagic sealing based on the supposition that 20,000 breeding females were killed annually during that period.

This is a hypothetical table not founded on actual catch, showing what would be lost if 20,000 breeding females are killed by pelagic sealing each year: you will see readily from the table how that is figured out, and the total loss in 10 years of female seals would be 361,840. The difference between this table and the last is that the last is attempted to be founded on the actual destruction as reported. This is based on a hypothetical destruction of 20,000 female seals in each year. I am talking exclusively of female seals in these tables. They take no account of anything else. It is the loss of breeding females. I should have remarked that there is a total loss of females, and a loss of breeding females, the difference being of course that females are not breeding females till they are three years old, and the loss of breeding females is 220,820, and the total loss of females at the end of the period is 361,840.

The American Commissioners do not assume to number the herd, but they give a hypothetical herd in which there is supposed to be 1,500,000 females, of which 800,000 are capable of breeding. That is a total herd of 3,000,000. It is seen, therefore, assuming the Pribiloff herd to correspond in numbers to the Commissioners' hypothesis, that in 10 years of pelagic sealing which destroyed 20,000 breeding females a year, the number of females in the herd would be reduced by 361,840, or over 24 per cent of the whole number of females, while the breeding females would be reduced by 220,820. If you take it at 3,000,000 as its normal condition, and assume half of those are females, and that of the 1,500,000 females, 800,000 are capable of breeding, the figures tell the consequence, that 27 per cent of the breeding cows are gone in 10 years. Of course, it may be said these figures are upon the hypothesis of the Commissioners, because an exact census cannot be taken, but it is the best hypothesis that the case admits of. I do not think that examining this table, in connection with the evidence in the case, it will occur to members of the Tribunal that the premises are in any respect erroneous, that the hypotheses are not the most just and reasonable that the materials of the Case enable us to make; and from this source as well as from all the others we arrive at a conclusion that I confess, to my mind, would be just as apparent before I heard a word on the subject from scientific, or practical men, from tables, from experience elsewhere, as it is now. Anyone who will give a moment's attention to the geometrical progression of animal life—animals of this class I mean, or animals that are analogous to those with which we are concerned—must see, if he is no more of a mathematician than I am, what result takes place.

Cast your eyes back for one moment to the growth of the population of this world. The conditions of increase are nothing like those we

assume here. The human race is not polygamous. The number of children that are produced under ordinary circumstances is far less. The time that elapses before the productive period arises is much greater. Now let a person reflect for a moment how long it is since the continent of America was discovered. The Indians that then inhabited it are substantially gone. A remnant alone remains in the Far West that are fast disappearing. Now look at the 60,000,000 or 70,000,000 of people on that Continent, leaving Indians out. Where do they come from? Emigration considerably, of course. All from emigration in the first place—all the descendants of emigrants. But what country has lost population in that period from whence they came? One or two—perhaps one, might be named; under unhappy circumstances in a more recent period, its population has diminished, but not during that entire period. In every country in the world that 400 years ago began to contribute to the population of the Western Hemisphere its own population has largely increased.

Now suppose a herd of animals of this kind is not touched by man at all. The increase would not be indefinite: it would reach a point which would be called by naturalists its maximum. The laws of nature provide for those things. No race of animals could ever over-populate the earth or reach a point where the laws by which the increase of population regulates itself.

The PRESIDENT.—Malthusianism.

Mr. PHELPS.—Yes, the natural Malthusianism. The natural operation of that theory undoubtedly; but in order for that, causes have to intervene, provided by Providence, by which these animals are kept at their maximum. It was enquired by the President, in the early stages of this discussion, how it came to pass, if the males were not reduced by artificial killing, that the females would become most numerous.

That is a question that is for naturalists to answer, or for observers; but I suppose the answer to be in the theory of the survival of the fittest. I suppose when the number of males becomes too large in such a herd of wild animals, when they are not artificially restrained as in the propagation of domestic animals, there is a mutual destruction by fighting, of which these islands are the conspicuous theatre, with regard to this race of animals, and it results not in the survival of all the males, but only a part of them. However, that is theoretical, and I do not care to pursue it.

Now, Sir, this is the point to which all my observations have tended to day, and, part of them, yesterday: are we, or are we not as a matter of fact, established by the evidence in this case, drawn from many converging and independent sources, entitled to say, that the continuance of pelagic sealing just as it has taken place, especially in view of the increase of it, which we have shown also to be steady, and which will only find its check when the destruction of the animals ceases to render it profitable, results necessarily at no very distant period in the extermination of this race of animals here as it has everywhere else.

Now returning to what has been said by my friends on the other side —that is to say, that the management on the islands has not been good, and therefore that the pelagic sealer is not responsible for all the decrease that has taken place in this herd.

Before I look into the facts upon which I shall claim that to be a proposition absolutely unwarranted—that will no more bear examination in the light of the whole evidence in the case than any of the other propositions that I have been able to demonstrate to be inaccurate and unfounded—suppose it to be true? Suppose that in the prosecution of

this industry by a great nation not wanting in intelligence, anxious to preserve this herd, largely interested in preserving it—that in this industry as in every other pursuit that man ever set his hand to, experience has shown, as it advanced and grew, that earlier methods were in some respects deficient—that the first ideas were not always the best—that time has developed not only the necessity, but the means of improvement. Is there an industry to which that does not apply? Can there be? Can any man undertake to say that the time will ever come when the oldest handicraft will have reached a point at which improvement is impossible? I fancy that no man who has a common acquaintance with the history of his race will venture to assert such a conclusion. Suppose it is true that the number it was estimated might be taken from the seal-herd without harming it, had proved too great—suppose it was true that in the manner of taking them the best possible manner is shown by experience not to have been observed and that improvements are needed, is there any doubt that they will be adopted? May not the interest and intelligence of the nation which, with such sedulous care, has managed this industry during the short period since 1869 when they began. make it certain that the improvements will take place? Are the difficulties that are suggested difficulties that cannot be overcome? Is it like the killing of the female seal in the water,—something that cannot be helped if you are to kill seals there at all? Very far from it. Therefore, I might well dismiss this suggestion of the accountability of the management on the Islands for a part of the decrease with the single remark:—Granted that experience has taught us better intelligence, and that some things must be corrected which are easy of correction, what has that to do with the certain and inevitable means of extermination with which we are dealing in this case? It almost needs an apology for carrying this enquiry any further; and it is only because I am not willing to leave anything that I conceive to be wrong—without allusion.

Now, what are the points in the management on the Islands which are claimed by my learned friends to have been mischievous in the past? They are two. They say, we have killed too many male seals. The draft that we set out with of 100,000 is too great. You will remember that the Statute authorises the Secretary of the Treasury at any time to restrict it, if it is found that they are taking too many. You will remember that under the Orders of the Secretary in 1890, the number was restricted to 22,000; and, therefore, it is perfectly plain that, if any restriction is necessary for the preservation of this race, it will be made. The United States here is not struggling for the privilege of prior extermination, because that would be quite in their power without any license at all.

The second objection is that in the manner of driving the seals, at times I will allude to presently, they have been injured; those that are not killed have been so injured as to affect the reproductive power of the race, and so to diminish the birth rate by affecting the opposite sex from that which is exposed to pelagic sealing.

If that were true it does not touch the question of extermination at all. It simply shows that we have somewhat hastened it by ill-advised conduct which it is to be presumed will certainly be checked and be corrected if the race can be preserved. But there is no just foundation for that assertion. It stands principally upon the statements of a gentleman about whom more has been said than would have been said if he were here present to be examined orally, who has been promoted in this case by my friends to the office of Professor,—a gentleman who has

given considerable attention to this subject, who has written much and said more, and who undoubtedly knows a good deal about the subject and has been regarded as an authority.

But before I come to consider the only point on which we have any criticism to make upon Mr. Elliott's deliverances upon this subject, which are all in favor of our contention, except on this one topic, let me say that we can well afford to accept this gentleman at the estimate put upon him by my learned friends on every point but this; we do not need his corroboration, but we have it very emphatically, for all it is worth, on every point almost, connected with seal life which we are contending for, except this.

Now, as to the number, my friends have endeavored to show that the American average on the Pribilof Islands, of 100,000, was a great deal larger than the Russian authorities had deemed safe. To begin with, what if it was? What constitutes the Russians a particular authority? The reference to the average which Russia, in the early period, before they began to discriminate, when they were killing in an exterminating way, that is to say killing without any reference to whether they were males or females—does not prove anything. It was not until 1847, as the British Commissioners admit, that the present system of discrimination was begun. It has been followed ever since.

After that, between 1850 and 1867, it will be found from the evidence that the number of skins they took, depended on the markets of the world. Of course they could not overstock the market without depreciating the returns, instead of increasing them. Bancroft, the historian that is referred to in the British Case so frequently,—I read from the footnote to the United States Counter Case page 73—says:

> In 1851, 30,000 could be killed annually at St. Paul Island alone, and in 1861 as many as 70,000, without fear of exhausting the supply.

The figures from 1860 to 1867, given in the British Case, are shewn in the United States Counter Case at pages 71 to 73, to be incorrect. What are they? They say for 1861, 1862, 1863, 1864, 1865, 1866, 1867,—so many; the last five being estimates—round numbers, and as to 4 of them an interrogation mark is put against them by the Commissioners, which indicates that they are open to question—they are rather suggested. Then in Sections 777 to 779 of the British Commissioners Report, you see how these figures are reached. To get those of 1861, they took Elliott's totals for the years 1842 to 1862 and subtracted Bancroft's totals from 1842 to 1861, and the difference they call the figures of 1861. But what does Elliott himself say about those totals of his? At page 165 of the Census Report he says:

> I now append a brief but significant extract from Techmneniov—significant simply because it demonstrates that all Russian testimony, other than Veniaminov's, is *utterly self contradictory* in regard to the number of seals taken from the Pribylof Islands. Techmneniov first gives a series of tables which he declares are a true transcript and exhibit of the skins sold out of Alaska by the Russian-American Company. The latest table presented, and up to the date of his writing, 1862, shows that 372,894 fur-seal skins were taken from the Pribilof Islands, via Sitka, to the Russian markets of the world, in the years 1842–1862, inclusive; or giving an average catch of 18,644 per annum (p. 221). Then further on as he writes (nearly one hundred pages), *he stultifies his record above quoted* by using the language and figures as follows: "In earlier times more were taken than in the later; at present (1862) there are taken from the island of St. Paul 70,000 annually without diminishing the number for future killing". Further comment is unnecessary upon this author, who thus writes a history of the doings of the Russian-American Company.

The bottom, therefore, of the British Commissioners computation derived from Mr. Elliott, falls out upon the testimony of Mr. Elliott, who says that it is not in the least reliable. The United States show

that the number of seals killed in that year, 1861, was 47,940, and in proof of this they have published a letter from the Chief Manager of the Russian American Colonies to the Russian American Company, written at Sitka, October 14, 1861, containing a Report upon the operations of the Company for that year. The reference for that is the United States Counter Case, page 195. One would suppose that was satisfactory evidence of the number killed by the Company. He says—this is an extract of course:

In the course of this year—

that is 1861; the date of the letter is October 14th

In the course of this year 47,940 seal skins have been taken from the islands of St. Paul and St. George, of which number 24,943 salted, 3,000 bachelors, dried, and 2,500 greys have to be sent to New York; and 12,000 dried skins will now be sent by the ship *Czaritza* to Cronstadt.

The British Commissioners, in this extraordinary method of computation, make the figures for that year 29,699. The Manager of the Company informs us that it is 47,940.

Sir CHARLES RUSSELL.—One is shipped from the island, and the other may be killed on the island. The two figures are not inconsistent.

Mr. PHELPS.—Why not? He describes what had become of all these—where they are all sent. They are all sent to market.

Sir CHARLES RUSSELL.—You have been speaking yourself of not glutting the market.

Mr. PHELPS.—They are all sent to market. They are not only killed, but sent to market; and they only shew the fallacy of figures that are arrived at by taking one unreliable and unproved sum, and subtracting it from another unreliable and unproved sum and taking the difference as the basis.

At Section 779 of the British Commissioners Report is the authority for the years 1862 to 1867. That is their figures. Most of them they have marked with an interrogation point, as I said before. They by no means undertake to vouch them;—I am not to be inferred as saying that they misrepresent this, because they say themselves that these figures both inclusive, have been filled hypothetically by Elliott. They say:

The figures for the years are therefore far from satisfactory.

Those figures of course disappear, because in the first place the Commissioners say themselves that they are unsatisfactory: they appear, in the next place, to be based upon a hypothesis, and the man who invents the hypothesis, Elliott, says they are unreliable. They disappear into the air.

We have put translations and facsimiles of the official Correspondence of the American Company consisting of Reports from the witnesses, and orders to the managers, in the Counter Case at pages 195 to 199, and at page 429.

I will read the Report for 1862—we have seen what 1861 was. This is an extract. It is the Report of the Chief Manager at Sitka. He says:

In spite of the great slaughter of seals on St. Paul and St. George they are every year occupying more space with their rookeries; and I therefore permitted the manager to take 75,000 skins on the former island, instead of 50,000; and on the latter 5,000, an increase of 2,000. Seeing now, however, that the demand for sealskins for New York does not go beyond 20,000, I will alter this arrangement, and instruct him to prepare 25,000 salted sealskins and 20,000 dried on St. Paul and not to take more than 3,000 on St. George, as heretofore. The sealskins remaining over cannot spoil, as they are thoroughly salted.

What becomes, I should like to know, of the suggestion that in these years the Russians found it necessary to take fewer seals than the United States took afterwards? This is 1861 and 1862. What are the records for the following years? In 1863 it was 70,000. I refer to the United States Counter Case pages 195, 196, 197 and 199. They are taken from the original letters of the managers of these Companies which are there given. I read in this abbreviated way to save time, and to present results instead of wading through language. You will find the letters there.

1863:	70,000	(U. S. Counter Case, p. 195)
1864:	70,000	(— — — p. 196)
1865:	53,000	(— — — p. 197)
1866:	53,000	(— — — p. 197)
1867:	75,000	(— — — p. 199)

The British Commissioners suggest that the Russians were honest enough, as they were about to cede the business to the United States, to take a large number of seals the last year notwithstanding it might be a detriment to the islands. That is not a very respectful suggestion concerning a Government like Russia, and certainly is not warranted by any evidence; but in the United States Counter Case page 199, Nº 15, that such is not the cause of the increase, is shewn. Then the Russian average in the late years of their control, (after they began to discriminate so that the herd was in a normal condition), reached 70,000 skins that were taken; and it appears that more could have been, and would have been taken, except that they were kept down by the exigencies of the market, the want of demand.

In 1868, in the chaos that took place in the absence of law, there were 240,000 seals killed. That is shewn by Mr. Morgan's testimony in the United States Case, Appendix Volume II, page 63. And in 1869, the following year, after the government had gotten hold of their property and began to control it the amount was 85,000. The number of seals killed on the Pribilof Islands from 1870 to 1889 for all purposes, (including those pups killed for natives' food and the few seals that died during the drives) is given in the United States Counter Case, pages 425 to 428; and the total number is 1,977,337, being an annual average of 98,857. That is what we took from the island before the take was restricted by orders of the Secretary of State or under the operation of the successive arrangements of the *modus vivendi*. There is what the evidence shews upon this point.

Then it is said that there were warnings to the United States Government that the killing of 100,000 seals annually was too great—that our officials, some of them, made known to the Government that too many male seals were being killed; and they quote Daniel Webster, an excellent witness, properly relied on by both sides, who says that formerly there would be an average of 38 cows to 1 bull—now they will not average 15.

Let us see from Mr. Webster's affidavit—his observation was very large—what he does say about it. You may take a casual expression or a line without its context and get a very erroneous impression. The reference to this is page 179 of the 2nd United States Appendix. What I am reading is a quotation. He says:

> There was never while I have been upon the islands any scarcity of vigorous bulls, there always being sufficient number to fertilize all the cows coming to the islands. It was always borne in mind by those on the islands that a sufficient number of males must be preserved for breeding purposes. . . The season of 1891 showed that male seals had certainly been in sufficient number the year before, because the pups on the rookeries were as many as should be for the number of cows landing. . . *Then, too, there was a surplus of vigorous bulls in 1891 who could obtain no cows.*

That is Mr. Webster's evidence.

Then they cite Captain Bryant. The British Commissioners quote Captain Bryant. It is very remarkable how full the British Commissioners Report is, of references to what is said, often, by unknown men; to letters, often, the writer of which is not given; to letters or to persons as in this case where the author is given, but the substance only is stated as understood by the Commissioners, without any context; the Report is full of that sort of evidence, which every one who has ever had any dealing with evidence knows is the most likely, of any in the world, to be mistaken. It is hearsay, excluded as evidence, under the Common Law. Why? Simply because human experience shews that you cannot get hearsay correctly. You can get what is said to be hearsay, but the moment you undertake to resort to hearsay evidence, you are utterly at sea. Mr. Foster suggests that I am wrong in respect to this quotation, and I am very happy to make the correction. In this instance this is quoted from Captain Bryant's statement,—I was wrong as far as this is concerned. The context, however, shews that when you get at the context that is not what Captain Bryant means—that is not what he says.

Sir CHARLES RUSSELL.—Would you kindly give the reference?

Mr. PHELPS.—It is our House Executive Document, No. 83, 44th Congress, page 178.

Sir CHARLES RUSSELL.—Where is it cited?

Mr. PHELPS.—At page 69 of the Counter Case. This is not referred to by the British Commissioners. Captain Bryant recommends, in October 1875, that for two years only the killing be reduced to 85,000. This is omitted from the British Commissioners Report. Then in his sworn testimony before a Congressional Committee in the year 1876, his views on this subject are brought out, and this is cited in the United States Counter Case page 71. This is what he says:

> In the season of 1868, before the prohibitory law was passed and enforced, numerous parties sealed on the Islands at will and took about two hundred and fifty thousand seals. They killed mostly all the product of 1866-'67. In making our calculations for breeding seals we did not take that loss into consideration, so that in 1872-'73, when the crop of 1866-'67 would have matured, we were a little short. These seals had been killed. For that reason, to render the matter doubly sure, I recommended to the Secretary a diminution of 15,000 seals for the two years ensuing. I do not, however, wish to be understood as saying that the seals are all decreasing—that the proportionate number of male seals of the proper age to take is decreasing.
>
> Q. The females are increasing?
>
> A. Yes, Sir; and consequently the number of pups produced annually.
>
> Q. It looks, then, as if the males ought also to increase?
>
> A. I think that number of 100,000 was a little more than ought to have been begun with. I think if we had begun at 85,000 there would have been no necessity for diminishing. On the other hand, I think that within two years from now it could be *increased*.

Now it appears that all that Mr. Bryant meant (and this is his explanation to the Committee, not his evidence in the case), was this—he meant to say that the year 1868 when 240,000 had been killed had so reduced the herd that he thinks it would have been safer to have begun at 85,000 instead of to begin at 100,000; but that in two years after it could have gone to the larger figure. And in section 818 of the British Commissioners Report, quoting, they say:

> Bryant states that this year (1877) there was evident increase in the number of breeding males. He estimates that there were about 1,000,000 breeding seals on the islands, as against 1,300,000 in 1869.

Mr. Elliott, who was on the Islands from 1872 to 1876 makes no reference to the gap in certain classes of males, which Captain Bryant alone

appears to have noticed. The British Commissioners in paragraph 822 of their Report say that Elliott in the same Report—that is the Census Report of 1881—says that the breeding rookeries have been gradually increasing since 1857

Sir CHARLES RUSSELL.—What year is that in?

Mr. PHELPS.—Elliott's Census Report of 1881.

Sir CHARLES RUSSELL.—You are passing 1872, 1873 and 1874?

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—Very well.

General FOSTER.—And 1876.

Mr. PHELPS.—I have to pursue this subject a little further, Sir, before I have done with this topic. I shall not be long upon it, but I am so much fatigued, and the hour of adjournment has arrived, that I shall ask to be allowed to defer my further observations till to-morrow. I may say I am very confident that I shall finish all the observations I have to trouble you with, to-morrow.

[The Tribunal thereupon adjourned till Friday, the 7th of July 1893, at 11.30 a. m.]

FIFTY-SECOND DAY, JULY 7TH, 1893.

Sir CHARLES RUSSELL.—Before my learned friend resumes his argument, Sir, I want to make a correction in point of fact. You will recollect a discussion that occurred some days ago (I think it was also referred to during the argument of my learned friend) about the map No. 98 in the schedule of maps and described as the "Map of 1822 with additions to 1823",—that was stated by some one on our side originally, and I believe I repeated the statement, that it came from the British Museum. Well, that turns out to be inaccurate. It is a map in the possession of the Foreign Office in London and is here now, and I produce it to my learned friends. It is a matter of no importance; but we wish to be correct in our statements.

The PRESIDENT.—It is the Arrowsmith map?

Sir CHARLES RUSSELL.—Yes; it is described here as, "by Arrowsmith, Hydrographer to His Majesty, 1822", and in print underneath, "Additions to 1823". There the matter ends.

The PRESIDENT.—They are printed or engraved editions?

Sir CHARLES RUSSELL.—Yes; printed or engraved additions. Therefore, showing that though published originally in 1822, there was a second edition in 1823.

The PRESIDENT.—We shall be pleased to see the map.

Sir CHARLES RUSSELL.—Certainly. This is one side of it, but it is the important side. You will see "Behring Sea" is not marked.

Now, you will recollect that yesterday my learned friend produced and dwelt for some time upon a certain Table of figures, working out or professing to work out certain mathematical results. You will recollect that Table of figures which was handed in. I ought to tell the Tribunal that my learned friends did not furnish us with copies of that document beforehand; and my reason for mentioning that fact is that, if they had, we should have been prepared by this time to offer certain criticisms to which we think it is open. It has been examined by persons who are more competent than I profess to be, because I do not, any more than my learned friend, profess to be a mathematician; we conceive it is based on false assumptions; but even on those assumptions, it is not worked out correctly. And, therefore, we claim the right respectfully to put in black and white, as my learned friends have done, a criticism on this Table. The Tribunal will then judge what weight is to be attached to the original document, as well as to the criticisms upon it.

The PRESIDENT.—You mean the calculation. This was no new document, but only a calculation.

Sir CHARLES RUSSELL.—And a calculation, as we say, which is inaccurate.

The PRESIDENT.—That is simply a matter of arithmetic.

Senator MORGAN.—And it only refers to matters that are in the Case and Counter Case.

Sir CHARLES RUSSELL.—We deal with the document that they have handed in and point out, Sir, the errors that we conceive are to be found in it.

The PRESIDENT.—There can be no objection to any error being rectified, I should think.

Sir CHARLES RUSSELL.—Of course, we should propose to hand to my learned friends a copy of whatever figures or criticisms we put down before handing it in to you.

Now, only one other thing; my learned friend said yesterday that I had, in my criticism which I addressed upon the figures, lost sight of the geometrical progression that would apply to the consideration of this question. I am not much concerned to defend myself; but I want to point out that I was dealing with the question of whether pelagic sealing could have occasioned the great decrease said to have been manifested in 1884; and, for that purpose, it was not necesary to consider the question of geometrical increase, because these animals do not begin bearing until they are three years of age. That is all I meant, and before the 3 years, before 1884, the amount of pelagic sealing was almost *nil*.

The PRESIDENT.—There is no question of the propriety of bringing in the geometrical progression as Mr. Phelps did.

Sir CHARLES RUSSELL.—There are two sides of that account, Sir—that is a criticism—only one of which has been looked at by my learned friend—there is a debit and a credit side.

The PRESIDENT.—As to the paper you propose to hand in after you have been in communication with your friends on the other side we will take it and see what it is and reserve to ourselves the right of determining what use is to be made of it.

Sir CHARLES RUSSELL.—Certainly.

The PRESIDENT.—Now, Mr. Phelps, will you please to resume your argument and continue after your own plan, and we shall be pleased to hear you.

Mr. PHELPS.—In respect of the map which my learned friend has properly produced, since it has come into their possession, I have only to repeat the observation I made before, and which was substantially made by Sir Richard Webster, that this map, from its date, could not have been in the possession of the negotiators of the American Treaty and that it is extremely improbable that it should have been in the possession of the British negotiators.

With regard to the table of figures submitted yesterday to which my learned friend refers, I have nothing further to say. The document will vindicate itself upon examination. If it does not vindicate itself, it would be quite impossible to set it up, and I have no fear of any criticism that it will be in the power of any one upon the facts of this case to make.

As to the other point my learned friend refers to.

I do not know that I quite comprehend what he means to say. If he only means that if the females that were killed in the water were unproductive females who never could have any young, I quite concur with him that the ravages of pelagic sealing would then become slow and that would be a question which this case has not presented. But the objection to it on economical grounds, aside from any question of humanity is that every female that is killed is not only the probable immediate mother of young, but the future mother of young to an extent only bounded by the age of the animal.

Now I return, Sir, to the subject I was considering yesterday at the time of the adjournment, and to which I am afraid I am giving more time than it justifies, because I think it is all sufficiently answered by the suggestion I have already made, that even if it were found to be true

that to some extent on the islands there had been a miscalculation, an overdriving, or anything else which experience shows was not advisable, it is to be presumed, and it is perfectly certain that would be corrected, as it is quite in the power of the Government to correct it, and that it does not at all enter one way or the other into the question of the consequences of pelagic sealing, which are quite independent. It simply suggests if it is true, though we have taken the pains to show it is not true, that the conduct of the American authorities has helped towards the decrease that now exists, and is conceded to exist. I had considered yesterday the first proposition that is made that too many seals have been killed, and I was passing over the evidence as fast as I could on the subject of the decrease, and of the warnings that are said to have been given to the American Government by its own agents on this subject. Resuming that, I referred to Captain Bryant, the first witness called on the other side. Dr. Mc Intyre is another witness relied upon, and when you examine his testimony you find in respect to this, that it shows no such thing. Dr. Mc Intyre is cited by the British Commissioners. He was the superintendent upon the Islands, and he says the number of seals have decreased *since* 1882. He did not mean *from* 1882. All the evidence in the Case is to the contrary of that. It was very much later. It was as late as 1889. In 1884 and 1885 there was a slight decrease, but the significant decrease I am talking of, that would attract attention, was much later than that. In support of that, passages are cited from his Congressional Report in 1889, entitled "Fur-seal fisheries" and the moment the language is read it will be seen that Dr. Mc Intyre does not mean any such thing as is ascribed to him. He is referred to at section 830 of the British Commissioners' Report, and he says at page 116 of the Congressional Report of 1889.

> From 1870 to 1882 there was a constantly increasing number before the beginning of the annual marauding, and the increase was apparent each year. The boundaries of the rookeries were being constantly extended. The lanes through the rookeries were in many cases completely closed before 1882. There was no question at that time as to the increase, but since 1882 the lanes through the rookeries have again opened and grown wider from year to year. During the last two years bachelor seals pass through these lanes as they did not formerly.

He was absent from the Island, as is shown in the United States Case Appendix, 1883, 1884 and 1885. He knew nothing about it and could have known nothing about it and does not profess to have known anything about it. When he says since 1882, he does not mean to say *beginning with* 1882. He is writing in 1889. Another quotation from Dr. McIntyre's testimony is found in the Appendix to the United States Argument page 293:

> I was, therefore, always alert to see that a due proportion of breeding males of serviceable age was allowed to return to the rookeries. This was a comparatively easy task prior to 1882 but it became from year to year more difficult as the seals decreased. No very explicit orders were given on this point till 1888.

There is the same observation.

In the affidavit of Dr. McIntyre in the 2nd volume of the United States Appendix, page 45, he uses this language, and this is really his judgment on the subject:

> That from the year 1880 there was an expansion of the areas of the breeding grounds and that in the year 1882 they were as large as at any time during my acquaintance with them; that during the three years following 1882, namely, 1883, 1884, 1885, I was not upon the Islands; that upon my return to the Islands in 1886, I noticed a shrinkage in the breeding areas but am unable to indicate the year of the period of my absence in which the decrease of the breeding seals began.

These are the only witnesses on the Island before 1889 who are relied upon by the British Government to sustain the assertion that too many seals were killed on the Island.

The PRESIDENT.—Is that the same witness, Dr. McIntyre, you were reading from in the British Commissioners Reports.

Mr. PHELPS.—Yes, a witness of unquestionable authority. All I desire to find out is, what he means to say. In 1890, the Treasury Agents on these Islands were Mr. Goff, Mr. Nettleton, Mr. Lavender, and Mr. Murray. They were new men, none of them having been there before 1889, and it was at that time Mr. Elliott appears on the scene. Passing Mr. Elliott for the moment, see what the others say. Mr. Murray, in his Official Report cited in the British Appendix, Vol. 3, page 19, expresses the opinion that the seals were diminishing. That is in 1890, because of the killing off of male seals whereby none were left for use on the breeding grounds. In the same Report, he expresses the further opinion that the seals had been steadily decreasing since 1880. Of course, this could not be based on any personal knowledge at all; but in 1892, with larger experience, Mr. Murray testifies under oath in these words:

During my observations in 1890 I was led to believe that the decrease was partly due to the lack of bulls on the breeding rookeries, and I so reported to Agent Goff.

We shall see pretty soon how he was led to believe and by whom:

But after thoroughly investigating the subject the next year by daily visits to the breeding grounds of the several rookeries, where I saw nearly every cow with a pup by her side and hundreds of vigorous bulls without any cows, I came to the conclusion that there was no truth in the theory, and that it was the cow that was scarce and steadily decreasing.

It was Mr. Elliott, who came there with the *prestige* of being an authority on that subject; who was sent there by the Government; who had formerly visited the Islands and written on the subject, that put it into the head temporarily of Mr. Murray and one or two others that this theory he set up (and we shall see why pretty soon) was true. And I may remark in passing, that there is abundant proof of the inaccuracy of Mr. Elliott's observations, because Mr. Murray found on the breeding-grounds the offspring of the various animals that Mr. Elliott laments with much rhetoric were wanting. Mr. Nettleton visited the Islands for the first time in 1889, and his report for 1890 appears in the British Case; and he confirms the remark I made just now. "I do not feel called upon to go into details with regard to this," he says, "in view of the forthcoming Report of Professor H. W. Elliott," but in July, 1892, after he had been there long enough to have an opinion of his own and after he had probably come to be better acquainted with Mr. Elliott. (It is in the United States Case and Appendix, Volume II, page 75:)

During my stay on the islands I have never seen a time during the breeding season when there has not been a number of large, vigorous bulls, young bulls hanging about the borders of the rookeries watching for an opportunity to get a position of their own.

Then Mr. Lavender is referred to, another of the recent Agents; and he undoubtedly was under the influence of Mr. Elliott's activity. He says:

The writer was surprised when he first visited the rookeries to find no young bull seals upon them;—this looked strange to him, and he began to look up the cause, and it occurred to him that the constant driving of young males and the killing of all the 2, 3, 4, and 5 years old.

—what he means by that you can judge as well as I can; that is to say, you cannot judge at all. Mr. Goff we shall see afterwards.

I have not yet mentioned Mr. Elliott; and except so far as Mr. Elliott's Report is to be relied upon, there is absolutely no evidence (and we shall cite a great deal of evidence to the contrary) that there was a diminution of the sort he undertakes to describe on those Islands which could have had to do with the decrease of the birth-rate.

Now, let me come to this matter of driving; and I have still to postpone the consideration of the only witness that really supports it, Mr. Elliott. His theory is absolutely invented by himself,—nobody ever heard of it before. He cites no authority for it, except a passage from one of the Russian writers, which, as I shall show, is mistranslated and reads exactly the other way. There are two passages in Mr. Elliott's Report translated from the Russian, and in both of them it appears not merely that they are erroneously translated, but that the sense of the passage translated is exactly the opposite of that which is given as his translation. The hauling grounds are situated, as appears, at a distance of 1½ to 2½ miles; the average distance is about 1½ miles; the Rookery Charts in the United States map show this. Before pelagic sealing obtained any dimensions, the killable seals were on the hauling grounds, that is to say males from 2 to 5 years of age,—those males that Mr. Lavender appears, by his statement, to have thought should not have been killed. He does not tell us what you could kill if you do not kill those, if you killed any, and the evidence shows that less than an average of 20 per cent of these driven up were turned back. Mr. Elliott's theory is that numbers were injured by this re-driving and being allowed to go back. That is the point I now come to.

Up to 1890 there was no re-driving, and there is not a word of evidence to show that there was. None but a small percentage in the drives, when a superabundance of seals would go up, and some might come back again, but not in sufficient number to be appreciable. It is said they were turned back, and taking the largest construction of this evidence, as I desire to do, and not to minimise it, you may argue or infer that perhaps if some few went back from the drives they might be driven over again, but whether they were not all ultimately killed is of course quite a different question.

Till 1890, the seals were sufficiently abundant not to require this second driving, and the driving which Mr. Elliott complains of never took place till 1890, and that the evidence is conclusive to show. Now suppose that by the driving in 1890—and that is another conjecture that is utterly without foundation—suppose that some of these re-driven seals were injured by that process in 1890, when would that make its appearance in the herd? They could not begin to be productive till they were 5 or 6 years old—none could get on to the rookery and it is not pretended that they could. If then these driven seals could begin to be productive when 5 or 6 years old, it would be, of course, still another year after that, if not 2 or 3, before the results of any failure in re-productive capacity would make itself appreciable. It is perfectly evident, therefore, that this decrease, which everybody agrees was to be seen there in 1890 and 1891, could not have come from any abuse in the driving in the year 1890. The very earliest time and season, that if any such facts were true, they could manifest themselves on the Island would be some years later. In 1890 the catch was stopped on the 20th July by Mr. Goff, the United States Treasury Agent, because he perceived they could not get the requisite number which their contract allowed, and less than 22,000 skins were taken that year. It is undoubtedly true that, in order to get 22,000 skins in the year 1890 there was more or less excessive driving, or re-driving—a method of

driving that probably could not be carried on as a permanent thing from year to year without mischievous results, but it had never taken place before, and the reason was, because there was no occasion for it. It was the result of the scarcity that had been brought about by this pelagic sealing and for which no other reason is suggested.

Mr. Justice HARLAN.—What year is that?

Mr. PHELPS.—1890. I say no reason is suggested. I should perhaps say that no reason is proved. There is a general talk by my learned friends about the consequences of driving; but when you look into the evidence to see when it took place, 1890 was the first time, and then it stopped.

The PRESIDENT.—What was the allowance made by the Government for that year 1890?

Mr. PHELPS.—I believe it was 60,000—I believe that was the first year it was changed. There was always a provision, you will remember in these leases, that the number allowed on the face of the contract could be diminished by the Treasury Agent, and it was reduced. General Foster reminds me, to 60,000 by order of the Secretary of the Treasury, and they were only able to get less than 22,000, so that less than 22,000 was actually taken, though the Secretary's order would have permitted them to take 60,000.

The witnesses that are relied upon on this subject of redriving, every one of them, refer only to the year 1890, when the fact is not in dispute, but when, as I have said, it could have produced no possible effect. This is what Mr. Goff said, who stopped this, and I read from Volume III of the British Appendix, part III, page 16:

> We opened the season by a drive from the Reef Rookery, and turned away 83 1/2 per cent, when we should have turned away 15 per cent of the seals driven, and we closed the season by turning away 86 per cent, a fact which proves to every impartial mind that we were redriving the yearlings. . . and that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries, to the detriment of the lessees, natives and the Government.

In 1890 that was true; that is what Mr. Goff reported to his Government.

In his affidavit, Mr. Goff says, in the United States Case, Volume II, page 113:

> A few seals are injured by redriving (often confounded with overdriving and sometimes so called), but the number so injured is inconsiderable and could have no appreciable effect upon seal life through destroying the vitality of the male. The decrease, caused by pelagic sealing, compelled whatever injurious redriving has taken place on the islands, as it was often necessary to drive every two or three days from the same hauling grounds, which caused many seals let go in a former "drive" to be driven over again before thoroughly rested. If a "drive" was made once a week from a certain hauling ground, as had been the case before pelagic sealing grew to such enormous proportions, and depleted the rookeries, there would be no damage at all resulting from redriving.

Mr. Nettleton, another Treasury Agent, concurs in those views, because in his deposition, United States Case, Volume II, page 76 he says:

> The result of my observations of the methods of driving the seals from the hauling grounds to the killing grounds is that a very small fraction of one percent of the seals die from being overdriven or from being overheated in driving.

Something is said about Mr. Palmer, who had no knowledge of this subject. He was there with Mr. Elliott, and partakes of the views of Mr. Elliott that I shall examine later.

On the Russian Islands, as the British Commissioners themselves said, the driving was a great deal harder for the seals than on the American.

On Cooper Island.

say the British Commissioners in section 706—

on the contrary, the drives generally extend across the island, and are from three to four miles long, very rough, and crossing one or more intervening steep ridges. These drives must be much more trying to the seals than any now made upon the Pribiloff Islands.

We never heard from there or any quarter in this case that any diminution had ever been noticed till the year 1892, when the pelagic sealing commenced.

The statement of Mr. J. K. Moulton in the United States Case, page 72, volume II, is:

I am positive the reproductive organs of every one of the hundreds of thousands of seals I have seen driven were uninjured by their movements on land, and I am further convinced this must be so from the fact that a seal when moving on land raises himself slightly on the hind flippers, so that his reproductive organs are clear of the ground.

In 1891 and 1892 the number of seals killed on the ground was 13,000 and 7,500 respectively. In neither of those years were yearlings killed. All yearlings driven up were allowed to return to the water. Mr. Macoun's evidence or statement in the report is gone into. He witnessed part of one drive, which is all he claims to have known anything about. And if you take the trouble to read it, I do not care to spend much time upon it, you will see the consequences.

Now let me refer to some few of the witnesses as rapidly as I can out of the many witnesses on this subject of driving to be found in the United States Case.

We have examined 44 witnesses on this point, who are men on the Islands, employed there in one capacity or another, and knowing the manner in which this takes place, in a business you will recollect, the method or theory of which, is described by the Commissioners themselves as an ideal method. The only objection that is attempted to be stated to it is the manner in which it was carried into effect. Mr. Bryant says—and this is in the Appendix to the Argument, page 235:

The driving and killing of the bachelor seals was always carried on in the most careful manner and during my stay upon the islands, there was practically no injury caused to seal life by overdriving, and after 1873, when horses and mules were introduced by the lessees to transport the skins, the seals were not driven as far, killing grounds being established near the hauling grounds, and the loss by overdriving was reduced to the fraction of 1 per cent.

Mr. Falconer, who was on the Islands from 1870 to 1875, says in his testimony.—I cannot read it all:

The greatest care was always taken not to overheat the seals in driving them, and when a seal was by accident smothered, the skin was removed and counted in the number allowed to be taken by the lessees. There were not, to the best of my recollection, twenty-five seals killed during any one season on St. George by overdriving.

Whenever the sun came out while a "drive" was in progress the driving at once ceased, so great was the care taken not to overheat the seals. . . .

I never saw or heard of a case where a male seal was seriously injured by driving or redriving.

Certainly the reproductive powers were never in the slightest degree impaired by these means. When we consider that the bulls, while battling on the rookeries to maintain their positions, cut great gashes in the flesh of their necks and bodies, are covered with gaping wounds, lose great quantities of blood, fast on the islands for three or four months, and then leave the islands lean and covered with scars, to return the following season fat, healthy, and full of vigor, to go through again the same mutilation, and repeating this year after year, the idea that driving or redriving, which can not possibly be as severe as their exertions during a combat, can affect such unequal vigor and virility, is utterly preposterous and ridiculous.

Senator MORGAN.—Has any witness ever stated that, from his observation, there was any loss of virility in male seals?

Mr. PHELPS.—No, I am coming to that. I want to get in the testimony of some of these witnesses, and then I will observe upon that in connection with Mr. Elliott:

To show the wonderful vitality of the male seal, I will give one instance;

I do not care to follow that up.

Mr. Glidden who was on the Island from 1882 to 1885—you will see these Agents give different periods—in the Appendix to the Argument at page 237, says:

The driving from the hauling grounds to the killing grounds was always conducted with the greatest care; was done at night or very early in the morning slowly and with frequent rests, so that the seals might not become overheated. During the killing the merchantable seals were always carefully selected. No females were killed, except, perhaps, one or two a season by accident, and the remainder of the herd were allowed to return to the water or hauling grounds. Very few seals were killed in a "drive", and the skins of these were, in nearly every case, retained and counted in the quota allowed to be taken by the lessees. The number of seals killed in this way could not possibly have affected seal life on the island. I never saw or heard of a case where a male seal was seriously injured by driving or redriving; and I do not believe that the virility of males driven was destroyed by climbing over the rocks or affected in any way by driving. Certainly the reproductive powers of male life on the islands were never decreased or impaired by these methods.

Dr Hereford the resident physician was there from 1880 to 1891, covering the whole time in which the overdriving or re-driving must have taken place, if it was to produce any effect that is yet noticeable, and he says:

The methods employed in handling the drives are the same identically as of twenty years ago. The same methods were observed when I first went to the Islands, and were in vogue during the period that I referred to as an actual increase in seal life, and have been continued up to the present times. There is nothing different, except the enormous increase of vessels and hunters engaged in pelagic sealing in Behring Sea.

Mr. Kimmel was the Government Agent on St. George Island in 1882 and 1883; and he describes the manner in which these seals were driven and states (pausing to read it) substantially what those witnesses whose testimony I have referred to say.

Krukoff, an Aleut resident on St. Paul Island ever since 1869, one of the employés, says:

The driving is all done by our own people under direction of the chiefs and we never drive faster than about half a mile in one hour. We very seldom drive twice from one rookery in one week. . .

I never saw a seal killed by overdriving or by overheating; odd ones do die on the drives by smothering, but their skins are taken by the company and are counted in with the others.

Mr. Loud was the Agent from 1884 to 1889, and he says:

While I was on the islands I attended nearly every "drive" of the bachelor seals from the hauling grounds to the killing grounds,—

—as it was his duty to do,—

And these "drives" were conducted by the natives with great care, and no seals were killed by overdriving, plenty of time being always given them to rest and cool off. A few were smothered by the seals climbing over each other when wet, but the number was very inconsiderable,

and so on.

Dr McIntyre was on the Islands from 1870 to 1882, and from 1885 to 1889; and he testifies further to the same purport with his testimony that I read before, and I will omit reading it now.

Dr Noyes was a resident physician on the Islands from 1880 to 1893; and his testimony is to the same effect.

Mr. Redpath was the Agent from 1875 to 1893.

Mr. Wardman from 1881 to 1885, and Mr. Webster from 1870 to 1893, and still there. It would only be a wearisome repetition to read over again the testimony of these witnesses, using slightly different language, but conveying exactly the same ideas and stating the same facts.

What then does this whole charge of over-driving come to, aside from Mr. Elliott, on all the evidence in this case on both sides? On the one hand, there is not a word of testimony to sustain it, but there is on the other hand a vast body of testimony to the contrary. We have examined every agent and employé on the Island, and every official who was there in a position to know, and there is no evidence that there was anything objectionable in the manner of driving down to 1890, but it is all to the contrary. Then how came it to pass that in 1890, an exception arose as to the method of re-driving and frequent drivings that had never obtained before? Simply because from the ravages of pelagic sealing, the animals were not to be obtained in any other way. So that what is set up in answer to our complaint of the devastation that this business has wrought is only the actual consequence of the devastation itself.

Now take Mr. Elliott's theory. A few words on that, still conscious that I have unduly dignified this branch of the case by the time I have spent upon it; a few words may be usefully said about Mr. Elliott, who has cut a figure in this case from the beginning that is altogether disproportionate to any consideration he is entitled to.

I have nothing to say against him. You will remember, when we began this hearing long ago, there was an application for Mr. Elliott's Report. Had there been any attempt to suppress it? We had given it to the British Commissioners when at Washington, and they had it as long as they wanted it. That shows there was no disposition to conceal it. Why was not it printed? Not one in five of these Reports—nay, not one in ten—are printed. If we could put in the letter that accompanied this from the Secretary to the Treasury, you would find out why it was not printed. I cannot tell you and I cannot state the reason without putting myself in a position I should quite decline to occupy, by attempting to make a statement not warranted by any evidence in the case, because there is no evidence. If the Report had come in and become evidence in the case, so that we could reply to it, all this would have been shown.

Mr. Elliott, whose knowledge on this subject I do not depreciate, is far less of a man than my learned friends seem to have supposed. They attach great importance to his having been appointed by the Government, but of all the agents who have testified here, everyone was appointed under an Act of Congress. He was not specially appointed any more than anybody else. One of the advantages of a republican form of Government, is that men of moderate qualities are not excluded from public offices. On the contrary, that is one of the advantages we enjoy. Some Governments are deprived of the valuable services of that class of men. We are not.

The eminent jurist, Judge Swan, who throws some light upon the subject, and Professor Elliott came into violent collision. Judge Swan proceeds to refute all Elliott's science, depreciate his ability, and denounce his motives; and if you take Swan's judicial estimate of the man, he would disappear from the case at once. But as undoubtedly Mr. Elliott would have something to say in reply to Judge Swan, I do not consider the Judge's opinion conclusive. What was the trouble? Mr. Elliott had been connected, as Judge Swan said—and I think he

told the truth probably—it would not be respectful to assume of any man with the title of Judge that he would say anything else—that Mr. Elliott had been connected with the old Company. There was a violent competition at Washington about the renewal of the lease, and the new Company got it from the old, and Mr. Elliott's side was defeated, and then immediately after—that is to say, within two or three months, he made his appearance on the Islands.

Then what took place? For the first time he makes the discovery that the virility of the herd was being destroyed by the business of overdriving. He does not say it took place before 1890; he had not been there for many years, and his Report shows, that when he was there last, he could not speak in too high terms of the manner in which the driving was carried on; but he seizes on this condition of thing in 1890, and makes it the basis of a violent attack.

Senator MORGAN.—Does his name appear in the Act of Appropriation that authorized him to go out there?

Mr. PHELPS.—I do not know, Sir, General Foster says that it was an Act authorizing the appointment of an Agent. He was not particularly named. You would know better as to what the usual usage with regard to a thing of that sort is than I should.

Mr. Justice HARLAN.—He was appointed by the Secretary of the Treasury.

Sir CHARLES RUSSELL.—Yes; he was not named.

Mr. PHELPS.—Well, this discovery of Mr. Elliott was an attack on the administration of the new Company that had got in.

You see what it is; a violent rhetorical attack upon the business that the Company was carrying on. It is due to Mr. Elliott to say, in treating him fairly, that the method of driving that he saw there in 1890 was objectionable, as I have already admitted, and to that extent that the Treasury Agent had to put a stop to it. But if that is all he had said, he would have said only what we say now; but he starts the theory of its effect upon the virility of the herd. Now I answer Senator Morgan's question, if he will excuse me for having postponed it until I could make it intelligibly. There is not another witness that I know of, and I say that subject to correction, that ever pretended to have made any such discovery. In order to give apparent currency to it, Mr. Elliott cites this passage from the Russian writer Veniaminof, at page 203 of his Report; and this is the way his translation reads.

> Nearly all the old men think and assert that the seals which are spared every year, i. e., those which have not been killed for several years, are truly of little use for breeding, lying about as if they were outcasts or disfranchised.

What was the true translation? We have an official translation here, if anyone desires to see it, by the French Foreign Office.

Sir CHARLES RUSSELL.—Is the original here?

Mr. PHELPS.—Yes, certified by the French Foreign Office. This is the correct translation.

> Nearly all the old travellers think and assert that sparing the seals for some years, i. e. not killing them for some years, does not contribute in the least to their increase and only amounts to losing them forever.

Veniaminof makes no reference whatever to driving, and does not say one word about any supposed effects of driving upon the reproductive powers of the seal.

Sir CHARLES RUSSELL.—Have you the original,—the text of Veniaminof?

Mr. Justice HARLAN.—Is it in Russian or French?

Mr. PHELPS.—Russian, I believe.

General FOSTER.—We have not the original here.

Lord HANNEN.—Is not it that the effect of driving is such that it is no use sparing their lives,—is not that the effect of it?

Mr. PHELPS.—No, I will read it again.

Lord HANNEN.—If you please.

Mr. PHELPS—

Nearly all the old travellers think and assert that sparing the seals for some years, i. e. not killing them for some years, does not contribute in the least to their increase and only amounts to losing them forever.

What does he mean by that? What I was saying yesterday; by the natural conditions of this herd you cannot keep up the number of males;—nature does not keep up the equal number of males and females, though beyond doubt an equal number are born into the world. That was a question that was early suggested by the President, and which I endeavoured to answer yesterday.

If in polygamous animals there are as many females as males in the world, how comes it to pass, in a state of nature when nobody interferes with them there are not as many females as males? That is the question we are discussing. He was discussing the question of what sort of policy it would be to stop killing and let them all grow,—let all these males alone for a period of years. Let them all come to the period of puberty.

The PRESIDENT.—He does not speak of the driven seals?

Mr. PHELPS.—No, not in the least. He says, what observation shows as to all, that you will not get any more males by that. It will be the fittest that survive, and you will have the same condition of things that you had before; in other words, you have lost those seals that you might have taken without detriment to your herd. General Foster reminds me this is to be found in the Counter Case, the full translation.

If I had nothing to do to-day but to review Mr. Elliott's Report I think I could make it a little entertaining. If you read his field-notes (I will give you a specimen at pages 236 and 237) they will be found to contain an ounce of observation to a pound of rhetoric. A scientific observer would make field-notes out of doors, and put them down as a basis for subsequent collation and analysis,—as statistics; but his statistics are all rhetoric. For instance, and this is only a sample, on June the 10th, 1890, of his field-notes, at page 236.

This unnatural action of the cows, or rather unwonted movement, has caused the pups already to form small pods everywhere, even where the cows are most abundant, which shadows to me the truth of the fact that in five days or a week from date, the scattering completely of the rookery organization will be thoroughly done.

Sir CHARLES RUSSELL.—He goes on to say that it did not take place until the 20th to the 25th of July, 1872.

Mr. PHELPS.—I do not read all this:

It is impossible not to consider the question which this scene every moment prompts—"what proportion of these old males which we see here now, overdone and scant in number—what ratio of their number will live to return next year?—and if they do all live to return, what manner of good will they be?—in many cases will they be potent at all?" And again, not a single young bull to be seen on the breeding grounds or at the breeding margins! Where are they coming from? They, so conspicuous by their numbers and aggressiveness in 1870-71! Where is the new blood which must take the place of the old and enfeebled sires before us? already failing to meet the demands of the hour on every side and ahead of us! Where is it?

The only answer which my study of this season gives me is *there is no new blood. Not nature enough left.*

Then lower down:

The poacher at sea has lent his aid since 1885 to this destruction.—

Sir CHARLES RUSSELL.—I think you ought to read the next; he does refer to driving.

Mr. PHELPS.—Yes, I am willing; it was only to save time, and I hope the Arbitrators will treat themselves to the very little entertainment there is in this case of the amusing kind, by perusing some of these field-notes. What my learned friend wants me to read is:

The club and effects of driving has destroyed it, slowly at first, but surely throughout the last eight years!

He had not been there!

Sir CHARLES RUSSELL.—"And rapidly during the last three of this period."

Mr. PHELPS.—Yes.

And rapidly during the last three of this period—especially rapid last year and at the present hour.

He had not been there, and not a living man had told him so.

Every man who was there swears to the contrary.

I could spend half a day reading this if it were material to show the character of the man. He started on his theory, and like some orators, gains in strength as he goes on; as he warms up to the subject he becomes not only more eloquent but more tremendous in the reach and force of his statement.

Sir CHARLES RUSSELL.—I beg my learned friend's pardon, but he made what I consider a very grave insinuation about Mr. Elliott, namely, that he was attacking the new company because of his interests in the old Company.

The reason why I want that last passage read is this, the lease to the new Company was in 1890 and in a passage I have read he does not confine his complaint of mismanagment to the period of the new Company at all because he says:

The club and effects of driving has destroyed it slowly at first, but surely throughout the last 8 years.

Therefore going back to 7 years of the old Company.

And gradually during the last three of this period—especially rapid last year and at the present hour.

I am rather surprised at that insinuation because my learned friend Sir Richard Webster distinctly stated in page 1623 of the report that Mr. Phelps had undertaken that no comment was to be made on Mr. Elliott's conduct attributing to him motives, or any comment except what the report furnished.

Mr. PHELPS.—I am not now saying anything but what Judge Swan said who was the other witness, and I leave it to my learned friends to settle between Judge Swan and Mr. Elliott, if it is of any importance at all. It is altogether probable on the face of this report that Mr. Elliott was willing at least that the Government should cut down the profits of this Company by abridging the number of seals they might take. But I do not care about it. We have not the least necessity to discredit Mr. Elliott, because in every disputed point in the case but this, he sustains the United States contention as completely as all our other witnesses do, so that in nine-tenths of this case Mr. Elliott becomes our witness. We do not need him and do not call him, but we accept his statements when put in by the other side. And, there-

fore, it is only on this point in which Mr. Elliott is completely answered, when we point out that the redriving that he objects to never took place before 1890; and while he seems to assume in some of these rhetorical passages that it has, he does not say so, and could not say so without saying that which is untrue. Neither does he cite any authority.

If my learned friend does not like Judge Swan I will refer him to what Mr. Tupper says about him.

Sir CHARLES RUSSELL.—I did not say that I disliked Mr. Justice Swan.

Mr. PHELPS.—I do not mean to say that you did, but Mr. Tupper in a letter in the British Case page 3, has the following criticism made upon Mr. Elliott by Mr. W. L. Morris. It is not Mr. Tupper's, but he cites it. He says Mr. Morris says:

> This man seems to be the natural foe of Alaska, prosecuting and persecuting her with the brush and the pen of an expert, whenever and wherever he can get an audience, and I attribute the present forlorn condition of the territory more to his ignorance and misrepresentation than to all other causes combined. . .

And Mr. Tupper then goes on to say.

> His evidence in 1888 is open advocacy of the United States contention. His writings and reports prior to the dispute will be referred to and it will be submitted that his statements and experiences before 1888 hardly support his later theories.

That is what we say; and Dr. Dawson, one of the British Commissioners, estimates Professor Elliott like this. Judge Swan—see the United States Counter Case, page 414, quotes Dr. Dawson as follows.

> Elliott's work on seals is amusing. I have no hesitation in saying that there is no important point that he takes up in his book that he does not contradict somewhere else in the same covers. . . His work is superficial in the extreme.

This is really trifling, and it is of no importance at all. On this subject he constructs a theory, and it is but a theory. How could anybody come to a conclusion about the effect upon an animal of this kind, which he seeks to attribute to it. There is only one way, and that is to wait the result of experience. Time will tell. Nothing else will tell, unless indeed it were something that is not pretended to exist in this case, some such special exterior injury as would show for itself what its consequences must be.

I pass over much more that I could say on this point, pointing out the errors of his reasoning and his mistakes in point of fact upon this; but I do not think the case requires it.

But now, that we are upon Mr. Elliott I want to verify what I said just now in reference to his support of the contention of the United States; and I will just name the points on which you will find he does support the contention of the United States. I read from page 69 of his Report. These are detached passages, but you have the Report and the context is all before you:

> The polygamous habit of this animal is such that, by its own volition, I do not think that more than one male annually out of fifteen born is needed on the breeding-grounds in the future:

Then, on page 118.

> In this admirably perfect method of nature are those seals which can be properly killed without injury to the rookeries, selected and held aside by their own volition, so that the natives can visit and take them without disturbing, in the least degree, the entire quiet breeding-ground, where the stock is perpetuated.

Then, on page 139.

When the *holluschickie* are up on land:—

Sir CHARLES RUSSELL.—You really must read the next line:

Such was the number and method of the young male seals in 1872-1874.

Mr. PHELPS.—Well, really, I have not time to read much of this.

Sir CHARLES RUSSELL.—Yes, I will not interpose.

Mr. PHELPS.—If I make a reference, it is by no means my purpose to give any unfair deduction from Mr. Elliott. You will see by reference to pages 71 and 74, he regards the methods adopted on the Pribilof Islands as excellent; and he describes the drives in the parts quoted from his Report of 1874 on pages 122 and 128.

Now on page 269 of his present report he says:

I should remark that the driving of the seals has been very carefully done, no extra rushing and smothering of the herd, as it was frequently done in 1872. Mr. Goff began with a sharp admonition and it has been scrupulously observed, thus far, by the natives.

Then on page 283, he says:

Yesterday afternoon I went back to Tolstoi over the seal road on which the drive above tallied was made in the night and morning of the 7th inst.; the number of road "faints" or skins was not large, which shows that the natives had taken great care in driving these seals; this they have uniformly done thus far.

Mr. Justice HARLAN.—What year was he speaking of there—1890.

Mr. PHELPS.—1890—when he was on the Island. He had not been there since 1876. You will find what he says about killing females on page 74.

We do not touch or disturb these females as they grow up and live; and we never will if the law and present management is continued.

Then on page 213 he says:

In 1835 for the first time in the history of this industry on these islands was the vital principle of not killing female seals, recognized.

He says again that according to his observations of 1872 to 1874 and 1876, the herd could safely support a draft far larger than 100,000, probably as large as 180,000 annually. That will be found on page 69.

He was there in the three years 1872 to 1874; he was there again in 1876 and he does not intimate in the report of 1890 that the condition of 1876 was not as good as that of the previous years 1872, 1873 and 1874.

Now what does he say about pelagic sealing. This is on page IX.

I could figure out from the known number of skins which these hunters had placed on the market, a statement of the loss and damage to the rookeries—to the females and young born and unborn, for that is the class from which the poacher secures at least 85 p. c. of his catch.

And on page 13 he says:

The young male seals have been directly between the drive, club and poacher since 1882, while the females have had but one direct attack outside of natural causes, they have been, however, the chief quarry of the pelagic sealer during the last five years.

Then if you will turn to page 214 you will see what he says on another point that I have not observed upon—perhaps shall not—that is the loss through wounding and sinking of seals. It says:

Four thousand female seals heavy with their unborn young are killed in order to secure every one thousand skins taken. (See also page 85 foot note.)

Then if you will turn to page 214 I will read another quotation. He recommends there:

That all pelagic sealing in the waters of Behring Sea be prohibited and suppressed throughout the breeding season, no matter how, so that it is done, and done quickly.

This step is equally imperative; the immorality of that demand made by the open water sealer to ruin within a few short years and destroy forever these fur bearing interests on the Pribilof Islands, the immorality of this demand cannot be glossed over by any sophistry; the idea of permitting such a chase to continue where five thousand female seals heavy with their unborn young are killed in order to secure every one thousand skins taken is repugnant to the sense of decency and the simplest instincts of true manhood.

I cannot refrain from expressing my firm belief that if the truth is known, made plain to responsible heads of the civilized powers of the world, that not one of these governments will hesitate to unite with ours in closing Behring Sea and its passes of the Aleutian chain, to any and all pelagic fur sealing, during the breeding season of that animal.

You will find on page 297 what he says on another point which has been mooted here—whether a female seal suckles any young but her own.

It has been said by some people, in order to break the effect of this murder of nursing mothers, that, after all, the other nursing mothers, that are not killed may suckle other pups. The absurdity of the statement that a fraction of the mothers could supply all the pups with sustenance, is all the contradiction that should require. Mr. Elliott says at page 296, speaking of the killing of these nursing mothers:

That means death or permanent disability, even if the cows are driven but once—death to both cow and her pup left behind, since that pup will not be permitted to suckle any other.

With respect to the pups learning to swim upon which there has been some criticism, Mr. Elliott says at page 255:

In the beginning of August a large majority of them are wholly unused to water.

And he says that a number of them do not get into the water before September the 1st.

He speaks also of the gentle disposition of the seals. On page 123 he says. "Docility of fur-seals when driven"—is his title—

I was also impressed by the singular docility and amiability of these animals when driven along the road; they never show fight any more than a flock of sheep would do.

Then on page 98 on the "Gentleness of the seals" he says:—

"Descend with me from this sand dune elevation of Tolstoi, and walk into the drove of hollluschickie" below us; we can do it; you do not notice much confusion or dismay as we go in among them; they simply open out before us and close in behind our tracks, stirring, crowding to the right and left as we go, twenty feet away from us on each side. Look at this small flock of yearlings, some one, others two, and even three years old, which are coughing and spitting around us now, staring up at our faces in amazement as we walk ahead, they struggle a few rods out of our reach, and then come together again behind us, showing no further sign of notice of ourselves. You could not walk into a drove of hogs at Chicago without exciting as much confusion and arousing an infinitely more disagreeable tumult; and as for sheep on the plains they would stampede far quicker. Wild animals indeed; you can now readily understand how easy it is for two or three men, early in the morning, to come where we are, turn aside from this vast herd in front of us and around us two or three thousand of the best examples, and drive them back, up and over to the village.

This may be usefully considered in connection with the point that we discussed some time ago as to the condition of the seals as a matter of property. He says further on page 18, in respect to the young females going back to the islands, which has been made a subject of discussion:

It must be borne in mind, that perhaps 10 per cent of the entire number of females were yearlings last season, and came up on to these breeding-grounds as virgins for the first time during this season—as two year old cows, they of course bear no young.

And on the same page he says this:

This surplus area of the males is also more than balanced and equalized by the 15,000 or 20,000 virgin females which come on to this rookery for the first time to meet the males. They come, rest a few days or a week, and retire, leaving no young to show their presence on the ground.

And on page 139 he says:

Next year these yearling females, which are now trooping out with the youthful males on the hauling-grounds, will repair to the rookeries, while their male companions will be obliged to come again to this same spot.

I may allude briefly to the condemnation by Mr. Elliott of various points that have been suggested rather than proved on the other side. On page 83 you will find—I do not quote his language—that coition does not take place in the sea.

On pages 57 and 58 he contradicts the assertion that the effect of raids on the Islands had been considerable as tending towards this decrease; and I may say here once for all, for I cannot dwell any longer upon it—it would take two or three days more if I were to go through the evidence on all these minor points—let me say here now in respect of this business of raids on the Islands, that I am entirely indifferent which way the fact is found. If there are any raids on the Islands (and they have taken place undoubtedly in some instances) they come from these pelagic sealers. It is the very presence in the water of these schooners that produces all the raids that have taken place on the Islands, whether they are many or few; and in the condition of the weather there it is perhaps true that they cannot always be prevented. That is one of the very mischiefs we are trying to protect ourselves against; not merely that they are slaughtering the seals in the water, but whenever fog or night or any accident enables them to do it, they go upon the Islands and trespass there. He says on page 53 and on two or three other pages, that the seals have great power of locomotion on the land.

There is another theory that has been thrown out here—that there is a congregation of young seals that do not come back to the Islands. I shall have a few words to say about that independently of Mr. Elliott; but on page 105 you will find he says this:

By the 14th-20th June, they (the bollushickie) appear in their finest form and number for the season, being joined now by the great bulk of the 2-year olds, and quite a number of yearling males. By the 10th of July their numbers are beginning to largely increase, owing to the influx now at this time of that great body of the last year's pups or yearlings; by the 20th of July, the yearlings have put in their appearance for the sea-on in full force. Very few yearling females make their appearance until the 15th of July, but by the 20th they literally swarmed out, in 1872-74, and mixed up completely with the young and older males and females as the rookeries relax their discipline and "pod" or scatter out.

On page 253, he speaks again of the yearlings there. He says:

A great many yearling females are halting down at landings in and among the scattered harems, aimlessly paddling about.

On page 298 he says:

I observed a very large proportion of yearling cows scattered all over the breeding ground from end to end near the sea margin, while the yearlings of both sexes are completely mixed upon the outskirts of the rookery, here and everywhere else commingled with the adult cows and their young pups.

There is another point that has been suggested here by my learned friends, that these seals consume the food-fishes, or that they may do so at some time or other. What that has to do with this case I do not know. The question as to the right of the United States does not depend upon it. The question of regulations does not depend upon

it because the Governments have propounded these questions to the Arbitration in the Treaty. But Mr. Elliott shows that the true enemy of the fishery is the dog-fish, and that the seal is the devourer of the dog-fish. You will see on page 307—

> Suppose for argument that we could and did kill all the seals, we would at once give the deadly dog-fish (*Squalno-ancarthias*) which fairly swarms in these waters, an immense impetus to its present extensive work of destruction of untold millions of young food fishes such as herring, cod, and salmon.
>
> A dog fish can and does destroy every day of its existence hundreds and thousands of young cod, salmon, and other food fishes—destroys at least double and quadruple as much as a seal; what is the most potent factor to the destruction of the dog-fish *first*, he will be doing positive injury to the very cause he pretends to champion, if he is permitted to disturb this equilibrium of nature and destroy the seal.

Now I have said more than I ought about Mr Elliott; and what is the conclusion of the whole? It will be seen that we have neither desired to suppress this Report, nor had we the least inclination to do so. If you strike it out of this case, you strike out nine parts of the evidence that are in our favour, in order to get the one—the only one that is against us, so far as it goes; and that is destroyed, and the mistaken theory of Mr. Elliott on that subject is exposed when we find his conclusion is one that is not warranted by any evidence;—that the kind of driving he objects to had never taken place till 1890, and that only in several years afterwards could it be ascertained whether his preposterous idea, as we think it is, of an injury to the vitality of the seals is made by causes so slight.

Let me say one word on the subject, however of the waste and destruction by killing and by the sinking of seals that are killed—the fatal wounding of seals that escape. There is a great deal of evidence on that point. It is evidence on both sides, and it would take a long time to go through and estimate it. The evidence on the part of Great Britain is from the sealers, not only swearing in their own behalf, but swearing to their own marksmanship and success in killing seals. That it has been universally understood, until that testimony was brought forward in this case, that the result was a vast waste, we have seen from everybody's statement who has made any statement earlier than this.

It never was doubted before that it must be so; and it will be transparent to any person who will reflect on the circumstances. It will be more transparent to anyone who has ever had anything to do with the business of shooting at all, and above all of shooting game or animals in the water. No man who has had any such experience will be persuaded otherwise than that a very large number of animals under the best circumstances must be lost—always are lost. No man who has shot a deer in the water, or who has shot at ducks in the water and not upon the wing—at animals that frequent the water—does not understand how large a percentage necessarily must be lost. And you will bear in mind that this Sealing Association agreement among each other requires that only a certain number of "old hands" in the business shall be employed on each vessel, whatever the reason of that is; and that even many of the witnesses that attempt to make out that a very large proportion of seals are saved out of those that are killed, make this qualification—"the *green hands* lose." They need not say that. We know that green hands lose the seals. It is a very expert marksman indeed that would not lose a great many;—the green hands lose on their own showing. But I pass over this lightly for the reason that this, like so many points that have been discussed, really does not bear on the issue. If they are to destroy the animals, they are not any more destroyed because they sink to the bottom of the sea, and their skins

are lost. They are lost to us just as much. Their effect upon the herd is the same. It is only the question whether those who kill them get the profit of the skins; and yet at the same time it is most natural to observe that you find agreed all through this case, by those who have commented upon it, that the waste and destruction alone of this method of sealing condemns it, if you are to look at all at the interests of mankind in the preservation of this herd, or to the interests of commerce in having the yearly product. If those considerations enter at all into the question, then it is a material consideration, that, as we say, a very large proportion variously stated by the witnesses (I will not undertake to say what, for I have made no estimate of the result of the testimony) are lost.

Then you have unquestionably noticed another thing—that of all the skins that go into the London market from what is called the "North West Catch"—that is the pelagic catch—the uniform price is considerably less than the skins of the same animals taken on the island, and the reason is that they are full of shot holes;—that is the only difference—except that they are largely the skins of females. That may have something to do with it, but generally the reason given by the witnesses is that they are full of shot holes, so that of the skins that are saved, commerce is deprived of the real value of many of them. But I pass over many of these points, rather than to weary you with what, perhaps, is not very material.

I want to say a word further on the subject in respect of which I read from Mr. Elliott—the return of these seals to the islands. There is a theory—it is nothing but a theory—that there may be young seals that do not go back till the instinct of nature takes them back for the purposes of reproduction. What evidence does that rest upon? Who knows, who can know, who pretends to know, that these seals do not return? The evidence is just to the same effect as what I have read from Mr. Elliott. Numbers of witnesses testify that young seals are back there. This very business of driving that we have been discussing shows that. What is the trouble with the driving in 1890—what is the objection to it? They drive up seals and let them go: what do they let them go for? They cannot get the desired number of skins; they can get but little more than one-fifth: they have not the number which the contract entitles them to take: why do they let them turn back? Because they are too young. All this theory of Elliott's is based on the presence of those young males on the islands.

As to the young females, the evidence of their presence on the islands is voluminous.

Then there is another thing. The necessities of the change—the shedding of the fur brings these animals back—which takes place every year. I read from Mr. Grebnitzky's evidence, the Governor of the islands whose experience is so long and who has no interest in this case. It is to be found in the United States Counter Case page 363. He says:

> I believe that at sometime during the year every seal comes ashore. There is no reason to believe that a certain number of any class remain swimming about in the neighbourhood of the islands all the summer without landing, although there is considerable difference in the time at which different classes arrive.

Writing about Mr. Grebnitzky, the British Commissioners say, at section 202 that he, Grebnitzky,

> Believes the main reason of the landing, at later dates, of the seals not actually engaged in breeding, is that during the "shedding" or "stagey" season, their pelage becomes too thin to afford a suitable protection from the water.

Captain Bryant's testimony cited on both sides is quoted by the British Commissioners, at Sections 718 and 719. They say in Section 718.

Referring particularly to his experience in 1869, Captain Bryant writes: "At the close of this period the great body of yearling seals arrive. These, mixing with the younger class of males, spread over the uplands and greatly increase the proportion of prime skins, but also greatly increase the difficulty of killing properly. Up to this time, there having been no females with the seals driven up for killing, it was only necessary to distinguish ages; this the difference in size enables them to do very easily. Now, however, nearly one-half are females, and the slight difference between these and the younger males renders it necessary for the head man to see every seal killed, and only a strong interest in the preservation of the stock can insure the proper care.

The meaning of these remarks and their bearing on the possibility of restricting the killing on the islands to males, becomes clear when it is remembered that the external genital organs of the male do not become distinctly obvious till about the third year of its age, § and particularly so when it is remembered that even as long ago as 1872-74 the "major portion of the catch" consisted of two- and three-year-old seals, ‖ while at other times even yearlings have been killed.

This last language is the language of the Commissioners. The first, was their quotation from Captain Bryant.

Mr. Goff says (this is quoted in the British Counter Case p. 265).

Now, in opening the season, it is customary to secure all the 2-year-olds and upwards possible before the yearlings begin to fill up the hauling-grounds and mix with the killable seals.

And, again, he says, as they quote him.

And we closed the season by turning away 86 per cent, a fact that proves to every impartial mind that we were redriving the yearlings.

I will refer to another piece of evidence because this can be made perfectly clear. An examination of a Table, (one published at pages 255 and 256 of Volume II of the Appendix to British Counter case), shows that during the whole term of the lease of the Alaska Commercial Company, more than half the catches consisted of "Middling pups", and under. A "Middling pup" is two years old. There is also the evidence of Mr. McIntyre and Mr. Morgan and others.

There is no evidence—there can be no evidence—to the contrary—because it cannot be told in the sea, what a seal is, where it has come from, or where it is going except from its being in the migration route, how long he has been at sea, and whether he is going back again; and the evidence of all these persons whose particular knowledge of seals, and whose character for truth are beyond question, shows that the yearlings and the two-year-olds, male and female, do come back every year in very large numbers. If they do, what possible warrant is there for the suggestion that there is some unknown fragment of them that remain out at sea; especially in view of the necessity of their getting on shore for the annual shedding of their fur.

I am reminded, while I remarked that Mr. Elliott had given us two erroneous translations, that I have only produced one; and, while it is not of great consequence, yet having referred to it, I should like to produce the other.

The British Commissioners Report, Section 429, quotes from Elliott's United States Census Report at page 141, and no doubt they quote him correctly. They say:

429. On this point, speaking of an early date in the history of the islands, Veniaminof writes; "This opinion is founded on the fact that never (except in one year, 1832) have an excessive number of females been seen without young; that cows not pregnant scarcely ever come to the Pribilof Islands; that such females cannot be seen every year."

Mr. Justice HARLAN.—That is not Elliott's.

Mr. PHELPS.—Yes, it from Elliott's Census Report.

Mr. Justice HARLAN.—No.

Mr. PHELPS.—It is Elliott's quotation from Veniaminof.

Mr. Justice HARLAN.—Yes.

Mr. PHELPS.—That is what I mean. It is a quotation from Veniaminof which he has translated, in the United States Census Report at page 141, cited by the British Commissioners in Section 429. This is the correct translation, as certified, of that passage.

> This opinion is founded on the fact that (except in one year, 1832) no very great number of seals has ever been seen without pups; but it cannot be said that unpregnant cows never visit the Pribilof Islands, because such are seen every year.

What the author says is exactly the opposite of Mr. Elliott's translation.

There is the evidence, if you call that the evidence, upon which this extraordinary theory is based that is in the face of all the other evidence in the case. I could read evidence from now to the end of the day, to show that the yearlings go back to the islands every year.

Now what is the upshot of this whole business? If the time that I have taken has not caused the Tribunal to lose sight of the thread of the argument I have been endeavoring to pursue for the last two days, the point with which I set out was this; to prove from the evidence what I say is not merely proved—it is demonstrated—that the business of pelagic sealing leads necessarily to the extermination of the seal. In proof of that, we have shown that 85 per cent of its slaughter is females; that a very large proportion, 75 to 85 per cent of the females in the North Pacific Ocean, are pregnant and about to be delivered; that in the Behring Sea an equally large proportion, are those who have survived the onslaught made upon them in the North Pacific Ocean, have been delivered of their young, and are out at sea in pursuit of food, and they are there destroyed: that the consequence of that is the death of a great number of pups on the Islands; that the suggestion that the pups are destroyed by any other cause is not only unsustained by evidence—it is not even sustained by a reasonable suggestion of what the cause might be; and it is demonstrated and shown to be untrue, because except as to the two Rookeries in one year 1892, the death of the pups always coincided and concurred with pelagic sealing.

Then I have endeavoured to show in this hasty and cursory way,—it is more cursory, I beg you will remember, than if I felt at liberty to take more of your time,—that the suggestion of the present decrease, which is only a circumstance in respect of the ultimate result of pelagic sealing, is due to any other cause than this, is totally without foundation: that what is said about the taking of too many males never transpired until it was brought about by the result of pelagic sealing itself. That all authorities agree that the herd would stand as it always used to stand, when it was needed, a draft of 100,000 a year—but as they could not know the diminution of the birth rate that was being gradually but certainly brought on by pelagic sealing the time came when, in 1890, it was quite true that they could not take that number of seals. Then the other suggestion, that aside from the number the virility of the herd has been injured by the manner of driving, turns out, on investigation, to be absolutely unsupported except by this theory of Mr. Elliott's, and to be contradicted overwhelmingly by all the other evidence in the Case.

I need not refer to the other theory that there are seals abroad that do not come home. That is unproved and contradicted by all the witnesses. What is the result of it all? Why it comes down to a demon-

stration, as I respectfully claim, of the proposition I set out with, and which is the great underlying proposition in my argument in this case: that the right which is contended for on the part of these individual and speculative Canadians and renegade Americans and which they claim as their justification is the right of extermination.

There is no other view to take of it. It is not the right to share with us,—that right would be open to discussion if the United States have no property interest,—it is the right of extermination, as a feature of the freedom of the sea. My learned friends say that the right of the United States cannot be maintained without infringing the freedom of the sea; they talk about the right of search, which has nothing to do with this case; the right of seizure, which is not before this Tribunal; but which if it is to be resorted to in self-defence is exactly the right and the only right that has been administered ever since there was a law of the sea in protection of every interest that a nation has to protect. There is nothing else that can be done except the resort to measures which are more stringent and more severe, and which the usage of nations does not warrant. The right of extermination is then the question in this case. I have assumed it to be so in what I have said on the law points, I have proved it to be so, I respectfully suggest, upon the facts.

[The Tribunal then adjourned for a short time.]

Mr. PHELPS.—I come now, Sir, to the only remaining topic upon which I shall address the Tribunal, the subject of Regulations, in case the decision should be such as to require its consideration by the Tribunal. I alluded in the beginning of my argument, to the extraordinary position, as it seems to me, that Great Britain occupies upon this subject. I pointed out, by reading from letters in the correspondence that preceded the creation of this Tribunal and the making of this Treaty, the position that Great Britain took. I showed, in the first place, that at the very outset of the negotiations, in the first interview that ever took place between Lord Salisbury, the British minister of Foreign Affairs, and the United States representative, a convention was agreed upon substantially, the terms of which you will remember.

I do not know that I can give now the latitude and longitude, but you will remember that its limits were designated on the map—how large they were to the South into the sea, and how large they were east and west. That fell through upon the remonstrance of Canada. It was never withdrawn by the British Government. It was never recalled, but it drifted along through correspondence (that I shall not allude to again) until the United States became satisfied and the event showed they were right, that it would not be carried into effect. It was suggested that the Convention thus agreed to by Lord Salisbury—the close time being from the 15th April to the 1st November, subsequently modified to the 15th October—was made because Lord Salisbury did not understand the subject. Quite apart from the consideration that he would not have acted and never did act—upon a subject he does not understand, after he had heard from Canada officially, and more than once as the correspondence shows, and after the light that was thrown upon it, not only by the American Government, but by the subsequent communications from British cruisers, Lord Salisbury never took the ground that he would have taken as a frank and honourable man, if it had been true that he had been drawn into an agreement in ignorance of material facts. He never put himself on that ground. The last communication from Lord Salisbury on that subject to the American Government and to the American Minister, both orally and in

writing, was this:—"We hope to carry the convention into effect. It will take time, but we hope to do it." Then I pointed out further, and you will excuse me for alluding to this, as a foundation of what I am going to say without reading again in support of it, that from that time forward in all the negotiations under President Harrison's Administration, when Mr. Blaine was Secretary of State, the language of the British Government was uniformly "We are ready to do anything that is necessary for the preservation of the fur-seal. We deny your right to protect yourself. We think that infringes on our rights, but when you come to a Convention for the preservation of the seal, we will do anything that is necessary."

I pointed out further, that with the exception of a very guarded passage in one letter in which Lord Salisbury suggested, in regard to the statement of these points by Mr. Blaine, that there might be two sides to the question, that there was evidence on the other side, and that it was not agreed to by Canada,—some very guarded statement that did not commit him or his Government,—with that exception he never challenged anything that Mr. Bayard said in that communication sent to the British Government outlining the Convention that was necessary, and which was, as I have before informed you, reprinted and spread abroad, in which all these assertions that we make now as to the character and consequence of pelagic sealing were set forth. He never undertook to defend it, or to deny its consequences or results, except only in the one guarded passage that I formerly read. So that the record of the British Government is perfectly clear up to the time of this hearing, and the record is perfectly clear now, because what has been said here is no part of the diplomatic record of the country or the Foreign Office. Up to the commencement of this hearing, Great Britain, in every word that was said, has been at one with us on the subject of the preservation of this race, and is the author of this Commission by which the measures necessary for the preservation of the fur-seal were to be ascertained; and in one passage as you will remember, the language used was, "without reference to the interests of anybody." I should say further, that when they sent out these Commissioners, my learned friends have relied as an evidence of the good faith of their Government in respect to the object in view, upon these instructions to the Commissioners.

The main object of your inquiry will be to ascertain, "What international arrangements, if any, are necessary between Great Britain and the United States, and Russia or any other Power, for the purpose of preserving the fur-seal race in Behring Sea from extermination?"

As to the appointment of that Commission, let me refer, as I have but very little to read on this branch of the case, I hope, from correspondence, to Mr. Blaine's letter of February 16th, 1892.

It is in the first American Appendix, page 348, to Sir Julian Pauncefote, after the Commissioners had been appointed on both sides.

Sir, I am in receipt of your note of this date, in which you give me the official notification of the appointment of Sir George Baden-Powell and Professor Dawson, as Commissioners on the part of the British Government on the joint Commission created in view of the proposed fur-seal Arbitration.

In acknowledging your note I deem it important to direct your attention to the fact that the government of the United States, in nominating the Commissioners on its part, selected gentlemen who were especially fitted by their scientific attainments, and who were in nowise disqualified for an impartial investigation and determination of the questions to be submitted to them by a public declaration of opinion previous or subsequent to their selection. It is to be regretted that a similar course does not seem to have been adopted by the British Government. It appears from a document which you transmitted to me, under date of March 9, 1890 (inclosure 4), that one of the gentlemen selected by your government to act as Commissioners on

its part has fully committed himself in advance on all the questions which are to be submitted to him for investigation and decision.

I am further informed that the other gentleman named in your note had previous to this selection made public his views on the subject, and that very recently he has announced in an address to his Parliamentary constituents that the result of the investigation of this Commission and the proposed Arbitration would be in favor of his Government.

I trust, however, that these circumstances will not impair the candid and impartial investigation and determination which was the object had in view in the creation of the Commission, and that the result of its labors may greatly promote an equitable and mutually satisfactory adjustment of the questions at issue.

Now there is the first point in which Great Britain swerved away from what before had been its uniform and honourable and most proper and appropriate language in respect of the regulation of this matter, if it was to be regulated by convention, and putting aside as was proposed by Mr. Bayard and Mr. Blaine the discussion of any question of right—the first thing they did was to select gentlemen—gentlemen of high respectability, competent, no doubt, in every respect to be selected, but men—one of whom, at least, and the other to a considerable extent were completely committed beforehand. I want to refer—because we cannot consider this question of Regulations intelligently, unless we ignore altogether the work of the Commissioners that were appointed under the Treaty for the very purpose of helping the Tribunal on this subject—we cannot discuss this question without considering the position in which these gentlemen stood. This is a note by one of these Commissioners, Mr. George Dawson, Assistant Director of the geological survey of Canada, and it is to be found in the 3rd volume of the British Appendix on page 450.

I cannot read all that because there are three full pages of this large volume and it is dated March 5th 1890—before their appointment. It is from beginning to end a strong, ingenious and very earnest argument in favour of pelagic sealing and against any kind of Regulations that should not provide for and protect it. Some of the passages are very strong. Take this instance; and the Tribunal will understand I am only reading detached passages.

If, indeed, the whole sweep of the Pacific Ocean north of the Equator was dominated and effectively controlled by the United States, something might be said in favour of some such mode of protection from a commercial point of view, but in the actual circumstances the results would be so entirely in favour of the United States, and so completely opposed to the interests and natural rights of citizens of all other countries, that it is preposterous to suppose that such a mode of protection of these animals can be maintained.

He argues the property question at considerable length and has strong opinions upon that subject. Then at page 452 he goes on to say:

The protection of fur-seals from extermination has from time to time been speciously advanced as a sufficient reason for extraordinary departures from the respect usually paid to private property and to international rights; but any protection based on the lease of the breeding-ground of these animals as places of slaughter, and an attempt to preserve the seals when at large and spread over the ocean, as they are during the greater part of each year, is unfair in its operation, unsound in principle, and impracticable in enforcement.

Then he discusses lower down the impracticability of killing seals in the open sea and goes on to propose that the killing should be largely limited on the Islands and that indeed if it could be done the proper way would be to stop all the killing on the Islands. He says:

The circumstances that the females fur-seal becomes pregnant within a few days after the birth of its young, and that the period of gestation is nearly twelve months, with the fact that the skins are at all times fit for market (though for a few weeks, extending from the middle of August to the end of September, during the progress

of the shedding and renewal of the longer hair, they are of less value) show that there is no natural basis for a close season generally applicable. Thus, should any close season be advocated, its length and the time of year during which it shall occur can only be determined as a matter of convenience and be of the nature of a compromise between the various interests involved.

I only read that to show the position of this gentleman.

I do not blame him for his opinions—he is entitled to his opinions and is entitled to advocate them. I should as soon think of taking issue with my learned friends because they have delivered able arguments in support of their side of the case. But if the proposal was to create a Tribunal in the place of the gentlemen I am addressing to determine this case, I should very seriously object to having my three learned friends who, under other circumstances, would be most competent and appropriate to fill such a place, appointed as Members of the Tribunal; and I need not say they would not for a single moment accept such a position, if it was tendered to them.

The difficulty is that this Commission, as you will see all the way through, is quasi judicial. It is to some extent the same as your own, and there is the same objection to putting the man who has formed strong and inveterate opinions and views, and expressed them and become the champion of that side quite as much as either of my learned friends who are here in the capacity of Counsel during their argument—on a Commission designed to be a Joint Commission to prescribe these Regulations, and to ascertain, not what is necessary for the interest of the sealers, not what is for the interest of pelagic sealing, but what is necessary to preserve the seals;—the objection to putting such men on this Commission is very great, and the result is what might be naturally anticipated. I never doubted for one moment that if gentlemen who were selected as I believe the United States Commissioners to have been, who had never expressed opinions that I know of, and who had no interest and no feeling, had, on the other side been met by two gentlemen who had sat down as the Members of this Tribunal sat down, to enquire, in view of all the evidence what is to be done, a scheme would have been propounded which, whether satisfactory to both sides or not, would have been adopted by the Governments. I never doubted another thing, though you will only take this as my suggestion—that this was what Lord Salisbury desired, finding himself between two fires;—in the first place confronted by the facts pressed upon him by the United States, which he could not controvert, and pressed by the industry—and a very important one, of Great Britain, and on the other hand met by the determined opposition of Canada,—he took this ground—a perfectly fair ground on the face of it, and perfectly sincere—that he would agree to anything necessary to preserve the seals, and that what was necessary should be reported by the Commissioners.

Now what have we here on this hearing? This whole case, from beginning to end, now happily so near, has been a struggle on the part of my learned friends for the protection of the business of pelagic sealing; and if their recommendations were adopted, after the Tribunal should have decided that the United States have no right to protect itself, they would proceed to establish regulations that would not afford the slightest protection.

What are the claims of my learned friends on the other side. They say: "Limit these regulations to Behring Sea". Do you claim that would preserve the seal? No, we agree it would not. It is plain it would not. That cannot be denied. Why, then, limit them to Behring Sea? Upon some technical construction of the plain language of this Treaty, derived from the antecedent correspondence, something that

Mr. Wharton said, when dealing with the *modus vivendi* which could not extend beyond Behring Sea, because there was no statute of the United States then, enforcing regulations on their citizens in the North Pacific. Limit them to Behring Sea. But if you close Behring Sea from January to December, what would be the result on the preservation of the seal? My learned friends admit it would be ineffectual. Sir Richard Webster said you must, in order to save the seal, prevent the killing of the gravid females on their way to grounds where they are delivered; and yet they would limit it so as not to interfere with such killing at all, which is all done in the North Pacific.

What time is proposed by these British regulations? To shut up Behring Sea from the 15th September round to the first July; and I shall show you from the evidence in this case that no British sealer ever went into the Behring Sea earlier than the 1st July, except in some rare exceptions in the last days of June, and they are all out before the 15th September. The proposed closed time, therefore, for the protection of the seal would leave all the sealing that has ever taken place in Behring Sea open, and would make a close time as to those parts of the year when they would not be there even if there was no close time.

Is that all? They say they want these Regulations temporary. That is, for some term of years. What is the result of that? You will remember that you have decided, before you arrive at these Regulations, that we have no rights. We have submitted that question, and have agreed to abide by the result, and we must abide by it, and we shall abide by it, of course, whatever it may be. You have decided before you reach this part of the case, therefore, that we have no rights. Then you say "We will give you Regulations for 5 or 10 years". At the end of that time, where are we? We cannot defend ourselves at all; we have agreed that we are to be bound by the award of the Tribunal, we cannot make further Regulations without the agreement of Great Britain, and we cannot get any Regulations except what they agree to. No Regulations would be agreed upon, and where should we be? We should be absolutely defenceless, and the seals would have to perish. It is a hundred times better to establish no Regulations at all than that.

Then what else? They want them made non-enforcible; that is to say Regulations on paper, so that if there is transgression by the sealers, we alone having to suffer, we should have to enter into a diplomatic correspondance with Great Britain on the subject. We have tried that remedy before, and the result is that we are here. Where should we be if we cannot enforce the Regulations? We can open a diplomatic correspondance with a country across the sea which stands between us and this Province, with regard to whom we are at arms length.

Sir CHARLES RUSSELL.—This language of my learned friend betrays so very grave a misapprehension of our position that I am bound to interpose, Sir. We never said that the Regulations were not to be enforcible; on the contrary, we pointed out that legislation in each country would be necessary to give effect to the Regulations to bind the nationals of each country; and speaking for the Government of Great Britain, I said that that country would be bound to pass the necessary enactment to enforce it; and that, of course, it would.

The PRESIDENT.—I think we understood the language of Mr. Phelps to have the meaning that you have expressed.

Mr. PHELPS.—If I am mistaken in the position of my learned friends, I cheerfully take back anything that I have said.

The PRESIDENT.—What you mean is, that it is not to be enforced by one party?

Mr. PHELPS.—Yes. I mean, that they propose, with regard to these ships, if they transgress the Regulations and are destroying the seals, that we shall have no right to capture a vessel or to do anything except to appeal to Great Britain and remonstrate with them.

Sir CHARLES RUSSELL.—That is not so.

Mr. PHELPS.—To remonstrate with them for not enforcing the Legislation which, if they undertake to enact a measure, they would enact. If I misunderstand my learned friend, I cheerfully take back all I have said; but what I understood their position to be is this; that there should be no such provision as that put into the draft of our Regulations whereby the United States Cruisers could capture a vessel that was transgressing your Regulations; that is to say, suppose we had a zone and a vessel is found sealing inside, then we must not capture it; but we must go to Washington and open a correspondence there with the Government stating that the schooner "Sally Jones" has transgressed the Regulations. Then, what is the Government to do? Of course, to send to Canada for information; where they will probably ascertain that the Captain of the Schooner "Sally Jones" denies everything. To anybody who knows anything about diplomatic correspondence with a country acting for a Province, it is apparent that it has no information except what it derives from the Province—what would come from that; and this is only material to show the ground on which they put themselves.

The PRESIDENT.—That is your own appreciation, of course, M. Phelps and we have our own appreciation of it.

Sir CHARLES RUSSELL.—I am sorry there should be this difference of opinion because my learned friend Sir Rirchard Webster re-echoing what I think I had previously said made use of this expression.

> I only contend for that which the United States itself universally contended for up to this point and which Russia, Great Britain, France, and as far as I know, every other civilized Country has always contended for successfully that if a ship is found infringing the Treaty—that if a ship is found infringing the convention by the nationals of another country it shall be handed over for justice to the courts of its own flag.

That is according to the terms of the Russian Convention.

The PRESIDENT.—We remember that perfectly.

Mr. PHELPS.—That is another thing and if my learned friends did not go so far as I understood them to go, then I misunderstood them and I do not care to press the question any further.

Is it not apparent, that the first thing the Tribunal has to do if they approach this question of Regulations, is to determine which of two theories will be adopted. Whether the theory which is laid down in the language of the treaty, which is transparent in every step of the correspondence, which appears in the instructions written by the British Government to their Commissioners, which is repeated over and over again all the way through, to do whatever is necessary for the preservation of the fur seal—not necessarily what the United States says is necessary but what is found to be necessary, or on the other hand whether you are going to adopt Regulations that do not go so far as is necessary to preserve the seal, but go in that direction as far as you can consistently with the preservation of the pelagic sealing which as I have proved to you is itself necessarily extermination. In other words you will go so far in adopting Regulations for the preservation

of the fur seal as you can go consistently with the preservation of their extermination. If the one theory is to be adopted that is one thing. Then we are to inquire really what is fairly and reasonably necessary to preserve this race. That is the inquiry. If the other theory is adopted, what can you do to retard its extermination consistently with preserving the right of extermination? In the one case you preserve the fur-seal; in the other case you are postponing by a few years its destruction.

In what I have said, perhaps at the risk of being thought to have said too much about this antecedent point, I have desired to bring out clearly what the Governments proposed to each other, and what they did. There is no ambiguity here. If there is any ambiguity in the previous correspondence it is cleared up when you come to the Treaty itself. Let me remind you of this often read language.

> If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such a position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seals in or habitually resorting to Behring Sea, the Arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary.

Necessary for what? The previous language shows:

> The proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea.

But if I were to stop here and review all this correspondence again, it would turn out, as I have said, to be carried on the face of the proceedings—all through, "we are willing to do all that is necessary. We do not desire to injure the United States; we are willing to join and send a Commission to find out and aid in determining what is necessary." To avoid the discussion of the proposal of Mr. Bayard in which he laid down his outline, and to avoid the discussion of the propriety of the very convention we entered into, and which, on the face of it, as the thing then stood, and the knowledge of the subject then existed met the requirements completely of the necessary preservation of the fur-seal, if it is found now, broad as those limits were, that they are not broad enough, because the investigations since have enlarged the knowledge of the subject, and have made it apparent that the parties were not doing what they thought they were doing in that Convention, we will agree to what is shown to be necessary to effect the common object.

But now the point that my learned friend, Mr. Robinson, particularly insisted upon is that you cannot go as far as is necessary to preserve the seal; that you may regulate the provisions for destroying him, but you must not prohibit it; that was his answer to a question of one of the arbitrators, and a very pertinent question it was. While he was discussing it Mr. Justice Harlan said, "Do you mean, Mr. Robinson, that if it is necessary to prohibit pelagic sealing, in order to preserve the seals, that we are not to do it, that we have not the power to do it?" "Certainly", said my learned friend, "you may regulate but not prohibit." Regulate what? Regulate what you have found to be the destruction; because if it is not the destruction, you do not want to prohibit it. There is no propriety in prohibiting it unless it is destruction, but when you get thus far and are able to say, Why the prohibition of this sealing is necessary,—because it is destruction—now says Mr. Robinson you may regulate the destruction, but you cannot stop it by the terms of this Treaty. Why it stultifies the Tribunal. It puts the Tribunal under a commission that nominally, at least, invests them

with important powers, and yet places them under the necessity of saying, "We are asked to protect the fur-seal; the nations have agreed that it should be protected; we have found out what is necessary to protect it, but cannot do the very thing and the only thing for which this Tribunal was constituted, in the event it should come to the conclusion that any regulations were necessary in the case, because the country could not protect itself."

Then they speak—and I do not know how far they mean to press this point—about conditions annexed to the Regulations; they talk about their being conditional, upon our stopping the killing on the Islands. Is the Tribunal invested with any power to enter on the United States territory and prescribe what they shall do on their own soil? Certainly not. Is there any necessity for it? Certainly not. They are engaged as earnestly as they can be in preserving the seal. If they have made any mistakes, they will correct them of course, when it transpires that they need correction; but they say, though you cannot make Regulations to bind the United States in the administration of their own property in their own jurisdiction, where there is no question of their right, where the concurrence of Great Britain is not necessary, and it is only when the concurrence of Great Britain is necessary, that the Tribunal is to provide Regulations, you may make it a condition that killing must be restricted on the islands; thus doing indirectly what you cannot do directly. What a proposition that is to a Tribunal of the distinction and character of this. What a proposition it is to any Tribunal, however humble and inferior it might be, if charged with dealing with this subject at all, to invite it to do by indirection what it conceives it cannot do directly.

A few words, and but a few words on the question of whether the authority of the Tribunal extends to promulgating Regulations that shall take effect outside the Behring Sea. I do not think that is seriously denied by the other side. I understand my learned friend, Sir Richard Webster to have not only agreed, but to have proposed a Regulation which he thought would be adequate to protect in the North Pacific Ocean pregnant females on their way there. I do not think I am justified in saying that he really contended that the authority of the Tribunal is limited to the Behring Sea itself, but a reference, again to the language of the Treaty makes that very clear, because the language is: "The Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and over what waters such Regulations should extend." If there could be any doubt, a reference to some of the many declarations on this subject in the previous correspondence would set it quite at rest.

When this sixth section was first projected or when the Treaty began to take form as early as December, 1890, the sixth Question was proposed in this way.

Mr. Justice HARLAN.—It is at page 286 of Volume I of the United States Case.

Mr. PHELPS.—Yes.

If the determination of the foregoing questions shall leave the subject in such a position that the concurrence of Great Britain is necessary in prescribing Regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined: (1) How far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and feeding therefrom? (2) Whether a closed season (during which the killing of seals in the waters of Behring's Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal fishing industry, so valuable and important

to mankind, from deterioration or destruction? And, if so. (3) What months or parts of months should be included in such season, and over what waters it should extend?

On June the 22nd, 1891, which was after the *modus vivendi* of that year had been signed, and the instructions to the British Commissioner were "for the purpose of enquiring into the conditions of seal-life and the precautions necessary for preventing the destruction of the fur-seal species in Behring Sea and other parts of the North Pacific Ocean." And the President of the United States, in appointing the Commissioners on our side, instructed them "to proceed to the Pribilof Islands and make investigation of the facts relative to seal life, with a view to ascertaining what permanent measures are necessary for the preservation of the fur-seal in Behring Sea and the North Pacific Ocean." There are the instructions issued on both sides to their respective Commissioners, and that appears again through this correspondence to an extent which would be only wearisome to reiterate.

At page 315 of the 1st United States Appendix, Sir Julian Pauncefote writes a letter to Mr. Wharton of June the 11th 1891, and he says:

Nevertheless, in view of the urgency of the case, his Lordship is disposed to authorize me to sign the Agreement in the precise terms formulated in your note of the 9th June, provided the question of a Joint Commission be not left in doubt, and that your Government will give an assurance in some form that they will concur in a reference to a Joint Commission to ascertain what permanent measures are necessary for the preservation of the fur-seal species in the Northern Pacific Ocean.

Mr. Wharton, in reply to that letter, recognises the fact, and he says:

I am directed by the President to say that the Government of the United States, recognizing the fact that full and adequate measures for the protection of seal life should embrace the whole of Behring's Sea and portions of the North Pacific Ocean, will have no hesitancy in agreeing, in connection with Her Majesty's Government.

So that you have the specific agreement that these measures were to embrace parts of the North Pacific Ocean, and instructions were given to the Commissioners on both sides how far into the North Pacific Ocean it was necessary to go; and in the next place you have the definite language of the Treaty, free from ambiguity, which gives the jurisdiction to the Tribunal to go to that extent; and then, you have it conceded by my learned friends that if you do not go into the North Pacific Ocean you do not answer the purpose that the Government had in view, and cannot fulfil the only duty with which the Tribunal is charged.

Now what have we to say generally, about these regulations, before coming to compare the two drafts. It is that they cannot be temporary. The theory of the Treaty, and the necessity of the case, is that they should be permanent; that they cannot be confined to Behring Sea, but they must extend as far as is necessary; that they cannot be made conditional upon the management upon the island, for the reason that that authority is not entrusted to the Tribunal.

Now we come to the proposition made on the British side as a partial result of the British Commission, though they do not go nearly as far as that Commission proposes, and what is it that they propose? Really, what is the final outcome. We have reached the point where the Tribunal is engaged in finding out what is necessary for the preservation of the seal. They propose some little, paltry regulations which do not need the judgment of this Tribunal, because the British Government is at liberty to adopt them if it pleases, within its own jurisdiction, and this Tribunal could not prevent it. They say let us have the vessels licensed. That is an affair of their own. We do not care

whether they are licensed or not. Then they say, let it carry a particular flag. We do not care about that. That does not concern us at all. They could carry any flag they liked, subject to the laws of their own country. Then they say, let them keep a log. What is that worth. Only this, that when we charge a vessel with having transgressed any regulations the log would show they had not. You would not find a sealer coming into Court with a log showing he had broken the regulations.

They are paltry, I say, these Regulations, and if they attach any importance to them, they are quite at liberty to adopt them, because they are Regulations we never objected to or asked for; they can do us no harm, nor can they do us any good; therefore they may be dismissed from consideration.

But what are the Regulations as put forth theoretically to save the seals. They are two:—a zone of 20 miles round the Pribilof Islands, and a close season extending from the 15th of September, after every seal is out of the sea round to the 1st July, which is the earliest date at which they come back again. Those are the two provisions that are really set forth by my learned friends as an answer to the enquiry suggested to the Tribunal by these two nations, what is necessary to be done for the protection of the seal.

Let us see exactly where those two will come out; I examine theirs first, to show the utter futility of them, that they are not worth the paper on which they were written, that we do not ask for any such thing as that, and that they would be but a mockery—keeping the word of promise to the ear and breaking it to the heart.

They say in language and in one of these Regulations—at least, Sir Richard Webster says in his argument, you must keep the vessels at home and not permit them to set out till the 1st May. Why? Because he argues and supposes—I am bound to presume so, especially if he has not looked into the sort of evidence I am going to call your attention to—If you keep the vessels at their ports till the 1st May, they will not catch the migration of the seals in time to destroy the pregnant females, except perhaps in the case of steam vessels which could more rapidly overtake the migration of the herd. They would be safe from its pursuit if they do not set out till May, and setting out in May, they will have the pleasure of chasing across the sea a flight of animals that is so far ahead of them they cannot possibly overtake them. Then what are they going to do with themselves if they cannot enter the Behring Sea till the 1st July which is as early as is any use. How are they going to spend the months of May and June, being at sea in pursuit of a body of seals that they cannot catch, and excluded from Behring Sea till the 1st July. It is no use to go there, unless they could intercept the pregnant females between the Aleutian Chain and the Islands. What is the sense of the sealers doing that, we do not learn from my learned friend.

Now I will ask General Foster to be kind enough to point out this on the map.

Let us see what time they arrive at the Pribilof Islands.

The testimony does not differ and the Commissioners do not differ. The United States Commissioners say that the old breeding males begin to arrive on the Islands the last week in April, and by June the 20th they are all located. The British Commissioners say the same thing. The United States Commissioners say the bachelor seals begin to arrive early in May and large numbers are on the hauling ground by the end of May or first week in June. The British Commissioners say with the main body of the full grown bulls, a large proportion of the bachelors

or younger males also appear. In further proof upon this point an examination of the table of killings from 1880 to 1889, shows that the killing season opened every year in May, and for the greater number of years on or before May the 20th and by June the 15th large numbers of bachelors had already been taken.

The United States Commissioners say the cows begin to arrive early in June, but in immense numbers between the middle and end of the month, and the harems are complete early in July.

The British Commissioners say a few gravid females usually land as early as the 1st June but it is under normal circumstances between the middle of June and the middle of July that the great body of the females come ashore.

All the difference is that the American Commissioners say the harems are completed early in July, and the British Commissioners say between that and the middle of July; the difference is very slight.

There is a good deal of testimony also about the seals swimming more rapidly than any fish, and that they usually travel 200 miles in one day. This is confirmed by the Canadian Fisheries Reports.

The British Commissioners state that in the latter part of June or about July 1st, the female seals in pup which have entered Behring Sea are found making their way rapidly and directly to the breeding Islands. Now before alluding to a good deal of testimony on these points I want to point out on the map what is very striking.

In the British Counter Case we have the logs of 19 Canadian vessels engaged in pelagic sealing in 1892, duly authenticated by the affidavits of the master or other officers of the vessels. These logs show the period of time occupied by each vessel in sealing, the locality of the vessel on each day when seals were taken, and the number of each day's catch. That is found in the 2nd Volume of the British Counter Case from pages 187 to 212. We have plotted on the map——

Mr. Justice HARLAN.—Is that a map made from these logs?

Mr. PHELPS.—Yes. I will describe it.

We have put on to the map the location where each of these vessels was on the 1st day of May; their exact course through the months of May and June, the points at which their catches were made, and, in the case of most of them, not all, the number of the catch. Now, as to those 19 vessels, of which we have an exact record, I will ask the attention of the Tribunal while General Foster points them out.

The *Umbrina*, No. 1, was off Sitka on the 4th day of May.

Sir CHARLES RUSSELL.—The latitude and longitude were given in the log. Has that been verified?

Mr. PHELPS.—Yes; this has been verified exactly. We have followed the latitude and longitude and the course, to know where they started from and where they went. The *Umbrina* started on the 4th February; on the 4th of May, she was off Sitka; on the 30th of May, she was southwest of Middleton Island; and, on the 16th of June, she was east, off the centre of Kadiak Island. There is the course of that vessel from February to April.

General FOSTER.—She went out in February, and sealed throughout the season.

Mr. PHELPS.—That is the way she came. From February to April, she took 296 seals.

General FOSTER.—As her log shows.

Mr. PHELPS.—In May and June, 555 seals. So that out of a catch of 851, 555 were taken between the localities which have been pointed out, Sitka and Kadiak.

Mr. Justice HARLAN.—Where is the second point?

General FOSTER.—*There.* [*Pointing it out.*] The place where the exchange was made in 1892 was Port Etches, which is *there.* [*Indicating it.*]

Mr. PHELPS.—I take No. 2, the W. P. Hall. On the 1st June she was south off Sitka Bay. On the 13th June she was off Yakutat Bay. I do not find the amount of her catch here.

General FOSTER.—We only tabulate the catch of those engaged during the whole season, beginning in January or February.

Mr. PHELPS.—Now take the Maud S. On the 1st May she was off Sitka; on the 31st May she was south-west of Yakutat Bay; on the 13th June, she was south-east of Marmot Island.

From February to April, as shown by her log she took 319 seals. In May and June she took 640.

Sir CHARLES RUSSELL.—Where do you get the figures from?

Mr. PHELPS.—From the log of the vessel.

General FOSTER.—The figures represent each day's capture of seals.

Mr. PHELPS.—Take No. 4, the Agnes McDonald, on the 1st May off Queen Charlotte Sound, on the 30th May off Yakutat Bay, on the 15th June off Cape Clear. There is where that vessel spent May and half of June. The catch is not given.

General FOSTER.—She was not engaged in the early part of the season.

Mr. PHELPS.—The entire catch is given, but we cannot tell which was taken before May and after June.

The PRESIDENT.—There was a good deal in July and August; is that in Behring Sea?

General FOSTER.—Yes.

Sir CHARLES RUSSELL.—This was the year of *modus vivendi.*

Mr. PHELPS.—No. 5 the *Arietis* on the 17th of May was off Icy Bay; on the 30th May off Cape Clear; on June 13th off Shumagin Island—that was her course.

No. 6, the *Beatrice*, on the 1st May was off south part of Queen Charlotte Island; on the 30th May off Cape St. Elias. On the 15th June she was off Cape Clear. That vessel took from January to April inclusive 249 seals. In the months of May and June she took 454.

N° 7 is the *Sapphire.* May 1 off Prince of Wales Island.
May 30, off S. W. Cape St. Elias.
June 11, off Middleton Island.

N° 8 is the *E. B. Marvin.* May 1, S. W. Sitka.
May 30, S. W. Yakutat Bay.
June 9, S. W. Middleton Island.

That vessel from January to April took 611 seals. In the months of May and June she took 1,012.

N° 9 is the *Viva.* May 1, off S. W. Yakutat Bay.
May 30, off Cape St. Elias.
June 20, off Middleton Island.

That vessel from February to April inclusive took 881 seals. In May and June she took 985.

N° 10 is the *A. E. Paint.* May 1, off S. Queen Charlotte Island.
May 30, off Yakutat Bay.
June 17, off Cape Clear S. W.

That vessel took from February to April inclusive 239 seals and the months of May and June 325 seals.

N° 11 is the *A. C. Moore.* May 1, off Cape Muzen, P. Wales Island.
May 29, off Middleton Island.
June 8, off Portlock Bank, S. W. Cape Clear.

N° 12 is the *Fawn*. May 1, off Forester Islands (Pr. Wales) Cape Muzon.
May 30, off Yakutat Bay.
June 28, off S. E. Portlock Bank.

N° 13 is the *Anioka*. May 6, off centre Queen Charlotte Island.
May 30, off Icy Bay.
June 17, off E. of Cape Elizabeth.

That vessel took from February to April inclusive, 57 seals; and in the months of May and June 613 seals.

The 14th is the *Mermaid*. May 1, off Dixon Entrance.
May 26, off Cape St. Elias.

And that is all the course that is given of her.

The 15th is the *Triumph*. May 27, off Middleton Island.
May 31, off E. of Portlock Bank.
June 16, off N. of Portlock Bank.

The 16th is the *Thistle*. May 1, off S. Clayquot Sound.

There she was on the 1st of May. She started, very nearly, from Victoria.

May 30, off S. W. of Yakutat Bay.
June 27, 200 miles S. Middleton Island.

That vessel took from February to April inclusive 148 seals; and in the months of May and June 293, making 441 seals.

The 17th is the *C. H. Tupper*. May 1, off Sitka.
May 31, off Middleton Island.
June 16, off Cape Elizabeth.

She took, from February to April 484 seals; and in the months of May and June 789 seals.

The 18th is the *C. D. Rand*. May 6, off Milbank Sound, S. of Q. Ch. Isd.
May 30, off Yakutat Bay, W.
June 15, off Portlock Bank, E.

She took from February to April 42 seals; and in the months of May and June 538 seals.

The 19th, and the last is the *Vancouver Belle*. May 1, off Christian Sound.
May 30, S. Portlock Bank.
June 3, off S. E. Cape Elisabeth.

That vessel took from February to April 66 seals; and in the months of May and June 279. That is all.

Mr. Justice HARLAN.—Do those figures, Mr. Phelps, embrace any catch in the spring or in June of the year by vessels that were not British vessels?

Mr. PHELPS.—Those are all Canadian Vessels.

Mr. Justice HARLAN.—I know. Were there any catches by other vessels?

Mr. PHELPS.—I am coming to that; these are only 19 vessels. The reason why they are given is because we happen to have the logs. But I want to point out one more thing. You will see the net-work made by the courses of those vessels. I will ask General Foster to kindly point out that red mark.

General FOSTER.—[Pointing on the map.] The black line indicates the course of the vessel in May. The *red* line (as far as it can be distinguished from the black) indicates the course of each vessel in June. The coloring is not very clearly brought out.

Mr. PHELPS.—I will ask General Foster to point out the red band circle there.

[General Foster did so.]

Mr. PHELPS.—That indicates a radius of 20 miles—10 miles each way. It is said in the evidence they are accustomed to send their little boats out that far.

If at every point that General Foster has indicated where seals were taken you supposed a radius of 30 miles, you will see, if we laid that down on the map, we should paint it all over with red so that it would not be distinguishable,—having regard to every change of course, if we indicated the area covered by the little boats in this way,—10 miles in every direction. You have to bear in mind that these are but a small part of the sealing fleet. The entire number of the vessels is given as 117. *This* represents 19 vessels.

Mr. CARTER.—We have the logs only of these 19 vessels.

Mr. PHELPS.—Yes; that is all we have the logs of. Now, suppose, Sir, that we had the logs and were to take the pains of adding the courses and localities of the balance of these 116 vessels, that is to say 97 more; we have given 19,—suppose we marked that map off with the courses of the 97 more, it is plain and perfectly apparent that the whole sea would be covered with such a network that it would be indistinguishable.

You would require a magnifying glass even upon such a large map as that to follow the line of vessels; and when you add to that the area covered by the small boats of the vessel, the entire sea is covered; and I should like to know what chance the female seals would have of escaping? That they have escaped in past years to some extent is because there were fewer vessels. With the whole 116, and as many more as may be engaged in this hereafter, you would have the map, showing the courses, so blotted and covered as to be indistinguishable. You see what the destruction in the months of May and June is in the North Pacific Ocean; and you see so far from my friend Sir Richard Webster being correct in what he undoubtedly supposed or he would not have said so—what he undoubtedly supposed was a sufficient protection of the gravid females—that these vessels would be all the time behind the herd and only engaged in picking up such holluschickies as were behind the female seals, when you come to look at the evidence on both sides as to the arrival of the holluschickies you will find they are very little behind the others. When you come to look, as we did yesterday, at the amount of the catch, you will find they are 85 per cent females at least. So that these vessels could have no object in being there in the month of June to pursue that little remnant of the holluschickies which would give them just about 15 per cent of what they hitherto made, and those, small and young seals and less valuable skins.

You see from the necessary result, if we did not go any further,—if this was all the evidence in the case, that from the necessities of the case you cannot protect these gravid females by any such provision as my learned friend Sir Richard Webster suggests—that is, to keep your vessels back till the 1st May. They are not inside the Aleutian Islands until late in June or in the course of June. As it is, they are there from very nearly the end of June or the 1st July and they pass very rapidly, and up to that time they are, of course exposed to the depredations of the sealers and to the same capture that has always taken place.

The PRESIDENT.—Do these log books for the year 1892 show that the sealers sailed along in front of the north-west coast any time later than the end of June?

Mr. PHELPS.—They do not.

General FOSTER.—13 of them closed their sealing season on or before the 16th June; 3 on the 17th June; 2 on the 19th June and 3 between the 20th and 30th.

The PRESIDENT.—Their sealing season along the north-west coast you mean?

Mr. PHELPS.—Yes.

The PRESIDENT.—They went on further. You admit they went on to the Commander Islands?

Mr. PHELPS.—I was about to state that they went up to the Port of Etches, that you see at the top, to unload and perhaps to get supplies. A vessel that went up to meet them in the latter part of June was seized by the United States and that virtually broke up the voyages of these sealers, because they could not unload or obtain the supplies they wanted, so they had to close their sealing season.

The PRESIDENT.—Those go further—to July, August, and September.

Mr. PHELPS.—Yes.

The PRESIDENT.—Where were they?

Mr. PHELPS.—In another map it is shown where they were. They went to the Asiatic side of Behring Sea. The *modus vivendi* kept them out of the American side.

The PRESIDENT.—Of Behring Sea.

Mr. PHELPS.—They went over there, and made a later sealing.

The PRESIDENT.—It was after June that they went over there?

Mr. PHELPS.—Yes.

The PRESIDENT.—Was it in the latter part of June?

Mr. PHELPS.—Yes.

General FOSTER.—After they made the exchange of the skins and got supplies, they went over to the Asiatic side.

Senator MORGAN.—Would you point out on that map where you first get the entrance to the Pribilof Island of these herds that are going over there.

General FOSTER.—Unimak Pass is one of the favorite passes, according to the testimony—the principal one. The testimony is that they go out as far as latitude 172.

Senator MORGAN.—I want you to point out the first one.

General FOSTER.—That is the principal one, [indicating on the map].

Mr. Justice HARLAN.—Are there some passes not easy to make the passage through?

General FOSTER.—There is one called False Pass at high tide. It is not used by the seals, I understand.

Senator MORGAN.—These seals that Mr. Phelps has been speaking of had accomplished about two-thirds of the distance between Vancouver and that pass to the Pribilof Islands at the time you mention?

Mr. PHELPS.—You see from the map where they were when taken.

General FOSTER.—We will show later on what the character of that catch is.

The PRESIDENT.—Do not they go after the seals along Unalaska—along the promontory?

Mr. PHELPS.—They are travelling there. I do not know how close they pursue it.

The PRESIDENT.—But you have no evidence about that.

Mr. PHELPS.—I do not know. I am not proceeding on that point for the moment.

The PRESIDENT.—From Unalaska—from Kadiak?

Mr. PHELPS.—Of course, all we know about the presence of the seals in this connexion is what the logs of the vessels show. We show where the vessels were and we show in most cases how many they caught—not in all—and the course of the vessels, and we have taken what vessels got them there and where they went.

Lord HANNEN.—As far as these vessels are concerned, you seem to suggest there is some reason why they could not be traced further. You say they went up into the corner of Unalaska to unload and get supplies.

General FOSTER.—That is one reason. The other reason is they take a straight course over to the Asiatic side. As you see, this map is on a very large scale and we could not represent the Asiatic side. We have another map showing where some of the vessels were.

Mr. PHELPS.—We have another map to show where some of them were—at the Commander Islands. We cannot trace them all of course.

To consider the question from another point of view. From the British Commissioners Report I take some extracts to show this. In Section 177 they say.

Abreast of, or somewhat further north than, the Queen Charlotte Islands (Lat. 53°), a considerable body of seals is often met with at sea by the pelagic sealers in May or June. These seals are then moving north ward....

About the first of April the Tshimsians resort to Zayas Island (Lat. 55°) for the same purpose (hunting of seals from shore). The hunting, as at present practised, extends over April and the greater part of May; off Banilla Island it is continued through the greater part of June, but this difference is due rather to the option of the Indians than to any diversity in dates in the arrival and departure of the seals in the two places. Seals of both sexes and all ages are killed during the hunting season, and a few full-grown bulls are seen, but are seldom taken. There is, in this region, no interval between the arrival of seals from the north in the early winter and their departure for the north, which occurs in the main about the end of May.

Sec. 178. Outside Cape Calvert (Lat. 52°) seals are most abundant in March, but a few remain until the latter part of June. The seals coming first are chiefly females, but after the 1st of June they are nearly all young males. Fully matured large males are found in small numbers.

Sec. 182. About Barclay Sound (49°) the seal are first reported in December... The greater number leave before the end of April, when they begin to travel north, but a few are killed, further out at sea, sometimes as late as the 15th June.

Sec. 184. Captain John Devereux, who has been for twenty-seven years on the coast of British Columbia... informs us, in reply to questions addressed to him, that from the latter part of November, or early in December, to the beginning of June, the fur-seal is found off the coast of the entire length of Vancouver Island (48° 30′ to 51°), but that in the early winter the weather is altogether too rough for hunting.

Sec. 187. In the vicinity of Sitka (58°) some seals appear near the coast as early as the middle of April, but they become abundant during May, and some are still seen in the early part of June.

On the Fairweather ground, in the Gulf of Alaska, (58° 30′) seals are most numerous from the 1st to 15th of June. About the 25th June, in 1891, they were found in abundance by the sealing-schooners on the Portlock banks, to the east of Kadiak Island.

About Kadiak (57° to 58°) they are generally found from the 25th of May to the end of June, being most abundant in the average of years about the 10th June. They are seldom seen in July, and very rarely even stragglers are noticed after the middle of that month.

That is the British Commissioners statement about where the seals are.

We have the testimony of a good many witnesses on this point. There is the testimony of a great number of Indians. Captain Lighthouse, for instance—I cannot read them all in the time I have—says.

The first seal appear in the Straits (San Juan de Fuca) and on the coast about the last of December, and feed along the coast, and seem to be working slowly to the

north until about the middle of June, at which time the cows are pretty much all gone, but the smaller seals remain until about the middle of July... Of all the seals captured by me about one-half of them, I think, were cows with pup in them, and it is very seldom that I have ever caught a full grown cow that was barren or did not have a pup in her. (U. S. Case, Vol. II, pp. 389, 390.)

There are 14 other witnesses at Neah Bay to substantiate that. The Indians near Queen Charlotte and Prince of Wales Islands depose as follows.

George Skultka says:

We commence hunting when the geese begin to fly, and hunt for a month and a half. The geese commence to fly about the last of April... I think about three females with pup out of every ten killed. I kill lots of yearling seals but never examine them as to sex. (U. S. Case, Vol. II, p. 290.)

Dan Nathlan; 25 years old says:

Have hunted seals since I was a boy. This is the first year I ever hunted on a schooner. I am now on the schooner *Adventure*. When I was a boy I hunted seals in Dixon's Entrance and off Queen Charlotte Island. Always hunted during April and May. In June the seals all leave going north... About one-half of the seal I have taken were females with pup. Have taken a very few yearlings. (U. S. Case, Vol. II, p. 286.)

Ntkla-ah another Indian says:

I was born at Howkan; I am very old, about 60 years old. I have been a hunter all my life. Have hunted fur-seals every season since I was old enough in a canoe. The seals always come before the birds begin to sing very much, and they are all gone when the salmon berries get ripe, which I think is between the months of March and July. I think about half the seals taken by me are females with pup. (U. S. Case, Vol. II, p. 288.)

Another witness, Smith Natch (United States Case, Volume II, page 298), says:

Always hunted fur-seals between March and June. They make their appearance in March in Dixon's Entrance, but at that time of the year the weather is so bad we cannot hunt them. May is the best time to hunt them because the weather is always good. They all disappear in June and go north up the coast, I think to have their pups...

Thomas Skowl, Chief of the Kas-aan Indians (United States Case, Volume II, page 300), says:

I always hunt seal in Dixon's Entrance and off Prince of Wales Island, and hunted them each year from March to June. The seals all leave about June 1st to go north and have their pups, I think... Most of the seals taken by me are females with pup. Never killed but one old bull in my life.

There is the testimony of a large number of these witnesses—(I do not like to read what is but repetition)—which will be found in the United States Case, Volume II, pp. 276 to 303.

There is a body of evidence that speaks of the course from Sitka to Yakutak, Latitude 57° to 59° 30′. Adam Ayonkee (at page 255 of the United States Case, Volume II), says:

Seals are first seen and taken by me each year off Sitka Sound, about the middle of April. Have followed them as far north as Cape Edward, where they disappear about June 30th. They are constantly on the advance up the coast... Most all seal that I have killed have been pregnant cows.

Thomas Gondowen, from the same locality, says:

Have hunted seals between Sitka and Cross Sound. They first appear about the middle of this month (April), and disappear about the last of June... Most of the seals killed are cows with pup. A few males are killed averaging from one to four years old. (U. S. Case, Vol. II, p. 259.)

Percy Kahik I Day, who has hunted seals since a small boy, says:

The seals first make their appearance about the middle of April off Sitka sound and disappear about July 1st. They are on their way up the coast... Most of the

seal I have taken have been pregnant cows. When the females are with pup they sleep more, are less active in the water, and more easily approached than the male seals. But very few young male seals are taken by me along the coast. (U. S. Case, Vol. II, p. 261.)

Peter Church, who has been sealing four years (at page 256 of the United States Case, Volume II) says:

Have first taken seal off Sitka the middle of April. Followed the seal up the coast as far as Yakutak, where they disappeared the last of June... Most of the seals taken by me have been females with young.

There are witnesses from Prince William Sound, latitude 60°.—Nicola Gregreoff and thirteen other Indians. Nicola Gregreoff says:

In the latter part of March a few fur-seals usually first make their appearance in Prince William's Sound and are more plentiful in the latter part of April. They are mostly large males, very few females being taken, and those only toward the close of the season in the latter part of May. Very few females taken in this region but are pregnant. (U. S. Case, Vol. II, p. 234.)

Olaf Kvan says:

The first seals appear in Prince William's Sound about the first of May and were formerly very plentiful, while now they are becoming constantly scarcer. I do not know the cause of this decrease. All the seals which I have seen killed were females, and the majority of these were pregnant cows. (U. S. Case, Vol II, p. 236.)

Nicolas Andersen says:

Seals are first seen at Prince William Sound about May 1st. (U. S. Case, Vol. II, p. 223.)

The last locality I will refer to is Cook's Inlet. Metry Monin and 12 other Indians testify that:

The fur-seals usually appear about Cook's Inlet early in the month of May. They were formerly found in this region in great numbers, but of late years they have been constantly diminishing owing to the number of sealing vessels engaged in killing them. They do not enter Cooks Inlet. (U. S. Case, Vol. II, p. 326.)

Another witness Alexander Shyha says:

The fur-seals usually appear off this part of the coast about the month of May, but they do not enter Cook's Inlet. (U. S. Case, Vol. II, p. 226.)

There is another class of evidence as to where pelagic sealing is carried on along the coast, and the character of that catch before the seal herd enters through the passes. The Marquis Venosta, when this was going on, put a question in the course of the argument on this point. He enquired whether by the month of June the female seals are practically in Behring Sea, and whether at that time a considerable number of gravid females were not found along the Alaskan Peninsula. Sir Richard Webster said that by the 1st of May they would be so far advanced that vessels sailing from Victoria on the 1st of May would not be able to overtake them. I propose to refer to a little of the vast amount of testimony on the subject of the duration of Pelagic sealing on the coast.

The United States Commissioners, at page 365 of the United States Case, say:

Pelagic Sealing is now carried on in the North Pacific Ocean from January until late in June.

The British Commissioners at Section 649 of their Report say:

Behring Sea is now usually entered by the pelagic sealers between the 20th June and the 1st July.

The British Commissioners at Sections 132, 212 and 282, say:

In pelagic sealing, the weather is usually such as to induce a few vessels to go out in January, but the catches made in this month are as a rule small. In February,

March, and April the conditions are usually better, and larger catches are made. In May and June the seals are found further to the north, and these are good sealing months; while in July, August and part of September sealing is conducted in Behring Sea.

Mr. Justice HARLAN.—What Section is that?

Mr. PHELPS.—I refer to sections 132, 212, and 282. The one I have read, is, I believe Section 132.

Captain Claussen testifies as follows:

> Q. When does sealing commence in the Pacific, and when does it end? A. Sealing commences in the Pacific about the 1st of January and ends about the 1st of July... Q. What percentage of the skins you have taken were cows? A. About 80 per cent. Q. What percentage of the cows you have taken were with pup? A. About 70 per cent. (U. S. Case, Vol. II, pp. 411-12.)

Sir Richard Webster says they can go ahead of the cruisers that leave port on the 1st of May. They cannot go ahead. I have shown that all the seals that are taken in the North Pacific Ocean by pelagic sealers are 85 per cent females; and of that 85 per cent, the greater proportion are pregnant.

Now the only point that remains is to show the duration of the time of this pelagic sealing in the North Pacific; that is to say that it goes on from the period of the year when it begins—when the weather allows it to begin—in January and February, down to the 1st of July.

Senator MORGAN.—Now in January and February, if I understand, they commence 200 or 300 miles down the coast—below at Cape Flattery?

Mr. PHELPS.—There is a good deal of evidence of that sort—that they go into Behring Sea about the 1st of July. In very rare instances, as I have stated before, the Tables show that a vessel got in the last days of June; but the season continues, in the North Pacific, down to the 1st of July.

On that point I refer to a number of these witnesses out of a great many that I could read.

Captain Kiernan (at page 450 of the United States Case, Volume II), says:

> I usually commence the voyage near the coast of California in the early part of January and continue along up the coast, following the herd to its breeding ground until the latter part of June, hunting all the way and entering Behring Sea about the 1st of July...

Captain Lutjens at page 458 of the United States Case, Volume II, says:

> Q. When does sealing commence in the Pacific and when does it end? A. It commences about the 1st of January and ends about the last of June.

He speaks of four-fifths being females, as they all do.

Captain Carthcut, master mariner, at page 409 of the United States Case, Volume II, says:

> I usually left San Francisco in February or March of each year, and sailed along the coast, following the herd north on their way to the breeding grounds on the Pribilof Islands in the Behring Sea. I usually entered the sea.

that is Behring Sea.

> About the first of July and came out in September.

Captain McLean, vouched for by the Canadian Inspector of Fisheries as an expert sealer, at pages 436-7 of the United States Case, Volume II, says:

> To my knowledge they (the seals) go into Bering Sea after the 20th of June. You may take it all the way from April, May and June; from April all the female seals that you kill are with pup, up to about July 1st.

And other witnesses, a good many of them examined by the British Government, say the same thing.

Captain Warren of Victoria, who owns a large number of these vessels, (at page 99 of the British Counter Case Appendix, Volume II), says:

The sealing season is divided into two parts, the coast season and the Behring Sea season. The coast season terminates about the end of June, but vessels intending to go to Behring Sea generally leave the coast fishing during the month of May sealing as they go northward, and reaching Behring Sea the end of June or beginning of July.

Captain Herman R. Smith, a British witness (at page 61 of the same 2nd Appendix to the British Counter Case), says:

On the Vancouver coast in the early part of the season, about one-half of the seals got are females, about one-half of which are with pup. As the season grows fewer females are got, and of those got a small proportion are in pup. By the second week in June, all females in pup have left the coast, as far north as Queen Charlotte Island.

Frank Moreau, examined by the United States (at page 468 of the 2nd Appendix to the United States Counter Case) says:

Sealing commences about the 1st of January and ends about the last of June.

There is no contradiction to this. There are a great many more witnesses that state the same thing; and we make out our point therefore from all these various directions, that the coast sealing—the coast catch—does last clear up to the 1st of July. By that time the seals are through the pass, and as they travel with great rapidity it does not probably take them more than a day to go through the pass to the islands. They are through the pass and the vessels follow in just about the 1st of July—very rarely before.

Mr. Justice HARLAN.—I would like to ask you this. Your tables in the case describe the different catches—speaking of the "Spring catch", the "Coast catch", and the "Behring Sea Catch". What is the dividing line, if there be one, between the "Spring catch" and the "coast catch", or is there a dividing line?

Mr. PHELPS.—I do not know that I can give a specific answer to that question. I think that the "Spring catch" is perhaps lower down—opposite the parts of the sea from which they start; and the "Coast Catch" is along *this* coast round further north. General Foster will show it you on the map.

General FOSTER.—It says they were accustomed to go into Victoria or Clayoquet Sound in the Spring—April possibly—or the latter part of March to unload the Spring Catch; and the coast catch is taken up *here* [indicating on the map], which is generally exchanged by a vessel being sent up to take the skins and furnish the vessels with supplies. That is called the "coast catch"; the whole altogether being the "northwest coast catch."

Mr. Justice HARLAN.—The reason for my asking the question is that I have a table before my eye. On page 211 of the British Commissioners' Report there is a table showing the catch of the British Columbian vessels for 1889. I take the vessel "Annie C. Moore". Spring catch 313, coast catch 489, Behring Sea catch 1318. Total 2120.

Mr. PHELPS.—I see the distinction and I will try to answer it to-morrow.

Mr. Justice HARLAN.—I suppose the "spring" and "coast" catches together constitute what is called the "North West Coast catch".

Mr. PHELPS.—I will enquire about it, Sir.

Sir CHARLES RUSSELL.—As I understand the contention we understand the spring catch extends from the earlier months from January

to April. Then at the end of that time they are supposed to go in for supplies.

Mr. PHELPS.—There is a large mass of testimony as to the character of the catch taken, that I have gone through; but I want to call attention now to a table that we have prepared, giving the logs of these 19 vessels.

Sir CHARLES RUSSELL.—This is something new.

Mr. PHELPS.—There is a good deal of evidence (I went over it by classes yesterday), that has been before referred to, about the character of the catch; it is composed of females that are pregnant, to a large extent. It comes from the Captains, Masters and Seamen of some of these very vessels that we have been talking about; but we have a table of these 19 vessels (in addition to the diagram on the map), taken from the logs in all cases, showing their total catch.

Sir CHARLES RUSSELL.—Can I see this, as I have not yet seen it.

Mr. PHELPS.—Certainly. You shall have a copy of it.

Sir CHARLES RUSSELL.—I wish I had seen it in time to examine it.

Mr. PHELPS.—The "Umbrina", for instance, setting out in January, took 115 seals in February, 106 in March, 73 in April, 517 in May, 38 in June, and then 622 on the Asiatic Coast; making a total of 1,473.

The "W. P. Hall" took 50 seals in June, and 366 on the Asiatic Coast; making a total of 416.

The "Maud S." took 82 seals in February, 103 in March, 134 in April, 627 in May, 13 in June, and 748 on the Asiatic Coast; making a total of 1,707.

This shows without reading this Table all through—(we can furnish copies of it)—that of these vessels, the greatest bulk of their sealing in the Pacific (aside from the Asiatic Sealing), was in the month of May. The whole catches of these vessels figure up like this: 28 seals in January, 835 in February, 994 in March, 1,938 in April, 8,360 in May; 1,438 in June. Then there is the Asiatic catch which is not material for my purpose.

The following is the Table referred to.

Name of vessel.	January.	Febr.	Mar.	April.	May.	June.	Asiatic.	Total.
Umbrina	.....	115	106	75	517	38	622	1,473
W. P. Hall	.....	.....	.....	.....	.....	50	366	416
Maud S	.....	82	103	134	627	13	748	1,707
Agnes McDonald	.....	.....	.....	85	440	65	374	964
Arietis	.....	.....	.....	.....	327	147	675	1,149
Beatrice	22	35	53	139	410	44	543	1,246
Sapphire	.....	.....	.....	121	824	38	.....	983
E. B. Marvin	6	181	144	280	958	54	.....	1,623
Viva	.....	75	141	665	713	254	.....	1,848
Annie E. Paint	.....	49	103	87	267	58	421	985
Annie C. Moore	.....	.....	161	.....	342	24	.....	527
Fawn	.....	.....	.....	33	310	137	.....	480
Ainoko	.....	24	.....	33	583	110	.....	750
Mermaid	.....	.....	.....	.....	187	.....	.....	187
Triumph	.....	.....	.....	.....	157	105	.....	262
Thistle	.....	41	58	69	209	84	.....	441
C. H. Tupper	.....	210	99	175	713	76	.....	1,273
C. D. Rand	.....	7	21	14	434	124	.....	580
Vancouver Belle	.....	16	22	28	262	17	296	641
Total	28	835	991	1,938	8,260	1,438	4,045	17,535

Now it will be seen from this Table that the total coast catch in 1892 I mean all round until they enter Behring Sea—of these 19 vessels, from January to April inclusive was 3,792; and in the months of May and June, 9,698, making a total of 13,490; in other words, 28 per cent

of the coast catch was taken *before* the 1st May, and 72 per cent during the months of May and June. Now if you apply those figures to the total catch of the Canadian fleet for 1892 which was 30,553—if you apply the same ratio to the other vessels that their logs shows to be applicable to this, we have, from January to April inclusive, 8,555 seals; and in the months of May and June, 21,998. If you were to apply that to the four years, why, you get just about the same figures.

This, Sir, I am afraid, is as far as I can go to-day. I am sorry that I have not been able to fulfil my promise to get through to-day; but I am not through, and I have to ask the indulgence of the Tribunal for a little while to-morrow, if it would suit the convenience of the Arbitrators; I hope not to be very long; I should rather finish this week, and I presume you would, but I am, of course, in the hands of the Arbitrators in every respect.

I was about to remark that the upshot of all these figures and diagrams and this multitude of evidence is to show, first, that the months of May and June are the principal, the largest, months for the catch on the coast to the extent of almost 75 per cent—72 per cent at any rate; and that the vessels do not enter the Behring Sea until the 1st of July, the very time when the close time that is proposed by my learned friends on the other side would allow them to enter; so that the proposed close time would not keep them out at all. Of course, it does not interfere with the catch on the coast, and it does not interfere with the catch in Behring Sea.

I want to consider the subject a little further (and especially the question of zone), to-morrow, and some few other points in respect to the sealing in Behring Sea. I have very little, if anything, more to say on the subject of the catch in the Pacific Ocean; and I think it will become very apparent when we get through, what area must be covered by the Regulations if you are going to save the seal—what *area* must be covered and what *time* must be covered to answer the purpose.

The PRESIDENT.—Mr. Phelps, we do not want to preclude you from finishing this week, as you have just told us it is your wish; so, we intend sitting to-morrow, but we would sit only to morrow afternoon.

Mr. PHELPS.—That will be quite enough for my purpose.

The PRESIDENT.—If it agrees with your arrangements, Mr. Phelps, we would meet to-morrow at 2 o'clock.

Mr. PHELPS.—Yes. The Tribunal, of course, will understand I am quite in their hands in respect of the time. All times will be agreeable to me, that are convenient to the Tribunal; and if 2 o'clock to-morrow afternoon would be convenient, it would suit me.

The PRESIDENT.—We are somewhat in your hands also.

Mr. PHELPS.—I beg you will not consider it so, Sir; I only regret that I have been so long.

The PRESIDENT.—I mean to say, it would be useless to meet to-morrow and to have this extra and shorter meeting, if you did not think you could conveniently say all you wanted to say tomorrow.

Mr. PHELPS.—I shall finish tomorrow, Sir.

The PRESIDENT.—Then, if you please, we will adjourn till to-morrow afternoon at 2 o'clock; we cannot sit before that time.

[The Tribunal thereupon adjourned until Saturday afternoon, the 8th of July, at 2 o'clock.]

FIFTY-THIRD DAY, JULY 8TH, 1893.

Mr. PHELPS.—I had nearly finished yesterday, Sir, what I desired to say in regard to sealing in the North Pacific, in support of our proposition that the principal sealing—the largest months, the result of which is far beyond that of any of the others, takes place in May and June, and occurs in the localities indicated by the logs of the 19 vessels whose logs we happen to have; and I entertain no doubt, because it is open to no doubt, for all the general evidence in the case proves it, that all the vessels that are engaged in that season of the year follow just about that course; so that if we had all the logs, they would be very nearly coincident or substantially coincident with these.

I wish, however, before quite leaving that point, to emphasize the fact that the very large proportion of seals taken in those months and in those localities not merely by these but by all sealers, are females in pregnant condition.

I will only add one reference, in a very few words, to what I gave yesterday on this point by reading one section from the British Commissioners Report. It is section 132 at page 21 and after that distinct admission of the fact we need not support it by any further marshalling of testimony.

With further reference to the effect of proposed time limits or close seasons on the shore and sea-sealing respectively, and in order to prove that such an apparently simple method of regulation is not equally applicable to both industries, it may be shown that generally this effect would be not only inequitable, but often diametrically opposite in the two cases.

Now this part of the section is what I cite this for:

In pelagic sealing, the weather is usually such as to induce a few vessels to go out in January, but the catches made in this month are as a rule small. In February, March, and April the conditions are usually better, and larger catches are made. In May and June the seals are found further to the north, and these are good sealing months; while in July, August, and part of September sealing is conducted in Behring Sea, and good catches are often made till such time as the weather becomes so uncertain and rough as to practically close the season.

There can be no question therefore that, accepting my learned friends suggestion that to do anything towards preserving these animals you must put a stop to the slaughter of gravid females, he is entirely mistaken in his idea that you would effect that by keeping your vessels back till the 1st May on the theory that before they overtook the migration of the herd the female seals would have reached the Pribilof Islands. Because all the evidence demonstrates that they do not pass through

the Aleutian Islands till June, perhaps well on into June, and all the evidence concurs as to the time at which they arrive on the islands, bearing in mind, Sir, a suggestion that I believe fell from you, or at all events from one of the Arbitrators, that it is true that the different ages and sexes of the seals do not travel together. There is a great deal of testimony to that effect, and a great deal of testimony otherwise, which I do not care to go into; but while the bulls precede the cows, the difference in time and in space is not sufficient to enable a discrimination to be made. It is impossible to say that there is any time for a vessel to go out, so that its catch would be confined to the old bulls, even if the destruction at that time would not be particularly injurious; but assuming that their place would be filled from the holluschickie if they were destroyed, it would be simply reducing the number of holluschickie. The time and locality is not enough to discriminate between the females and the holluschickie. The evidence is that they travel along substantially together. There is some evidence that the females precede them. Perhaps they do, and perhaps they do not. I do not stop a moment to weigh the evidence on this subject, because it is plain, as I said before, that there is not any discrimination practicable. It is not possible to say that a vessel can go in those months, or into that locality, with the expectation of failing to take female seals.

The PRESIDENT.—Practically there does not seem to be evidence that in pelagic sealing many of those old bulls are killed—I do not believe there is any evidence on that.

Mr. PHELPS.—I agree with you, Sir; the testimony is that very few of them are taken. I suppose they are a little in advance of the vessels, or are more successful in keeping out of the way than the poor females are.

The PRESIDENT.—They might be better marks as they are bigger.

Mr. PHELPS.—Yes, and also they winter in the north, and do not follow the migration of the herd, and do not come down south as far as California, and have not so far to go; but whatever the reason is, which we need not stop to speculate on, the fact is conceded on all hands.

I want to call attention to one other mass of testimony as to the time these pelagic sealers go into Behring Sea in point of fact, and this indicates something that is worthy of notice. We have examined 79 witnesses, that is to say, of the many witnesses we have examined, 79 fix a date as to the time they enter Behring Sea, and their testimony is—I should say that 79 testify—that they enter the Sea after June the 20th, and 68 of them between July 1st and July 15th. Of course, those two classes of evidence comprise a good many of the same witnesses, because there are but 79 all told, but out of the 79, I repeat, 68 say they entered the Sea after the 1st July.

Now, of the 316 Depositions taken by Great Britain and printed of the pelagic sealers of all classes, Captains, Mates, hunters, Indians and everybody, the question is only put to 5 of them as to the time at which they go into the Behring Sea; and those five testify precisely as these American Witnesses I have cited do. One says the latter part of June; two say early in June, and the other two July the 20th. Why was not that question put to the other witnesses in this great mass of evidence? I think I can give the reason. It is proposed by these Commissioners to make the close time as to Behring Sea terminate on the 1st of July,

that is to say, terminate just when the pelagic sealing begins, when it would not have any sort of effect at all and would not cut off a single vessel except a very few of the laggards that have gone in on the last day of June. It would have retarded them, I suppose, perhaps a week; one vessel in ten or twenty, as the case may be, would have been retarded.

Now, let me ask you, what would have been the effect if this close time that is now proposed for Behring Sea had been enforced during the last ten years and had been religiously observed.

In the light of this evidence—in the light of their utter failure to contradict it and careful avoidance of a question which could be answered in but one way—in the light of the admission I have read from the British Commissioners that the coast catch terminates on the last of June, and the Behring Sea begins on the first of July, what if this Regulation which has been submitted to you to be adopted for the preservation of the fur seal had been enforced for the last 10 years. It would not have saved the life of one single seal—not one—it would simply have imposed upon these few that are earlier than the first of July the necessity to wait a few days before they entered upon the harvest.

What more can be said about this close time? Not a single word usefully. I leave it to the consideration of the Tribunal. The other end of the close time you will remember is proposed to be the 15th September. All the evidence is that every seal is out of the sea before the 15th September. It is no use at the other end, it is no use at the beginning, and no use at the close. Now I come to the question of zone.

The PRESIDENT.—Is it the case that there is no sealing after September at all either in or out of Behring Sea?

Mr. PHELPS.—Inside of Behring Sea to which this alone applies, there is substantially none after the 15th—I would not undertake to say that after a very exceptional season some vessels might linger longer; but nothing to any extent.

Sir CHARLES RUSSELL.—There can be no sealing after the 15th September practically—the weather prevents it.

The PRESIDENT.—The sealing ships do not follow the herds of seals out of Behring Sea?

Sir CHARLES RUSSELL.—The weather prevents sealing.

The PRESIDENT.—Even in the North Pacific?

Sir CHARLES RUSSELL.—So I understand.

Mr. PHELPS.—Seals begin to leave along in September, and their migration is determined undoubtedly by the weather. Some times in a very mild season some seals remain. The great bulk of them migrate, and the exact period of migration, as with all migratory animals that I know anything about, is affected to a greater or lesser extent by the weather and the season. Certainly so with migratory birds.

Now in respect to this zone, this 20 mile zone—around the islands in Behring Sea. We have seen that the close time is of no avail at all. How much will be the avail of the 20 mile zone? I will show you in a few minutes a ludicrous picture of what Russia has made out for itself, by insisting upon this 30-mile zone which is 10 miles larger than they proposed for us. We shall follow some of the vessels that we had in hand before, through their very successful voyages around the Commander Islands, and I shall show by their logs—all that we could get—how much this 30-mile zone amounts to; that is to say, it amounts to almost nothing.

In the first place, who is going to measure such a zone and who is going to patrol it in seas that are affected by fogs and rain and rough weather more than any other part of the world. In fact, as you will remember, as has been pointed out, it is those qualities that are essential to the life of the seals; that is why they make their home there, that is the difficulty of finding any other home, and those constituents are necessary. You will remember that the testimony is that in a drive, if the sun comes out clear, it is necessary to suspend the driving and wait, because if the seals are pushed along in the sun, it is very injurious. Who is to patrol this? and what sort of a dispute is likely to arise on the question whether you are within or without 20 miles in such a sea as that—a solitude except for the sealers—not like the harbours of cities where there are light-houses and landmarks and land-surveys and water-surveys, and all manner of craft. Who is to fix the line, and how are you to prove it? It is, of course, vague and indefinite; but that objection is a small one, though not small by itself,—it is small in comparison. Now, I should like to compare that proposal of the British Government with Lord Salisbury's Agreement that has been so often referred to as to this close time and its dimensions.

Sir CHARLES RUSSELL.—Lord Salisbury has denied there was any agreement whatever.

Mr. PHELPS.—I beg your pardon; he has most distinctly admitted that he made it, and we have proved that he made it by the letters of the British Government over and over again.

Mr. Justice HARLAN.—His language was that they had decided "provisionally."

Lord HANNEN.—"Provisionally."

Mr. PHELPS.—Yes. I know his words. I will come to that later.

The PRESIDENT.—At any rate, it has had no conclusion except as a draft.

Mr. PHELPS.—That is all. It was reported as agreed to by the American Minister,—by the American *Chargé* and it is admitted by Lord Salisbury to have been made just as far as we ever asserted it to be made—not that it was reduced to a Convention, but that it was agreed upon as he says, "provisionally", whatever that means; that is to say, it was understood it was to be carried out, and we have shown that it would have been carried out, except for the remonstrance of Canada.

Lord Salisbury's language is: "At this preliminary discussion it was decided provisionally in order to furnish a basis for negotiations; and without definitely pledging our Governments that the space to be covered by the proposed convention should be the sea between America and Russia, north of the 47th degree of latitude; that the close time should extend from the 15th of April to the 1st of November," and so forth. And that is the best that Lord Salisbury can say.

Sir CHARLES RUSSELL.—In the same letter he says:

> My recollection remains unchanged, that I never intended to assent and never did assent to the detailed proposals which were put forward on behalf of the United States, reserving my opinion on them for fuller consideration; but that I expressed the fullest concurrence on the part of Her Majesty's Government in the general principle on which those proposals proceeded, namely, the establishment of such close time as should be necessary to preserve the species of fur-seals from extermination.

Mr. PHELPS.—I shall not exhaust the small time that remains to me in going over that subject again. I have read to this Tribunal (and if the references are forgotten I can furnish them again), all the letters

that were written on this subject, from the first letter from the American Minister stating this agreement—the successive letters of the American *chargé* stating it—the successive letters of Lord Salisbury and Officials stating it again. There is the best, and the most, when he is pressed by Mr. Blaine with the recession of England from what was as plain and complete an agreement as ever was made between nations, short of reduction to an absolute Treaty, that he can say, I leave it on that;—not because it is the strongest evidence on *our* side of what that agreement was—it is the strongest evidence on his. I pass on now, I need not occupy your time or my own further upon that point. The close time agreed on between the American Minister and Lord Salisbury was from the 15th of April to the 1st Novr, from the American coast on the east to the Russian Coast on the west, and all north of the 47th parallel of latitude.

Did Lord Salisbury ever take that back? Did he ever say to the American Government: "I went too far; I am now advised, having heard from Canada that it is unnecessary—that a similar area or a shorter time would do?" Yes, he did to this extent—he says to Mr. White in one of the later interviews (when Mr. White was *chargé* temporarily):—"The 1st of November is later than is necessary, and I should think the 1st October is late enough." That was the amendment he proposed after the time when communications had been received from Canada—after the subject had been before not only the Foreign Office, but the Colonial Office. That was the amendment he proposed to Mr. Bayard—"You have made it on the whole a month too late;" to which Mr. Bayard responded in substance, "I do not think so, but let us call it the 15th October." Call it then the 1st October, if you please, which is Lord Salisbury's own suggestion, and then it is late enough as far as Behring Sea is concerned, indeed as far as all seas are concerned—the difference is not worth talking about.

I have said the 20 mile zone would be ineffectual. I mean ineffectual to patrol and to mark it out; but suppose it could be marked out in such a manner as to be completely observed so that no seal ever could be killed within 20 miles of the island.

What then? What effect does it have on the sealing in Behring Sea? What proportion of the nursing females that are out from the shore would be protected? A small portion certainly,—I do not mean to say that there are no seals within 20 miles,—a proportion so small that it would be no good towards preserving the race. If you do not limit the slaughter of these mothers and their young more than that, do not be at the trouble, and expose these Governments to the expense and difficulty, of limiting it at all. "The game would cease to be worth the candle." It is agreed on all hands, that the cows arrive between the early June and the middle of July, and they remain on the Islands. The young are born, and propagation takes place; and they go out in search of food at times that are stated generally as, "a few weeks;" "sometimes a few days." It cannot be made perfectly definite, but the general concurrence of the testimony is that it is a few days to a few weeks after they land. Their young are usually born immediately upon landing; and different witnesses state different times. But it is, of course, like all such facts, a general one that it is impossible to bring to an exact point. Now where are these seals found when they do go out? That enormous numbers of them are taken is shown. That of those the greatest proportion are nursing mothers is shown. Now where are they taken in the Behring Sea? That has not been quite

shown in the argument. I have not particularly addressed myself to that question. I have dealt only with the fact that they were taken in the Sea, and when they were taken, and what their condition was, and what proportion of them were in that condition, and pointed out how the British evidence concurs with that of the American in its great weight.

In the Appendix to the United States Case, Volume 2, we have from a number of sealers a statement of the distances.

On page 400 Adair speaks of the distance—the distance I mean within which they took the seals—as being from 30 to 150 miles.

Then Bendt on page 404 gives the distance as from 10 to 150 miles.

The PRESIDENT.—Is this from the islands.

Mr. PHELPS.—From the islands. On page 405 Benson gives the distance as 65 miles.

On page 315 Bonde says 10 to 100 miles off St. George Island.

On page 413 Collins says a distance of 100 miles or more.

On page 328 Jacobson says, a distance of 200 miles.

On page 448 Kean says a distance over 150 miles.

On page 435 Laysing a witness who is also examined on the British side says from 50 to 150 miles.

On page 464 Maroney says, a distance of 40 to 200 miles.

These are all the witnesses I believe—it is intended to be all the witnesses—who give precise distances.

Captain Shepard of the United States Revenue Marine made 18 seizures of sealing vessels, and states that the skins were two-thirds to three-fourths those of females. He says that of the females taken at Behring Sea nearly all are in milk; and he has seen the milk on the decks of sealing vessels that were more than 100 miles from the Pribilof Islands. And these seizures were not confined to any particular summer. They range along from July 30th to August 15.

If you will have the kindness to turn to map No. 5 in the portfolio of maps annexed to the United States case, you will see how it is marked.

The PRESIDENT.—The seizures map.

Mr. PHELPS.—Yes it is map No. 5 called "seizures". On that map are laid down the places where the vessels there named engaged in sealing were seized, by Captain Shepard of the Revenue Marine, whose testimony is given, and upon whose log and upon whose testimony this Chart is compiled.

Mr. Justice HARLAN.—What do those dates on the right below the line mean? Is that the date of seizure?

Mr. PHELPS.—The date of seizure; and it will be found that those dates cover from June 30th to August 18th—they are all within that period. The map speaks for itself. The great majority, as the scale of the map will show, of these seizures were 60 miles or more than 60 miles, and a considerable number of them a great deal more than 60 miles, clear down to the passes through the Aleutian chain. Not a word can be added to that map as showing where sealers are found.

Now of the vessels so seized, we have plotted the logs of four—all that we have—showing where they had been. This map shows where they had been seized. Where had they been sealing? If you will take the first volume of the United States Appendix, and open it at page 525 (and in three subsequent pages 531, 543, and 574), you will find plotted the courses taken by four of these vessels that were then seized. The first one is the "Ellen", page 525. She entered Behring Sea on

the 10th July. The log ends on the 30th July; and perceiving where the Pribylof Islands are—on the left hand lower corner of that map, the map shows, at a glance, whereabouts this vessel had been sealing. Turning over to page 531 you find the log of the "Annie", which entered the sea on June 23—a week earlier,—and the log ends August the 15th. You see where the vessel was—at least 60 miles from the nearest point to the island that it reached; and almost all its cruise was a distance round these Islands, 160—170 miles off. I am reminded by General Foster, that the island of Unalaska is 190 miles away; and you see from the map that with the exception of one excursion that this vessel made up and back again, her sealing was all from 100 to 170 miles from the islands.

The "Alfred Adams" map which will be found opposite to page 543, shews where that vessel was taken. It approached somewhat nearer the islands, but the great body of the seals were taken over 100 miles away. That log begins with entering the sea on the 9th of July, and ends on the 6th of August.

Then the log of the "Ada",—the only other vessel we have—is found opposite to page 574; and its nearest approach to the island was 46 miles distant. In the area that is marked within the dotted line along on the 56 parallel or just below—between the 56th and the 55th parallel of latitude—there are 556 seals taken in 18 days, an average of 30 a day. Then down near Unimak and Unalaska, you will see a large number of seals and a good deal of sealing done at that long distance.

The PRESIDENT.—Is it confirmed that those are seals on their way to the islands, or on their way from the islands?

Mr. PHELPS.—They must be *from* the islands by the routes I have given, because while one vessel chooses to enter the sea as early as June 20th, all the rest are in it in July; so that the herd on the way *to* the islands with their young must of course have reached the islands, because they are all on the islands by that time.

The PRESIDENT.—As regards females, these were not seals with young?

Mr. PHELPS.—No, they are nursing females—females who have left their young on the shore.

Sir CHARLES RUSSELL.—We say some never were on the islands at all.

Mr. PHELPS.—One other observation on the cruise of the "Ada". In the area that is indicated there which was nearest to the islands, the average sealing was 30 seals a day. Down here at a distance of 175 miles or so the average of seals taken was 57.

Marquis VENOSTA.—During the month of July or the month of August?

Mr. PHELPS.—During the period between July the 14th and August the 24th. This vessel entered the sea on the 14th July, and the log that we have published and from which this is plotted, ends on the 24th of August.

General FOSTER.—The map shows seals taken each day. It shows for instance on August 19th, 123 seals.

Mr. PHELPS.—In the British Commissioners Report we have followed every trace that the evidence on either side enables us to furnish ourselves with, where any sealing vessel was at any given time, as well as to find out the proportions of catches. With their Report they submit a number of Depositions which give distances from the islands at which the deponents seal. I will just refer to that giving the page.

On page 232 of the British Commissioners Report or Appendix to it, there is Andrew Laing who testifies that he has never been closer than 30 miles—usually 30 to 90 miles from the islands.

On page 236 Captain William Cox says that he has sealed usually from 100 to 140 miles, and the nearest he has been is 80 miles.

Captain Petit on page 220 says he has usually sealed from 60 to 100 miles.

On page 224 Captain Baker says he has usually sealed from 30 to 90 miles.

On page 238 Captain Hackett says he has usually sealed from 50 to 150 miles, and never nearer than 50.

In the British Counter Case, in the 2nd Volume of the Appendix, you will find some more Depositions in which these distances are mentioned.

On page 47 Captain Sieward speaks of 120 miles.

On page 47 Captain Dillon says 90 miles.

On page 99 Captain Warren says a distance never nearer than 50 miles—generally 75 miles.

On page 100, Captain Pinckney says a distance of 80 to 150 miles west of St. George's island.

On page 100, Mr. Hughes says a distance of 100 miles west of St. George's island.

On page 108 A. W. Roland says a distance of 50 to 125 miles.

On page 139 Frederick Crocker says a distance as far as 200 miles.

Mr. CARTER.—All these speak of having taken *nursing* females.

Mr. PHELPS.—Yes, every one; and in fact as I have already shown, there is nothing else to be taken except a very small proportion of young seals or of young females. The testimony I have gone over shows that the vast proportion were of this character,—by an enormous preponderance of evidence, and I am endeavoring now only to locate the places. I do not go back to the other question.

Now will you kindly look at the same chart No. 5 of the United States Case.

The PRESIDENT.—The purport of my question was this—that there is a great difference between these catches after July in Behring Sea and the catches along the north-west coast before the seals have gone to Behring Sea. Are they all mothers or gravid females?

Mr. PHELPS.—Yes. Here they are gravid females.

The PRESIDENT.—They are nursing mothers?

Mr. PHELPS.—On the north-west coast you mean?

The PRESIDENT.—Yes.

Mr. PHELPS.—In the Behring Sea, these animals have all had their young—those that are going to have any—and many are pregnant again.

The PRESIDENT.—The first sealing was much more detrimental to the species than the second sort.

Mr. PHELPS.—That is a matter of estimate.

The PRESIDENT.—Immediately I mean.

I do not want to interrupt your argument—I mean according to your inference. It is your meaning I wanted to fix.

Mr. PHELPS.—That depends on whether the young left on shore perish. Young may perish after the death of the mother as well as before. But it depends on another consideration which all the evidence shows, that before these females leave the islands at all they are again impregnated.

The PRESIDENT.—All these facts are before us.

Mr. PHELPS.—Yes, I need not stop about that. On that chart you will also see localities where sealers were warned and seized in 1891 under the *modus vivendi*. Of the 63 vessels that were seized or warned, 48 were more than 20 miles from the Pribilof Islands. Of that number more than half were more than 50 miles from the island; no vessel was warned before the 5th July, and there were until the middle of August, warnings every day. Now suppose that all this time there had been a 20 mile zone, and suppose it had been possible to patrol it, and it had been patrolled so that it was not invaded—I should like to know, in the light of these facts, what diminution would have taken place? Some of course. I do not deny that seals are taken within 20 miles, but a proportion so small that as I remarked a little while ago it is no use at all to prevent it; you may as well let it go as to repress it to such a line as that.

I will not deal with the attempt that is made to show that these cows become immediately dry. The thing is preposterous. With no animal of the mammal class is any such statement true. And more than that, the nursing period of the young seals (in which they are helpless), confirms that; and, more than that, this vast body of testimony that the day before yesterday I presented to you to show the actual condition of the great proportion of these seals which were taken. The suggestion does not bear a moment's investigation. It was started by this man Captain Warren who is proprietor, or part proprietor, of a good many of these vessels, and he set up the suggestion that you may immediately begin to kill seals as soon as they go to sea, because while they are nursing their young they dry up immediately in a manner unknown to any such animal—in a manner that would leave the young to starve. That is the only attempt to break the force of this tremendous body of evidence to prove that the fact is not so.

I need hardly detain you, because it is a comparatively unimportant question; but I will briefly touch upon it to show that the catch in Behring Sea is much larger than that on the coast, in point of numbers. The only years in which we have any evidence on that point are three,—1889, 1890 and 1891; and 1891 is only part of a year, because the *modus vivendi*, as you will remember, came into operation during that year; and, therefore, that is but partial. But taking from the British Commissioners' Table the catch, at pages 205, 211 and 212, we have summarised what it shows. In 1889 there are shown 21 vessels with a catch on the coast, that is in the North Pacific, of 12,371 seals. In 1890, 30 vessels, (you see they had increased one-half,) with a catch on the coast of 21,390, pretty well approaching to double the catch of the year before.

Mr. Justice HARLAN.—You say "coast"; you mean "spring and coast" added together.

Mr. PHELPS.—I mean the North Pacific.

Sir CHARLES RUSSELL.—South of the Aleutians.

Mr. PHELPS.—South of the Aleutians, before you enter the Behring Sea. In 1891 these vessels had increased to 45, and the coast catch that year was 20,727.

Mr. Justice HARLAN.—What is the last reference, the one of 1891?

Mr. PHELPS.—It is page 212.

The PRESIDENT.—No. It is 205, I think.

Mr. PHELPS.—That is an average of 567 skins to all the vessels during the whole three years

Now take the same years, and see what was done in Behring Sea. In 1889 there were the vessels that we have an account of, and the catch

was 15,497 in Behring Sea, considerably larger than 21 vessels took on the coast. In 1890, 24 vessels in Behring Sea took 18,165; in 1891, 46 vessels took 28,888.

Mr. Justice HARLAN.—You say 46 vessels. I see the table says 50 vessels.

Mr. PHELPS.—Some of them did not go into the sea. These calculations have been carefully made, and I am sure they are accurate. So that, in 3 years, 86 vessels took inside the sea 62,550 seals. The time of the Behring Sea operations is shorter. It is all comprised within July and August. The coast catch begins as soon as the vessels can go out and it certainly is shown here to have occupied, more or less, February, March, April, May and June, May and June being much the largest months. This is an average of 727 skins a vessel in Behring Sea.

Mr. GRAM.—Is that only in the eastern coast of Behring Sea.

Mr. PHELPS.—Yes.

Mr. GRAM.—Not in the Asiatic?

Mr. PHELPS.—No the eastern side.

Mr. GRAM.—I think the western side is included in that; do not you think so?

Mr. PHELPS.—It may be.

Mr. GRAM.—You will find it in the Commissioners' Report, paragraph 68.

The PRESIDENT.—That was the first year of the *modus vivendi*.

Mr. PHELPS.—Yes that accounts for the size of the catch. It must be so—the *modus vivendi* was in operation.

Sir CHARLES RUSSELL.—Mr. Gram is quite right.

Mr. PHELPS.—General Foster says there is an estimate there of about 5,000 on the Asiatic side. If there is any uncertainty about those figures, we will refer you to other figures that are sufficient for my purpose. I think your suggestion is correct. It contains a certain amount for the western catch. It does not affect the average. The average, you will see, of the vessels on the coast catch was 567 and the average in the Sea is 727.

Mr. Justice HARLAN.—Before you leave that, I want to ask as to this table. On 205 there is a column there "Date of Warning" does that mean those vessels had got into Behring Sea without notice of the *modus vivendi* of 1891 and were warned out?

Mr. PHELPS.—Yes they got into the sea presumably without notice. The *modus* did not come into effect till June the 15th so that it is quite probable the vessels got in without notice, but whether with or without notice, they were there, and warned on those dates.

Sir CHARLES RUSSELL.—You will see in the ultimate column on the right some never got in. The other represents those that got in. The others were not in.

Mr. PHELPS.—That is so, but the vessels I have been dealing with are those that got into Behring Sea.

The PRESIDENT.—Have you made out a total proportion of catches in Behring Sea and catches on the coast?

Mr. PHELPS.—Yes, in this way,—that the average for the vessels in the North Pacific on the coast is 567 skins. The average for vessels in the Behring Sea is 727 and for half the time—the season in Behring Sea being so much shorter.

Now I will ask your attention to a little more plotting we have done for the benefit of the Russian Government, as well as this Tribunal, to inform them of the fruits of their diplomacy. We had yesterday 19

vessels on the Chart. This Chart shows the course of 8 of those Canadian sealers which we pointed out on the Chart yesterday, the only 8 that went over to the Russian Islands. There is no selection because we plotted every one that we could.

Mr. Justice HARLAN.—Where are the logs of these vessels?

Mr. PHELPS.—They are in the British Counter Case, Volume II, Appendix, page 187.

You see where those 8 vessels started in the vicinity of Attu and Agattu, belonging to the chain. You see the two Russian Islands, and around them the red line indicates a 30-mile zone; the black lines show the course of each vessel, so that it can be traced all the way where it went. You will see, in the first place, how few of those vessels invaded the 30 mile zone at all.—how few lines there are within the red circle that indicates the 30-mile zone.

The PRESIDENT.—You do not show where the Russians made the seizures?

Mr. PHELPS.—No; we show the logs.

Sir CHARLES RUSSELL.—That is a fact in dispute between the two Governments at present; but their allegation is they were seized within the 3-mile limit or in hot pursuit outside the 3-mile limit. As to some, it is admitted they were seized outside the three mile limit.

Mr. PHELPS.—We have plotted the logs of the vessels, and my learned friend has correctly stated the contention. The contention is that the boats had been within and were then found without; I do not go into that. All we have is the statement that speaks for itself.

The PRESIDENT.—That shows the log was not quite accurate.

Mr. PHELPS.—That is true. It is open to this criticism. We have taken the logs of these vessels, not of the vessels seized.

The PRESIDENT.—None of these.

Mr. PHELPS.—One I am told was, and the other seven were not. We have taken the logs of these 8 vessels, and traced them on the maps. If the logs are false or fictitious then, of course this amounts to nothing, but assuming the logs were correct, because 7 of them were not seized or complained of, you see where the sealing was done. Then if you cast your eyes upon the black points indicated at the points of the angles and courses outside, you will see where seals were taken according to this log and the number where the catch is more than 50 in a day. Inside the 30 mile zone the catch is given, whatever it is, whether more than 50 or not, and the actual number of seals shown to have been taken by the log, within 30 miles, is shown on the map. Outside of the 30-mile zone, only the daily catches were taken, that are 50 and upwards.

Mr. Justice HARLAN.—On the right of the map you see 219 seals taken in the 30-mile zone.

Mr. PHELPS.—Yes, I am about to allude to that. The result is that within the 30-mile zone, as shown by these logs there were 219 seals taken; outside, 3,817. Now if the 30-mile zone had been then in force, and had been observed and not violated, what proportion of the seals taken by these eight vessels would have been saved? 219, or not enough to warrant interference.

Mr. Justice HARLAN.—Do you mean it appears from the logs that of 4,026 seals 3,817 were taken outside the 30-mile zone.

Mr. PHELPS.—Yes, and 219 inside.

The PRESIDENT.—The purport is, you do not mean to encourage the Russian Government to renew their arrangements with England.

Mr. PHELPS.—I am fortunately not charged with the conduct of their diplomacy.

Sir CHARLES RUSSELL.—And my learned friend has already condemned or written the epitaph of diplomacy.

Mr. PHELPS.—If the British Government had the information on which these charges are founded and the Russians had not, it is evident that the Russians have yet something to learn on the subject of pelagic sealing; and in making those arrangements they will possibly verify an old proverb, which does not belong to diplomacy, which is "the more haste the less speed." What we have to do with it is to show the value of this 30-mile zone. Now reduce the 30-mile zone to 20, and see of these 219 seals how many would be left inside.

In leaving this—and I must not dwell on it, because a demonstration in mathematics cannot be added to by being talked about—a paper has been laid before you which I have shown my learned friends on the other side, containing certain extracts from evidence—nothing more I believe, as to a fact which has been spoken of in this case by some witnesses as tending to show that the female seals did not go out to obtain food—the condition of things on the rookeries—I will ask attention to the evidence there copied. I shall not say anything about it; it is evidence in contradiction of that suggestion.

Now, is it possible that Regulations of this character, a 20-mile zone round the Pribilof Islands, when nine-tenths of the seals are taken outside it, and a time limited between the 15th of September and the first of the following July, when no sealing at all would be done in Behring Sea if there were no time limit, is to be the result of the high-sounding and constantly repeated statement on the part of Great Britain all through this diplomatic correspondence, that they were ready to join and to do everything that is necessary for the protection of the seals? Is that the result of the language of this Treaty in the Article that has been so often read? Is it a compliance with the language? Is it offered as a compliance with it? Is it at all in conformity with the instructions which that Government as well as ours gave to the Commissioners who ought to have settled the question and would have settled the question if both sides had addressed themselves to it; and if it had not turned out that one side was addressing itself to the question of what is necessary, and the other side was addressing itself to the business of preserving at all hazards, and in every possible way, and not only preserving but increasing, the business of pelagic sealing?

A few words in respect to the Regulations that have been submitted by the United States. If the prohibition of pelagic sealing is not necessary to the preservation of the seal, then there would be no warrant for adopting such Regulations. We do not, for one moment, claim and have never claimed that anything should be done here to improve or benefit the business of the United States in this industry, to give them a monopoly, or anything else. That is not necessary for the preservation of the race. There is where the authority of this Tribunal stops. There is where the reason of it stops, and we should not for a moment be consciously guilty of asking for a regulation that is not necessary for that purpose, even though it might be indirectly, somehow or other beneficial to the profits of this industry, with which we have no more to do, in my judgment, than we have in preserving the profits of pelagic sealing. Why, then, do we propose to prohibit it? Because on this evidence it is demonstrated that it cannot exist, to a degree that would induce anybody to engage in it, without exterminating the race. I do not say that you may take no females out of

the herd without exterminating the race. That would be an extreme statement. You cannot take enough to make this business worth following upon the evidence in this case which I have shown before to be so conclusive and so overwhelming, without destroying the race. I respectfully submit this question to the Tribunal, to the consideration, in view of the evidence, of every Member of it—how far can you stop short of that, and preserve the seals? Take the month of January and consider that, or take the month of February, because January is too small to be noticed, if there is anything at all. Take the month of February and then go on to March. Go on in this increasing ratio to April, May and June, and then go into Behring Sea till the 15th September when they are all gone. Draw the line if you can, where it is enough short of a prohibition, to accomplish the object for which you are assembled here, in the event that it turns out that the United States have not that property interest or right to protection which enables it to defend itself. If we have gone too far—if in this Regulation of absolute prohibition you find we have gone further than is necessary, to that extent you will curtail it of course—It would be your duty to curtail the Regulations we propose, bearing in mind that you cannot limit the number taken. It is impossible to limit sex or even age. Draw the line for yourselves, I respectfully submit, and see how far short of a substantial prohibition you can stop and conscientiously say that you have preserved the race of seals from extermination. With the answer to that question which the Tribunal shall reach, we are bound to be satisfied and we shall be satisfied.

Then as to the extent of area we have named in our regulations, East of 180, and North of 35.

The PRESIDENT.—Does that comprise the whole of your limit with Russia?

Mr. PHELPS.—It comprises the migration current, and to go further than that, and take in the migration current through the Commander Islands would be for the benefit of Russia; which is what Lord Salisbury agreed to do at the instance of Russia. That is not for our benefit, and it is not for us to ask it here, nor is it within the power of the Tribunal, as it is the preservation of the Pribilof Islands seals you are charged with, because Russia is not a party here.

The PRESIDENT.—You are satisfied with 180.

Mr. PHELPS.—Yes, that takes in the migration course. Outside of that there are only a very few seals, which we do not take into account.

The PRESIDENT.—35 degrees goes below San Francisco.

Mr. PHELPS.—It goes below San Francisco, and that is 12 degrees lower down than the line agreed upon with Lord Salisbury, which was 47. Here again that limit of latitude, you will bear in mind, at that time was criticised, but there never was any objection stated to it, and if you are to repress sealing in the Pacific Ocean at all, 10 degrees more or less do not amount to much; but we invite attention to that. If it is too far, why, of course, you will limit it, bearing in mind that we do not mean to claim anything more than is necessary.

These are the two propositions on the one side and on the other. There is the Treaty that defines the dispute between these parties, the object and purpose of this Arbitration. If this part of the case is reached, there is the duty to discharge which the Tribunal has been kind enough to accept at the request, and upon the instance of the Governments. There is the evidence that points out the limits to which the discharge of that duty must inevitably carry it; and when I say inevitably, I do not mean to say that the line we have adopted of 35° is the

best one, the judicious one, the true one, or that the difference between 40 and 35 is inevitable. We simply suggest that as a proper boundary, as a just one, as a fair one, not meaning, of course, to say with the confidence with which I have said some things here, that it is absolutely necessary to go to that extent.

A few words, and but a few on another topic, connected with the Regulations—namely, their enforcement. I misunderstood, owing to not having had the advantage of reading my learned friend's remarks yesterday, what he had proposed, and for that I should apologize. I consider the case upon what I understand now that he does propose, and that is, that a vessel seized for violation of any Regulations that the Tribunal should impose and the country should adopt, should be handed to the British authorities to be dealt with. The error I made was that, instead of handing over the vessels, we were to make application and complaint in respect of them. Our Regulation, on the other hand, provides for the seizing of such infringing vessel and taking her into the ports of the United States to be proceeded with in Courts invested with such jurisdiction by our Statutes on the principle of what is known as prize law. All lawyers understand that the principles of prize law do not exclude the nation to whose citizens the seized vessel belongs. It condemns the vessel, but it does not exclude the nation from asserting a claim based upon the charge that the vessel was improperly condemned. If we seize a vessel and take her into the United States the jurisdiction is in the Federal Courts, and the vesting of this jurisdiction, as our Constitution does every jurisdiction which may affect international relations with another country, in the Federal Courts, is a very wise one for the purpose of securing other nations against being affected by the action of local Judges or Jurors or the pressure of local prejudice or sectional feeling.

It is proposed on the other hand, and this is all that we are at issue about, that if we seize a vessel, instead of taking her to our own port, we shall take her to a British Port; that is the difference.

That the Courts of other nations would proceed in good faith in the judgment they would render is a matter of course. We do not assume that the justice to be done by the Federal Courts would not be done by the Courts of British Columbia, or whatever the province was, but the same point arises that arose between Great Britain and Russia and was set forth by Mr. Chichkine in which this was debated. You seize a vessel in Behring Sea. You can do nothing but make a long voyage to British Columbia. There is no port nearer than that. You have to dispatch a vessel that ought to be on guard there, doing duty, to carry that vessel through the sea a voyage of I do know how many thousand miles. There is a practical difficulty in the way of that.

Sir CHARLES RUSSELL.—I am bound to point out to my learned friend that that difficulty has been met, by the legislation of the two countries concerned. It can only be effected by the legislation of the two countries.

The *modus vivendi* between Russia and Great Britain has been given effect to by legislation, which was only passed a few days ago, indeed it was when I was in London the other day, and a substitute is provided under the act and if it is not convenient to hand over a British vessel seized by Russian authority to a British authority, then the papers or vessel may be transmitted and action taken on them by British authority.

Mr. PHELPS.—In its practical result it comes exactly to what I understood my learned friend as having proposed in the first instance.

You do not seize the vessel, but you send an application, accompanied by papers which are good as far as they go, to the other side to proceed. That is the point. If they do not proceed you have a diplomatic correspondence.

Lord HANNEN.—To whom are the papers to be transmitted?

Sir CHARLES RUSSELL.—In the case of an English vessel seized by Russian authority—taken or copy taken by the Russian authority and transmitted to the English authority.

Lord HANNEN.—That is to say within the English judicial authority.

Sir CHARLES RUSSELL.—Yes.

Lord HANNEN.—And you proceed on the papers as if the vessel were there.

Sir CHARLES RUSSELL.—Yes each Government undertakes to prosecute.

Mr. PHELPS.—What becomes of the vessel? Here is a vessel that, on the theory of the case, is violating the laws of both countries.

Sir CHARLES RUSSELL.—It is charged with violating.

Lord HANNEN.—The vessel is detained till the result of the trial.

Mr. PHELPS.—But it cannot be detained.

Sir CHARLES RUSSELL.—And I do not understand that from the Act as it has been passed.

Lord HANNEN.—Perhaps you can get a copy of the Act?

Sir CHARLES RUSSELL.—Yes.

Mr. PHELPS.—A copy was sent to me very recently from the American Embassy, but I have not had time to read it; I only know that there is such an Act.

Now, stop a moment and reflect; here you are in the Behring Sea. There is no American Port nearer than the United States, and no British port nearer than British Columbia. The United States cruiser seizes a vessel caught red-handed in the act,—a criminal vessel, so to speak, if that is a correct expression, and takes her papers and sends them home. There is no mail from there. You have to keep them till the United States cruiser reaches some American port, when, by some American official, these papers can be forwarded to Canada. Where is the vessel in the meantime? You are dealing, I say, with a vessel that is out for the purpose of violating the law and Regulations; you are not dealing with a responsible ship. You are dealing with a tramp of the ocean. Is it going back to surrender itself at British Columbia for the sake of being condemned? What interest is there in a country, where all the sympathy is all the other way, in prosecuting this vessel?

The PRESIDENT.—They are registered vessels and covered by a flag.

Mr. PHELPS.—Yes.

The PRESIDENT.—If they do harm in one year, they will not continue to do it indefinitely.

Mr. PHELPS.—If they are not condemned, they will not go home,—no ship of that character. I do not deal now with a vessel on an upright errand which, having a false charge brought against it would go home and meet it at once.

The PRESIDENT.—But a ship cannot become a vagrant on the high seas unless it is a pirate.

Mr. PHELPS.—No, but it can go to some other port and shelter itself under another flag. I pointed out the other day what we meant as to these vessels having a different ownership from the place of registry. You see the practical difficulty of dealing with a class of vessels, that are caught in this business. The best that can be done on my learned friends' suggestion, is to take the papers and, when the United States

vessel gets home from its long cruise, then transmit them and depend upon the Provincial Government to institute such an action and press it in such way and with such evidence as will enable the Court to do justice. I do not assume for a moment,—I do not permit myself to assume that the Court will not do justice; but I never knew a Court that could do justice except at the instance of a plaintiff or prosecutor. That is the first requisite; and evidence is the next; and until a prosecutor takes up a case and presses it to prosecution, and furnishes the Court with the requisite evidence, no Court in the world can execute any justice in any case, civil or criminal.

Lord HANNEN.—It seems to me there ought not to be any difficulty about this. What you say is true, but you must remember the American Government would have Agents in the place where the trial would take place, and probably would conduct the prosecution.

Sir JOHN THOMPSON.—And the same question arose under the *modus vivendi*. The prosecutions there were in the British Columbian Courts. They were taken by Her Majesty's Officers.

Mr. TUPPER.—And condemnation followed.

Mr. PHELPS.—Yes.

The PRESIDENT.—One of my Colleagues has justly pointed out to me in all such international cases, in the case of the Convention for Submarine Cables and the North Sea Fisheries, the mode of prosecution is provided for in such a way as that the course of justice is sure to have its way.

Sir CHARLES RUSSELL.—And in each case it is handed over to the powers of the nationals it represents, as is provided in the *modus vivendi*.

Mr. PHELPS.—There is a very great difference, allow me to observe, between vessels seized in that part of the world where to carry them into an immediate port is easy, and where escape is impossible. I deal, not with a theoretical difficulty, but with a practical one. The difficulty is in getting the vessel into the jurisdiction and getting the case before the courts. It is a practical difficulty.

Mr. Justice HARLAN.—According to your view then, the only difference in the vessel which is seized in Behring Sea, is whether you shall take that vessel to the nearest American port, or the nearest British port.

Mr. PHELPS.—Yes, or nearest British or American vessel.

Mr. Justice HARLAN.—I did not mean to say that that could be done without, perhaps, some further legislation. That may or may not be.

Mr. PHELPS.—No, I shall not take up much time in dealing with a subject that does not depend upon evidence, and which the eminent jurists and lawyers I am addressing are entirely masters of, and do not need instruction from us upon. But I have an observation or two further to make about this. As I have said, if a vessel is condemned in the United States, by the operation of prize law, the judgment is not conclusive; but if the vessel is taken into British Columbia and is not condemned and is discharged, it is conclusive, as far as I can see, practically; I do not see how the American Government practically could deal with such a question.

Another question. We get these proceedings for the protection of maritime rights arising in one way or another, so long as they are rights under the usages of nations—we derive them by analogy.

Now in what case, I respectfully invite the Tribunal to consider, when a vessel exposes itself to seizure by violation of any maritime right, no matter what it is—in what case is it known that the vessel is not condemned in the country of the captor? If you choose, of course, in

making a Treaty, to make a different provision, that binds the parties; but I would respectfully submit to His Lordship, with his very large experience in this particular branch of the law, more probably than has fallen to the lot of either of the other members of the Tribunal, even of Mr. Justice Harlan,—in what case, unless a Treaty provides for it, is a vessel that is seized for a violation of a maritime right of a nation, carried any where else?

Lord HANNEN.—Will you allow me to make an observation? I have already indicated what I am about to say, that I do not recognize there is any such thing as prize law, except in the case of war; and you are asking us by our regulations to give you the same right in peace as there would be in war. It is nothing to the purpose. There are certain courts that have prize jurisdiction. Prize law properly speaking only arises in case of war.

The PRESIDENT.—As admitted by other nations.

Mr. PHELPS.—I quite concur in his Lordship's remark that prize law is applicable to a belligerent state.

Senator MORGAN.—That is a somewhat recent idea. Prize law originated not in a state of war, but originated in the right of reclamation and in reprisal.

Marquis VENOSTA.—I think that by the convention for the protection of the submarine cable, a public official has the right to ask for the papers that make a record and to denounce the offender. That right is admitted by the provisions of the Treaty.

Sir CHARLES RUSSELL.—It is so, and I do not think my learned friend has realized what is the effect of taking the ship's papers or indorsing the ship's papers. The moment that is done, when the ship makes for any port, she cannot get out of that port without clearing and without the assent of the authorities, and if she has no papers, she is in the jurisdiction of the Local Court, whatever it is, there, and may be seized for the offence indorsed upon the papers.

Mr. PHELPS.—I was only going in conclusion to advert to the language of the proposed Regulations, in reply to Lord Hannen's suggestion that in case of any such capture the vessel may be taken into any port of the nation to which the capturing vessel belongs, and condemned by proceedings in any Court of competent jurisdiction, which proceedings shall be conducted, as far as may be, in accordance with the course and practice of Courts of Admiralty when sitting as prize Courts. It is proposed that the jurisdiction should be given that is analogous as far as may be necessary.

Of course, I do not suppose that in the strict technical language of the law, a vessel of this sort would be regarded as prize—that is quite unnecessary to discuss. It is taken under the provisions of the Treaty; but, Sir, I do not care to pursue this subject.

Mr. Justice HARLAN.—Before you leave that, I want to ask Sir Charles Russell whether he doubts the power of the Tribunal to put into our Regulations, if we get to Regulations, some such clause as is in the *modus vivendi* of 1892. I do not understand you, Sir Charles, to dispute our power to do that, but to insist that that would be ineffective till supplemented by legislation.

Sir CHARLES RUSSELL.—You have understated our submission, Sir, as explained by both myself and my learned friend, Sir Richard Webster. Our position is this, that when the Regulations are laid down by this Tribunal each Power is bound to respect those Regulations and bound to give effect to them by legislation of their own; but that is not in the power of this Tribunal, what legislation the particular

Power is to carry out, or the machinery, in other words. That is to be left to the respective Powers, and that is what is done under the Jan Mayen Convention. Mr. Gram is conversant with that subject, and I referred—and I think my learned friend Sir Richard Webster referred to the Jan Mayen Convention as affording the example which we suggest can be followed by this Tribunal. That is the view of the Treaty which I and my learned friends respectfully contend for and submit for the Tribunal's consideration.

Mr. Justice HARLAN.—We could not then, in your view, provide that the vessel seized should be turned over to either Government.

Sir CHARLES RUSSELL.—Our submission is that that must be left to the respective Powers, to give effect to it, as it cannot be doubted each Power will.

The PRESIDENT.—Whatever provision we make will not have legislative force till it is turned into legislation in each country; but we have the right to propose the substance of the legislation that is to intervene.

Sir CHARLES RUSSELL.—I have never said anything with deference, to admit the right of this Tribunal to say that a vessel seized belonging to Great Britain should be taken by the Americans into an American port and there adjudged or *vice versa*. I have never said anything intentionally to that effect, and if I have inadvertently done so, I should deeply regret it. I have the passages before me where we discussed it.

The PRESIDENT.—Your opinion is that such Regulations ought not to be made.

Sir CHARLES RUSSELL.—And more than that, that this Tribunal may lay down Regulations, but we submit to the court that the enforcement of these Regulations must be left to the different countries.

Mr. Justice HARLAN.—You deny that we can make a Regulation to the effect that the ships of either Government may seize a vessel of the opposite Government offending and take it even into the Courts of the country to which the vessel belonged?

Sir CHARLES RUSSELL.—To put it shortly we submit the Tribunal has no power to suggest sanctions. They may make Regulations but have no power to suggest sanctions for the enforcement of those Regulations.

The PRESIDENT.—The limit may be difficult to draw between enforcement and Regulations and what is sanctions and what is merely rules to be followed. Take "warnings," will you admit you have the right to say that a ship of one nation may warn a sealing ship of another nation.

Sir CHARLES RUSSELL.—That may be.

The PRESIDENT.—That would be sanctions.

Sir CHARLES RUSSELL.—I should think hardly so.

The PRESIDENT.—The limit is very difficult to conceive. I do not understand how you could preclude this Tribunal from all the rights of making such a compromise between the two nations as they might make if left to their own diplomacy.

Sir CHARLES RUSSELL.—When once this Tribunal have said what they judge is fair and equitable, it leaves the moral obligation on each power adequately by legislation to give effect to the observance of those Regulations.

Senator MORGAN.—And only that.

Sir CHARLES RUSSELL.—I do not know that any difficulty has arisen up to this time in any of the Fishery Conventions.

The PRESIDENT.—If we leave the case in such a situation that the two nations are left to do things which we know that they will not do, which is opposed to their views, we shall have done nothing.

Sir CHARLES RUSSELL.—We cannot realise that, Sir, as a result at all.

The PRESIDENT.—Suppose we make a Regulation, and do not speak of the manner in which it is to be enforced.

Sir CHARLES RUSSELL.—We have the *modus vivendi* as a good illustration.

The PRESIDENT.—The *modus vivendi* has a Regulation.

Sir CHARLES RUSSELL.—And it is enforced by British Regulations, and I do not doubt similar British Legislation would follow on your Regulations.

Mr. Justice HARLAN.—Suppose that parts of the *modus vivendi* were, in substance, put in the Regulations, would you doubt the validity of that without saying it would enforce itself.

Sir CHARLES RUSSELL.—I have already said there is grave doubt whether this Tribunal has power to express sanctions.

The PRESIDENT.—Such as are embodied in the *modus vivendi?*

Sir CHARLES RUSSELL.—Yes.

Mr. GRAM.—We have an instance in the Congo Convention. It could not be enforced without Legislation in each country.

Marquis VENOSTA.—There are many Treaties including the mode of proceeding and mode of enforcing the Treaty, and there Legislation is required. There is the Convention for the protection of the submarine cable. There is a mode of proceeding for that; a Convention for the Fisheries in the North Sea, and there is a mode of proceeding for that. There are Articles in the Treaty, and those Treaties, of course, require Legislation, but the mode of proceeding for the purpose of enforcing the provisions of the Treaty—

Sir CHARLES RUSSELL.—Was left to Legislation?

Marquis VENOSTA.—Yes, but is established by an Article of the Treaty.

Sir CHARLES RUSSELL.—Yes; in that case. In this present case, the terms of Article VI, which, of course, would be in the minds of the Tribunal, are that the Arbitrators shall then determine what concurrent Regulations are necessary, nothing is said about what the sanction for those Articles ought to be. I do not consider the question of any practical importance.

The PRESIDENT.—The Tribunal must reserve to itself to examine that question, and we will see what we think about it.

Mr. PHELPS.—Perhaps it turns out that I was not so much mistaken yesterday with regard to the practical outcome of my learned friend's proposal as he led me to think I was. It depends on which method shall be resorted to, not to do the thing that is expected to be done, and by what circuitous route you should reach the result of finding out how not to do it. I do not propose to discuss that.

This very discussion, the discussion which springs up the moment you attempt to deprive a nation of a right, upon some abstract theory that it is not a right, although it is so necessary to be done that you will compel another nation to help them to do it—the moment you enter upon an inquiry of that kind you perceive the embarrassment. Then why any Regulations at all? If we have not the property right here—the right of protecting ourselves that we claim, why go any further and have any Regulations? what claim have we upon Great Britain to help us carry on our business? Solely because upon the very face and

threshold of this whole matter the thing that we claim is so completely ours, and it is so necessary to the interest of the world as well as of our own that it should be ours, that when, by some ingenious argument you deprive us of the right, then at once you set about to compel the other nations to join and enforce the very thing that we have no right to do against their will. If they had the common interest which should induce them to come forward voluntarily as they did in their original agreement and say, we share in this necessity and therefore are willing to contribute to it, that would be different. But here they are struggling to the last, if this comes to Regulations, in every conceivable way to make the Regulations worthless—to limit them in time, in space, in manner of enforcement, in every way in the world; no ingenuity can propose a suggestion that would emasculate such Regulations of all force, that you have not been entertained with. Can anything more clearly illustrate the utterly preposterous theory—I say it very respectfully—preposterous in its result, on which this whole debate proceeds? Either the seals are necessary and proper to be preserved on the territory under the jurisdiction where they belong, under the circumstances where they are found, for the purpose for which you preserve them, that is, to enable the United States to administer this industry—or they are not. It is either so, or not so. If so, the right of the United States results inevitably from that state of things. If not so, upon what theory are you going to force another nation against its will to adopt regulations for our benefit?

The PRESIDENT.—I am afraid you put the case a little far, because we cannot admit the English Government is not wishing to preserve and protect properly the fur-seal, in or habitually resorting to Behring Sea, after the British Government has signed a Treaty to that effect in virtue of which we here sit.

Mr. PHELPS.—That depends, Sir, with much respect, upon whether you read the Treaty or listen to my learned friends. I have endeavoured to point out the wide discrepancy between the profession and the practice; between the promise and the performance. The Treaty does go upon that stipulation; but what is the argument here? Why, my learned friend, Mr. Robinson, perhaps not noticing the force of his observation, says, If you do so and so we should be worse off than if we accorded the right to you. We should lose everything, and still be charged with helping to mount guard over the interests we have been deprived of. We should be worse off in the interests for which we have been contending, which he has been frank enough to say is the business of pelagic sealing.—If you take the Treaty, the correspondence and the instructions, you find two nations met in a common purpose; and no man can give a reason why they require any assistance in accomplishing that common purpose, if they are at one with regard to it.—But when you come to take the proceedings before this Tribunal, you find nothing is more ingeniously and earnestly opposed, from every possible point of view, than the adoption of any regulation that would really effect the very purpose for which in theory, and under the provisions of this Treaty, the Tribunal is assembled.

The PRESIDENT.—It means they do not agree as to means.

Mr. PHELPS.—It is more than that. It turns out from their discussion that we are so far disagreed with reference to the means that we are disagreed with reference to the object. I submit that to your consideration without further observation, which would not elucidate it

I had designed to mention, but at this late hour I shall not go back to discuss, one topic that I had omitted in its order, because at its

appropriate time the reference did not happen to be in Court, and later than that the convenient time did not come. I allude to it only for a single remark. It is the subject of the Newfoundland Fisheries, as they were spoken of in the United States Argument, and to which my learned friends made quite an elaborate reply, citing from Lyman's Diplomatic Correspondence, and some debates in the British Parliament. I designed to review that but time does not allow. I only wish it shall not be understood that we have asserted anything in this argument that we find it necessary to withdraw from. The statement, which will be found supported by the quotations in the Appendix, is strictly accurate in every respect. The Fisheries were granted to the Americans in the Treaty of 1783 after the Revolutionary War, not because they were open to the world, but because they were open to American and British subjects; and it was conceded on both sides in that correspondence, except for a single observation of Lord Bathurst in passing, who had nothing to do with the negotiations, which is evidently a mistake on his part. There is nothing to contradict that. It was conceded that these Fisheries, far out into the sea, at that time belonged to Great Britain, and only as British subjects could the United States take part in them. It was held so for a long time, and I think the rights of France now are under a similar arrangement. Whether they have since been thrown open to the world, is another question into which I do not care to enquire. I only allude to it for the purpose of asserting respectfully the strict accuracy of the position taken on that subject in the United States Argument, whether it has much or little to do with the questions we have discussed.

This, Sir, is the case of the United States Government; how imperfectly presented, as far as I am concerned, no one here knows as well or feels as sensibly as I do. It is a case, Sir, that no American need blush for. Its broad propositions of law, its absolute truthfulness of fact, its honest and straightforward procedure, seeking no advantage and taking none, are all before the Tribunal and before the world. We stand upon the justice of this case. We have not found it necessary to admonish you to beware of justice, of morality, of right, or to refrain from doing the plain thing that on the face of this whole business ought to be done, lest some far-sought and imaginary abstraction of theoretical law might possibly be violated. That is not our position. We have invoked justice. We have asserted that it is the only principle on which international affairs can proceed or ought to proceed; and it will be a sad day for the world if it ever reaches a contrary conclusion. The controversy that is involved here, like all human controversies, is transitory. It will soon pass away. If this herd of animals is to be exterminated, the world will learn to do without it, as it has learned to do without many things that are gone; but the questions, the real questions, to which the attention of the world will be directed,—what is the rule of conduct that international law prescribes in cases of new impression between nations; what is the freedom of the sea; what are its limits; what does it justify; what does it excuse,—those are questions that will remain. On the immediate issue of this controversy, the decision of the Tribunal will be final. These great nations have agreed to make it so; and what they have agreed to do, they will do. On the larger question I have referred to, the decision of this Tribunal is not final. From that there is an inevitable appeal to the general sense of mankind. None will be more gratified, I am sure, than the members of this Court, that it is so; that the opinion of jurists, of lawyers, of publicists will follow with interest, and approve or disap-

prove, and I cannot doubt approve, the conclusions you arrive at. It will be a source of satisfaction to you that the still better appeal to the ultimate judgment of civilised men will also follow and pass upon the judgment of this Court. It is, Sir, with a confidence predicated upon the justice of the American case, inspired by the high character of the Tribunal these nations have been fortunate enough to bring together, and strengthened by the anxious solicitude every member of it has shown through this long and wearisome discussion to reach a right conclusion,—that the United States Government submits this case to your consideration.

The PRESIDENT.—Mr. Phelps, the difficult part has been thrown upon you to speak the concluding words in this very eloquent debate after your friends on either side had striven to make the task more arduous for you. It has been discharged in such a manner as fully to deserve our admiration, blending the deep science of the lawyer with literary refinement and diplomatic dignity. We appreciated the delicate, even when pressing touch with which you have gone over matters put before us in manifold form. I beg I may be allowed to consider the laurel you have won at this cosmopolitan bar as a fair addition to the wreath of honors which you conquered on different fields both in the New and in the Ancient World.

Sir CHARLES RUSSELL.—Mr. President, we have now so far as discussion is concerned arrived at an end of this anxious and protracted proceeding. There is one word that I should like to be permitted to say, a word that I am quite certain will receive full endorsement from my learned friends. The word that I desire to say, Mr. President, is for my colleagues and myself to express our deep gratitude for the unvarying patience and courtesy with which we have been treated by every Member of this Tribunal. I should like to be allowed to add also how fully we recognize the manner in which your proceedings and our labours have been assisted and rendered easy by the cooperation, active and courteous, of the Secretaries and Assistant Secretaries of the Commission itself. We ought also to recognise the courtesy which we have received from the Secretaries of the individual members of the Tribunal with whom we have necessarily been brought more or less in contact.

Mr. President, we shall all of us have for many years to come a most grateful recollection of the courtesy and kindness we have received.

The PRESIDENT.—I thank you, Sir Charles, in our names for all of us, and the other gentlemen, for your courteous words; and certainly, as you say, the remembrance you will keep will be in the memories of all of us as long as we are alive.

Mr. PHELPS.—I may be allowed I hope, Sir, for my associates and myself, as well as for my Government, to express my cordial concurrence in what has been so well said by my learned friend, the Attorney General of England, every word of it.

I think the members of the Tribunal, other than yourself, Sir, may be gratified if I venture to add one further word to what my learned friend has said, and to express the sense that we all entertain, I am sure, on their side of the table as well as ours, of the great ability, the faultless courtesy, and the acute perception that has kept this discussion within its proper boundaries, which has characterized your administration, Sir, of the difficult office of President of this Tribunal. That position was accorded to you, Sir, by your distinguished colleagues, not merely on account of your personal fitness, a fitness which they equally shared, but to a certain extent, undoubtedly, in acknowledg-

ment of the more than generous hospitality we have had from your Country.

And if I may intrude far enough to add a word for myself personally, I feel that, perhaps more than any other of the counsel who have been charged with the conduct of this case on either side, I have been indebted to your own courtesy, and that of all the members of the Tribunal, for your great consideration and kindness. I have no language to express my appreciation of it.

The PRESIDENT.—We thank you again, Mr. Phelps, and for myself I have tried my best to be impartial. That is the only thing.

As for my Country, France has been honoured by the choice of your two Governments in regard to Paris, her chief town, as the place where this Tribunal was to meet, and what you are pleased to say of the French hospitality is what we consider has been but your due.

Sir CHARLES RUSSELL.—I have mentioned this matter to my friend, Sir, and if that meets with the approval of the Tribunal, I would suggest, if any requisition should be found necessary for the Tribunal for further elucidation on any point, we might agree that the requisition should be in writing, and that the answer to it on each side should also be in writing. I do not know that we need suppose the possibility or probability of such a question. If the question should arise, we should suggest that such course should be taken.

The PRESIDENT.—The Tribunal will take heed of what you mention. We cannot bind ourselves or preclude from ourselves the right and proper duty conferred upon us by the Treaty to remain at liberty to ask for any supplementary, either oral or written or printed, statement. In case we do we will give notice, and at any rate, as much as possible, we will abide by the requisition you have put upon us.

Mr. PHELPS.—We quite concur on our side in the suggestion of my learned friend, subject always to the approval of the Tribunal.

The PRESIDENT.—The Tribunal will now take the case into its deliberation; and in case any new meeting is necessary, which we do not anticipate as yet, we will give notice to the Agents of both Governments, who will instruct Counsel in consequence.

Mr. TUPPER.—I may say, Mr. President, and I think I can say it for General Foster, if he will allow me, both he and I will be in attendance upon the Arbitration, at all times ready to meet any calls that may be made upon us.

The PRESIDENT.—We thank you, and are happy to know that we can rely upon it.

APPENDIX.

I.

COITION IN THE WATER.

Aquatic coition is suggested by the British Commissioners.

See Secs. 246, 295–297 of their report.

But they do not claim ever to have seen it.

They refer:

(*a*) To "four or five gentlemen".

Who and where are they? What have they said? What do they know? They do not appear in the evidence taken in the British Counter Case. What has become of them?

(*b*) To "several intelligent and observant hunters".

Who are they? Where are they? What have they said? Such matter is not evidence: it is not even hearsay.

(*c*) To Captain Bryant.

Read what he says in "Monograph of North American Pinnipeds", pp. 385 and 405.

In his deposition (U. S. Case, App., Vol. II, p. 6) he says:

In watching the seals while swimming about the islands, I have seen cases where they appeared to be copulating in the water, but I am certain, even if this was the case, that the propagation of the species is not as a rule effected in this way, the natural and usual manner of coition being upon land.

If Captain Bryant's statement in the Monograph be correct, most ample proof of it should be forthcoming. But the evidence of those most able to observe is directly to the contrary (see *infra*).

(*d*) Professor Dall.

The following evidence of this gentleman, published at page 359 of the United States Counter Case, fully explains his former statement;

I learn that I have been quoted in the report of the British Behring Sea Commissioners for the purpose of proving that coition at sea is practiced by the seals. In connection therewith I have to say that my statements as to copulation in the water rest largely upon assumption. Young bachelor seals are seen to chase females leaving the rookeries and to play with them in the water; pairs of seals are seen engaged in a sort of struggle together and to remain caressing each other or apparently quiescent, sometimes for as much as an hour. From such facts, which I myself with others observed and reported, it was considered not unlikely that these seals were of opposite sexes, and that they were engaged in copulation, and, in the absence of definite information to the contrary at that time, I so stated. . . But it would be dangerous to rely upon these observations thus casually made, at a time when seal life was not so well understood as now, to prove that coition in the water is practiced. I never had an opportunity to assure myself that the pairs of seals seen playing were of opposite sexes, or, if they were, that their play was of a sexual nature, or if it was, that the act was complete and effective. There does not seem to be any way in which any one of these matters can be definitely proved. Even if they were shown to be possible and to occur at times, the general belief in it by casual observers at one time, myself among the number, was always, as far as I know, coupled with the opinion that it was an exceptional and abnormal occurrence.

Bryant therefore, remains, the only witness cited by the British Commissioners in support of aquatic coition.

On the other hand two great facts disprove the possibility of coition in the water.

a) The harem system, which dominates the whole life and economy of the animal.

b) The time of birth of the young.

Cows give birth on arrival (Report British Commrs., Sec. 30; Report American Commrs., U. S. Case, p. 326).

The period of gestation is about twelve months (British Commrs., Sec. 434; American Commrs., U. S. Case, p. 326).

Cows cannot be impregnated until after delivery.

Arrivals and delivery occur late in June and early in July with great regularity. Impregnation must, therefore, take place within a week or two after delivery of the pup, when the cows are on shore and guarded in the harems (U. S. Counter Case, pp. 63–64), and especially so if the British Commissioners are right in saying that the females do not leave the rookeries for several weeks after the birth of their young (Sec. 30).

That arrivals are not later now than formerly, see U. S. Case, p. 386, table; U. S. Counter Case, p. 397, evidence of W. H. Williams; U. S. Case, App. Vol. II, p. 13, evidence of J. Stanley-Brown.

If females not pregnant were impregnated before arrival, births would be earlier, which is not pretended to be the case.

The following evidence shows that aquatic coition is impossible:

J. Stanley-Brown (U. S. Case, App., Vol. II, p. 14) says:

> Pelagic coition I believe to be impossible. The process upon land by reason of the formation of the genital organs is that of a mammal, is violent in character, and consumes from five to eight minutes. The relative sizes of the male and female are so disproportionate that coition in the water would inevitably submerge the female and require that she should remain under the water longer than would be possible to such an amphibian.

Samuel Falkener (*ibid.*, 165) says:

> I am positive from my observation that copulation in the water cannot be effectual, and would be a most unnatural occurrence.

H. H. McIntyre (*ibid.*, p. 42), after seventeen years on the islands, says:

> It has been said that copulation also takes place in the water between these young females and the so called breeding males, but with the closest scrutiny of the animals when both sexes were swimming and playing together under conditions the most favorable in which they are ever found for observation, I have been unable to verify the truth of this assertion.

J. H. Morton (*ibid.*, p. 67), says:

> A firm foundation, for the support of the animals, which the ground supplies, and the water does not, is indispensable to oppose the pushing motion and forceful action of the posterior parts of the male which he exerts during coition.

S. R. Nettleton (*ibid.*, p. 75), says:

> Referring to the question as to whether pelagic coition is possible, I have to say that I have never seen it attempted, but from my observations I have come to the conclusion that pelagic coition is an impossibility.

See also articles by Dr. Allen, U. S. Case, App., Vol. 1, p. 407 and deposition of N. A. Grebnitzki, U. S. Counter Case, p. 362.

The appearance of the act, not the reality, may perhaps have been seen:

J. Armstong (U. S. Case, App., Vol. II, p. 2), says:

> I have seen seals in a position when it seemed to be attempted, but doubt whether it is effectually accomplished. If it were, I think we should see pups born late and out of season, but such is not the case.

J. Stanley-Brown (*ibid.*, p. 14), says:

I have sat upon the cliffs for hours and watched seals beneath me at play in the clear water. It is true that many of their antics might be mistaken for copulation by a careless observer, and this may have given rise to the theory of pelagic coition. I have never seen a case of the many observed upon which the facts could be so properly construed.

Captain Bryant's views upon this matter have already been cited.

Such sport is very natural, and is to be seen among many animals.

Mr. Macoun in his report (British Counter Case, App., Vol. I, page 139) cites the same authorities given by the British Commissioners. Mr. Macoun's views are mere inference and hearsay, and he was, equally with the British Commissioners, *unable to witness a single instance of pelagic coition either in 1891 or 1892.*

The *evidence* submitted by the British Government (Brit. Counter Case, App., Vol. II, pp. 43–121) consists of the affidavits of forty-six sealers. These affidavits appeared for the first time in the British Counter Case, so that the United States have had no opportunity to reply.

The following seventeen of these sealers swear that they have *never seen the act* throughout from two to nineteen years of experience: McGrath, two years experience; Ryan, ten years; Fanning, four years; McKean, seven years; Shields, seven years; Lorenz, three years; Baker, five years; Christian, two years; A. C. Folger, nineteen years; C. Peters, five years; A. J. Bertram, six years; A. McGarva, five years; G. E. Miner, six years; H. J. Lund, two years; P. Carlson, four years; E. A. Lewis, three years.

Seventy-five practical white hunters and sealers examined by the British Government on other points are not asked to give their views as to pelagic coition. The same is true as to thirty-one Indian hunters in Behring Sea.

Of those who swear that they have seen the act performed in the water, the following speak of having only seen it *once:* A. S. Campbell, three years experience; F. Campbell, five years; G. Roberts, four years; W. O'Leary, six years; W. De Witt, four years; F. W. Strong, four years; G. McDonald, six years; E. Cantillion, four years.

Three of the afore mentioned witnesses have seen it *twice:* T. Garner, three years experience; W. G. Goudie, five years; A. Billard, two years.

The following swear they have seen it, without saying how often: W. Petitt; G. F. French; C. F. Dillon; C. J. Harris; R. S. Findley; H. B. Jones; W. Heay; F. R. Warrington; T. Magneson; A. Reppen; T. H. Brown; G. Scott; G. Wester.

Two of these witnesses, however, swear to a manner of coition which is on its face impossible to the animal: A. S. Campbell (Br. Counter Case, Vol. II, p. 48) and W. Petit (*ibid.*, p. 43).

Two others swear that this occurred in *May*, which is impossible: G. F. French (*ibid.*, p. 45) and L. McGrath (*ibid.*, p. 46).

The true explanation of what the above-named witnesses saw is given by those witnesses who state that they have seen movements of the character here in question in the water, but could not tell and would not swear that they amounted to coition. See H. E. Folger (Br. Counter Case, Vol. II, p. 91); G. E. Miner (p. 97); E. Ramlose (p. 72); W. Shields (p. 70); J. S. Fanning (p. 95). See also Dr. Dall, whose statement is quoted *supra*.

Only three witnesses swear to having seen the act performed often or more than twice: A. Douglass (Brit. Counter Case, Vol. II, p. 52); O. Scarf (p. 67); C. Le Blanc (p. 51).

When could these men have seen the act? Not when Bryant saw it, for they were not there. Not before arrival of the cows, or the birth would be early. Not after, or the birth would be late.

The suggestion of pelagic coition is completely opposed to all the dominating and well understood habits of the animal, and seems to have been virtually abandoned by the counsel for Great Britain. Very wisely. Why was it ever brought forward? Only in the vain hope of impinging in some small degree upon the powerful argument drawn from the attachment of the seals to the American territory, by suggesting that in some casual instances seals may have been at least begotten outside of that territory.

Even if true, it would not affect the question in the smallest degree.

II.

TABLE SHOWING THE EFFECT OF THE KILLING OF BREEDING FEMALE SEALS IN DIMINISHING THE NUMBER OF THE BREEDING FEMALES IN THE HERD. HANDED IN BY MR. PHELPS ON THE 6TH JULY, 1893.

These tables are made upon the following assumptions:

1. That the seals born in any year decrease annually at the several rates indicated in the diagrams of the U. S. Commissioners (U. S. Case, p. 353).
2. That each breeding female has a breeding life of eighteen years.
3. That each breeding female gives birth annually from and excluding her third year to one pup and that half of the pups are females.
4. For a basis upon which the effect of all the pelagic sealing from 1872 to 1889, inclusive, may be determined, a calculation is made in Table "A" of the number of female seals which 1000 female seals, divided into 250 three years old, 250 four years old, 250 five years old and 250 six years old, would produce and which would remain in the herd at the end of each year for the period of eighteen years, after allowing for all destruction proceeding from causes other than pelagic

TABLE "A".

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th	14th	15th	16th	17th	18th
Pups	500	444	407	439	458	478	504	529	555	578	594	602	598	566	546	537	535	557
Yearlings	....	250	222	204	220	229	239	252	265	278	289	297	301	299	283	273	269	268
2 Years	....	....	197	146	136	146	153	160	168	176	185	193	198	201	199	189	182	179
3 "	250	....	....	120	107	97	105	110	115	121	127	133	139	142	144	144	136	131
4 "	250	208	....	....	100	89	81	88	92	96	101	106	111	116	118	120	119	113
5 "	220	225	188	....	....	90	80	73	79	82	86	91	95	100	104	107	108	107
6 "	250	236	213	177	....	....	85	75	69	75	78	81	86	90	94	98	101	102
7 "	....	220	208	188	156	....	....	75	67	61	65	69	72	76	79	....	87	89
8 "	....	....	205	194	175	146	....	....	70	62	57	61	64	67	71	74	78	81
9 "	....	....	....	198	187	169	141	....	....	68	60	55	59	62	66	68	71	74
10 "	....	....	....	....	191	181	162	135	....	....	65	58	53	57	60	62	66	69
11 "	....	....	....	....	....	184	174	156	130	....	....	63	56	51	54	57	60	63
12 "	....	....	....	....	....	....	180	170	153	128	....	....	61	54	49	53	56	58
13 "	....	....	....	....	....	....	....	176	167	150	125	....	....	60	53	47	53	55
14 "	....	....	....	....	....	....	....	....	169	160	144	120	....	....	58	51	45	50
15 "	....	....	....	....	....	....	....	....	....	154	146	131	110	....	....	53	49	43
16 "	....	....	....	....	....	....	....	....	....	....	132	125	112	94	....	....	45	40
17 "	....	....	....	....	....	....	....	....	....	....	....	110	104	94	78	....	....	38
18 "	....	....	....	....	....	....	....	....	....	....	....	....	174	69	63	57	....	....
	1500	1583	1610	1668	1730	1809	1905	1969	2099	2189	2254	2305	2290	2298	2119	2073	2056	2117

sealing. This computation for 1000 is applied in Table "B" to the total pelagic catch at the end of 1882, and in Table "C" to the whole pelagic catch at the end of 1889.

The percentage of breeding female seals remaining in each year after suffering all losses from natural causes, as taken from the United States Commissioners tables, is as follows, beginning with 100 seals:—

1st year, 100; 2nd year, 50; 3rd year, $33\frac{1}{3}$; 4th year, 24; 5th year, 20; 6th year, 18; 7th year, 17; 8th year, 15; 9th year, 14; 10th year, $13\frac{1}{2}$; 11th year, 13; 12th year, $12\frac{1}{2}$; 13th year, $12\frac{1}{4}$; 15th year, $11\frac{1}{2}$; 16th year, $10\frac{1}{2}$; 17th year, 9; 18th year, $7\frac{1}{2}$; 19th year, 5; and 20th year, 0.

Note. The diagrams of the United States Commissioners are necessarily framed upon conjectural assumptions, which it is impossible to verify. It is believed, however, that no change in these assumptions, which the truth in respect to the loss of seals by their natural enemies other than pelagic sealers, were it known, would require, would call for any material modification of the conclusions to which these tables lead.

TABLE "B"

Showing the number of females, which would have been alive in 1882 except for pelagic sealing, and which would have appeared on the breeding grounds in 1884 (calculating from Table A).

Years.	Number of years to 1882.	Catch.[1]	Loss of females.
1872	11	1,029	2,319
1873	10	.....	.....
1874	9	4,949	10,388
1875	8	1,646	3,289
1876	7	2,042	3,890
1877	6	5,700	10,311
1878	5	9,593	16,596
1879	4	12,500	20,850
1880	3	13,600	21,896
1881	2	13,541	21,535
1882	1	17,700	26,550
			137,624

[1] Catch taken from American Commissioners' Report (U. S. CASE, p. 366).

The American Commissioners give a hypothetical herd in which there are supposed to be 1,500,000 females, of which 800,000 are capable of breeding. It is seen, therefore, assuming the Pribilof herd to correspond in numbers to the Commissioners' hypothesis, that in ten years, of pelagic sealing, which destroyed 20,000 breeding females a year, the number of females in the herd would be reduced by 361,840, or over 24 per cent of the whole number of females, while the breeding females would be reduced, by 220,820, or 27⅞ per cent of the 800,000 breeding cows assumed by the Commissioners.

TABLE "C"

Showing the number of females, which would have been alive in 1889 except for pelagic sealing, and which would have appeared on the breeding grounds in 1891 (calculated from Table A).

Years.	Number of years to 1889.	Catch.[1]	Loss of females.
1872	18	1,029	2,178
1873	17	.....	.....
1874	16	4,949	10,259
1875	15	1,646	3,488
1876	14	2,042	4,693
1877	13	5,700	13,070
1878	12	9,593	22,018
1879	11	12,500	28,175
1880	10	13,600	29,770
1881	9	13,541	28,423
1882	8	17,700	33,382
1883	7	9,195	17,516
1884	6	14,000	25,326
1885	5	13,000	22,490
1886	4	38,907	61,837
1887	3	33,800	54,418
1888	2	37,720	59,859
1889	1	40,998	63,497
			483,420

[1] Catch taken from American Commissioners' Report (U. S. CASE, p. 366).

The normal numbers assumed by the United States Commissioners are, of course, hypothetical; but the hypothesis is consistent with the evidence. Any change in the hypothesis which the evidence may be supposed to admit of would not materially change the result.

TABLE "D"

Showing loss in the number of female seals, which would be effected by ten years of pelagic sealing, based on the supposition that 20,000 breeding females were killed annually during that period; allowance from natural causes being made on the basis of Table A.

	Number of females killed.	Loss of breeding females at the end of the period.	Loss of young females (under 2 years) at the end of the period.	Total loss of females at the end of the period.
1st year	20,000	26,660	17,120	43,780
2d "	20,000	25,580	16,400	41,980
3d "	20,000	24,500	15,620	39,980
4th "	20,000	23,240	14,860	38,100
5th "	20,000	22,040	14,140	36,180
6th "	20,000	21,040	13,560	34,600
7th "	20,000	20,500	12,860	33,360
8th "	20,000	19,620	12,580	32,200
9th "	20,000	17,780	13,880	31,660
10th "	20,000	20,000	10,000	30,000
Total loss of females	200,000	220,820	141,020	61,840

III.

OBSERVATIONS OF THE BRITISH COUNSEL UPON THE TABLES HANDED IN BY MR. PHELPS ON JULY 6TH, 1893.

[NOTE.—In the following observations only those facts or figures asserted or given by the United States have been dealt with. No new controversial matter has been introduced. The British government does not of course admit the truth of these figures or assumptions, but seeks only to shew that if they are admitted and granted, they establish conclusions the very opposite of those sought to be deduced from them by the United States.]

I. The object with which Mr. Phelps' Tables are put forward is to shew that the annual killing of a number of female breeding seals will have a large effect in permanently reducing the "herd."

It is not of course denied that the killing of breeding females or males to a very large extent might in time produce a diminution in the "herds", but it is contended that the effects sought to be established by Mr. Phelps' Tables are incorrect and exaggerated.

The estimate arrived at on page 5 of Mr. Phelps' Tables, is that the annual killing by man of 20,000 breeding females for 10 years, would reduce a "herd" of 1,500,000 female seals (of which 800,000 are breeding females) by 361,840 or 24 per cent (see Table "D").

But those who prepared this estimate, while they have taken into account the loss due to killing by man, have failed to give credit for the natural increase, which according to table "A" would be going on during the same period among those breeding females not so destroyed.

It would involve a tedious calculation to fix exactly what this increase would be, but even supposing that the whole number (200,000) killed during the 10 years, were killed in the first year, yet still this would leave over 600,000 breeding females to produce the increase; and assuming that this 600,000 increased during the 10 years in the same ratio as that shown on Mr. Phelps' Table "A" (viz from 1,000 to 2,189) the 600,000 would become 1,312,200. That is to say, the female "herd" would by natural increase have been augmented by 712,200 females, an increase which might fairly have been set off against the 361,840 killed, but of which the compilers of the table have taken no notice, and for which they have given no credit.

In fact, the natural increase of the "herd" would more than fill the void created by the killing of the females by man, provided such killing was not pushed too far.

Compare British Commissioners Report. Paras. 371-376.

Thus Mr. Phelps' Table "A" shews that the seal does not differ from other polygamous animals, such as deer, of which a reasonable proportion of females are annually killed in all carefully managed herds without injury.

The above natural increase has been taken at Mr. Phelps' valuation. Without endorsing the exact accuracy of that valuation, it is clear that a large natural increase must exist which needs to be credited in any correct computation.

The argument that the killing of every breeding female decreases the herd *pro tanto*, in a geometrical ratio, is obviously untenable, otherwise those "indiscriminate" pelagic sealers the killer-whales and the native Indians would have long since destroyed the whole number of seals.

Inasmuch as the tables of Mr. Phelps are based on the Diagrams of the United States Commissioners, it becomes desirable to examine these Diagrams somewhat more closely.

II. The two Diagrams (A) and (C) are given by the United States Commissioners to show the effects of "properly regulated" killing upon land. They relate to the male portion of a hypothetical "herd," which in its natural condition would amount to 40,000 males and 40,000 females, but which if land killing took place would, according to the United States Commissioners, be reduced to 23,568 males and 40,000 females.

United States Case, p. 352.

United States Case, p. 352, line 12.

Diagram (C), p. 355, and United States Case, p. 357, line 1.

The same conclusions would hold true whatever the whole number of seals was, it being only necessary to increase the figures in due proportion.

These two Diagrams relate to male seals.

Explanation of the Diagrams.

1. Along the lowest horizontal lines are arranged a number of figures representing successively the ages of the male seals. Opposite each of these figures is a vertical line representing by its length the number of male seals which there are in the "herd," of the age represented by the figure.

Diagram (A) represents the male "herd" of 40,000 seals in its natural state, according to the opinion of the United States Commissioners, and before any killing by man has taken place.

United States Case, p. 352.

From the Diagram it is apparent that in this "herd" there would at any given time be 10,000 male pups under 1 year old; there would be 5,000 yearlings or males under 2 years, but over 1 year old; 3,200 2-year-olds, or males over 2 years of age but under 3 years old; 2,400 3 year-olds; and so on. And it is quite evident that the total number of male seals in the "herd" may be obtained by adding together all the columns. In Table (*a*) annexed, the figures have been extracted from the United States Commissioner's Diagram (A), and added up. The total comes to 40,025, and agrees with the total marked on the United States Diagram (A).

If this "herd" in its natural condition be in a state of "practical stability," as the United States Commissioners for their purpose assume (that is to say, if the "herd" as a whole be neither decreasing nor increasing), then, on the average, the yearly number of births will be equal to the yearly number of deaths. The "herd" will be increased each year by the birth of 10,000 pups, and decreased each

Compare British Counter Case, pp. 371-376.

United States Case, p. 353, 3rd line from bottom of the page.

United States Case, p. 353, line 10.

year by 10,000 deaths from killer-whales and other natural causes, and thus the balance will be maintained.

By comparing the various figures with one another, the yearly mortality from natural causes of the seals of any particular age can also be seen. Thus, for instance, when the "herd" leaves the Pribilof Islands, it consists of 10,000 male pups, 5,000 male yearlings, 3,200 male 2-year-olds, and so on. But owing to the natural deaths in the ocean, when it comes back, the 10,000 male pups, which will now be entering on their second year of life, that is, becoming 1-year-olds, will have been reduced to 5,000. The 5,000 male yearlings which left the island in the previous season will now have been reduced to 3,200; and so, in like manner, every class of seal will come back older in age by a year, but reduced in numbers, and on the whole, as has been said, the male "herd" will be reduced by 10,000. But as soon as the "herd" thus reduced arrives at the islands, it is again increased by the birth of 10,000 male pups, and so the equilibrium is maintained. (All this can be seen from an inspection of Table (*a*).

United States Case, p. 352, 3rd line from bottom.

Diagram (C) in the United States Case shows the state of things produced by what the United States Commissioners designate as "*properly regulated killing*" of males, or as they also express it "*the male portion of the same herd, when judiciously worked by man*".

United States. Diagram (C). United States Case, p. 355. United States Case, p. 355, line 22.

This "herd" would, as the United States Commissioners explain, "*be greatly diminished, and the census of the whole herd correspondingly lessened, but when once reached the new condition would be constant and self-sustaining;*" and they estimate this reduction as being "to nearly one-half of what it would be in the undistured condition". On their Diagram (C) they mark the new size of the "herd" as 23,568 male seals.

United States Case, p. 356, line 20.

United States Case, p. 357, line 1.

A Table (*c*) has been prepared from the United States Diagram (C) showing the various numbers of seals in the reduced "herd" of various ages. When added up, the total comes to 23,680 (a figure not very different from that given by the United States Commissioners. For all practical purposes the difference is quite immaterial).

The yearly killing of males between 2 and 5 years on the islands, which has caused this reduction, is estimated by the United States Commissioners at 2,100,* and has been marked by them on Diagram (C).

At a first glance, it may appear surprising that so small a killing as 2,100 males *per annum* can reduce the "herd" so largely as is shown on Diagram (C). But it must be remembered that the killing all takes place among male seals from 2 to 5 years of age. Thus, for instance, the male 3-year-olds, which under natural conditions would be 2,400 in number, are by land killing reduced to 1,900. That number 1,900 is next year by natural deaths reduced to about 1,587, and then by killing on land is further reduced to 1,000, and next year the 1,000 by death from natural causes

* See Note at end.

and land killing is reduced to 300 male seals. Hence, while in five years natural deaths would reduce 10,000 male pups to 1,840, natural causes and land killing together would, in the same period, reduce 10,000 male pups to 300. If the killing of male seals took place *pro ratâ* among seals of all ages, it would reduce the "herd" to a very much less extent, for it is obvious (without entering upon abstruse calculations of the value of male life at various ages to the breeding power of the herd) that the seals which will be most valuable for breeding purposes are those which are just entering on adult life, having escaped the heavy mortality attendant upon extreme youth, and having a long prospective period of breeding before them. The United States Commissioners' Diagrams make it very apparent that the system of land killing hitherto adopted takes exclusively the young mature life of the herd, and when this is considered, the reduction in virile male life shown in the Diagrams becomes explicable.

The numbers of the various ages of female seals shown in Diagram (B) are identical with those of the male seals at corresponding periods of life, and may thus be seen from Table (*a*). On adding them up, we find that the following are the assumed numbers of female seals out of a "herd" of 40,025, shown by Diagram (B):

United States Case, p. 353, last line.

Young females, under 3 years	18,200
Breeding females	20,960
Decrepit	855
Total	40,025

If the figures in the various Tables be raised proportionately from a natural "herd" of 80,050, which by the killing of 2,100 annually is permanently reduced to 63,680, to a natural "herd" of 3,001,875, which by the killing of 78,750 *per annum* is permanently reduced to 2,388,937, we shall have in the "herd":

	Natural condition.	Reduced condition.
Male pups	375,000	375,000
Male yearlings	187,500	187,500
Males, from 2 to 5 years	285,000	228,750
Young bulls, from 5 to 7 years	131,250	21,000
Breeding bulls	510,750	74,250
Decrepit	11,437	1,500
Total males	1,500,937	888,000
Female pups	375,000	375,000
Females, from 1 to 3 years	307,500	307,500
Breeding females	786,000	786,000
Decrepit "	32,437	32,437
Total females	1,500,937	1,500,937

The above figures agree nearly with those given on pp. 357–358 of the United States Case, the latter of which are obviously round numbers.

OBSERVATIONS.

On looking at Table (*a*) we find that according to the estimate of the United States Commissioners the "herd" in its natural condition ought to contain 3,500 young males or young bulls over 5 years of age and under 7 years of age (shown on the United States Diagram (A) by the smaller green area). And we also see that in the natural condition the number of adult males or bulls over 7 years of age, called by the Commissioners "breeding bulls," ought to be 13,620 (shown in the same Diagram by the yellow area).

In order to compare this state of things in the normal healthy condition with the condition of things after "regulated killing" is in continuous operation, we turn to Diagram (C) and Table (*c*), when we find that the young bulls are now reduced from 3,500 to 560, and that the breeding bulls are reduced from 13,620 to 1,980. In other words, the number of virile males available for the rookeries is less than one sixth of what it was before. (This is irrespective of the question whether some even of those which remain have been injured by driving, or are for any other reason unfit for service.)

On looking at the Diagrams and comparing them, it is clear that this enormous diminution of the breeding bulls (so out of proportion to the yearly number of males killed, viz., 2,100) is really due to the excessive killing of young male life. This is especially shown by the rapid drop of the curve on Diagram (C).

It is asserted by the United States Commissioners that the 1,980 bulls left, can fertilize the female cows as effectively as 13,620. It seems hard to believe that, if this be so, Nature should have created so many bulls to serve no purpose, or that natural male life can be interfered with to so large an extent without injuring the reproductive powers of the "herd."

2. It is also seen that if, out of a natural "herd" of 40,000 males, man kills on land each year 2,100 (that is about one-twentieth of their number), the male "herd" gradually declines, until, when equilibrium has again been reached, the male "herd" is only about one-half its original size. The land killing of a certain number of seals every year produces, therefore, far more than a *pro tanto* reduction in the size of the "herd".

United States Argument p. 198.

3. It is stated on the part of the United States that every death of a female encroaches *pro tanto* upon the normal numbers of the "herd," and if prosecuted to any considerable extent will lead to extermination. This is not correct. By the *pro tanto* diminution of the "herd" is meant its reduction in a geometrical proportion, thus leading to extinction. The error of this theory may be seen as already stated, by noting that if it were true, the killing of even one female a year above the natural proportion (as by the permanent increase of the killer-whales by one extra whale), would thus lead to extinction. But such a result

is manifestly absurd. If in a natural condition each female bore on an average only one female pup, the death of such a pup before it had in its turn borne a female pup to replace it, would of course produce such an effect. But each cow, according to the United States Commissioners, produces fifteen pups, so that there is a large reserve to meet possible causes of death without diminishing the "herd," even if some are killed before they reach the breeding age at all.

See Diagram (B), United States Case, p. 353.

4. The Diagrams also show that when the seals are in a natural condition, there is a yearly death from natural causes of 20,000 seals (10,000 male and 10,000 female). This destruction arises from disease and killing by killer-whales and other natural enemies. It is mostly effected at sea, and is entirely indiscriminate as to sex. If, then, pelagic killing, without distinction of sex, be so destructive as is argued by the United States, it is difficult to see how, on the *pro tanto* theory, the natural pelagic killing at sea, without distinction of sex, of 20,000 seals annually out of a "herd" of 80,000 of both sexes, should not long ago have extirpated the "herd;" or, on the other hand, why, if so large a destruction has not extinguished the "herd," a comparatively small addition to that killing should be alleged to have suddenly produced so destructive an effect.

5. In the above Tables and the Argument of the United States' Commissioners it is assumed that every breeding seal, male or female, lands at the islands every year.

6. The above-mentioned large reduction in the numbers of breeding bulls, which is, according to the United States Commissioners, produced by regulated killing, would lead to an expectation that when land killing had been practised for some time the size of the harems would be increased, and the competition of the bulls for females diminished. Of course the killing of females at sea would tend to produce a contrary effect.

7. If the killing of 2,100 males out of a "herd" of 80,000 seals, or, what is the same thing, the killing of 78,750 males, or in round numbers 80,000 males, out of a "herd" of 2,380,000 seals of both sexes, is the most that can be effected without depleting the "herd," it is evident, on the United States Commissioners' showing, that the 100,000 males yearly killed on the islands has been too large a number, unless the "herd" has, during the period in which it was done, exceeded 3,000,000. The United States Commissioners assert that this has not been the case. On the contrary, they say that the "herd" has largely decreased within six or seven years before 1891. They seem to estimate this decrease as having reduced the "herd" to one-half its former quantity, but the estimates are conflicting. The natives and Daniel Webster consider that the decline began in 1877–78. In any case it is quite clear that the killing of 100,000 seals has been far too large according to the estimates shown by the United States Commissioners' Diagrams, and would fully account for the diminution of the "herd" without reckoning the pelagic sealing.

United States Case, p. 358.

United States Case, p. 333, line 9.

Page 337, line 18.

It is difficult to discover how the United States Commissioners arrived at this figure, 2,100. It seems more correct to place it at 1,707*. In which case the yearly killing of males out of a "herd" of 2,380,000 ought not to exceed 64,012 acccording to their Diagrams.

Table (a) showing the number of male seals of various ages represented in Diagram (A), of the U. S. Commissioners as making up the "herd" of 40,025 male seals.

Pups	10,000		
1-year-olds	5,000		
2 "	3,200	7,600	
3 "	2,400		
4 "	2,000	3,500 young bulls (green).	
5 "	1,840		
6 "	1,660		
7 "	1,500	13,620 breeding bulls (yellow).	
8 "	1,410		
9 "	1,360		
10 "	1,330		
11 "	1,260		
12 "	1,240		
13 "	1,150		
14 "	1,120		
15 "	1,050		
16 "	930		
17 "	740		
18 "	560		
19 "	365		
20 "	0		
Total	40,025		

*NOTE.—This figure (1,707) is arrived at by examining the successive diminutions of particular classes of seals due to natural causes and to land killing. An examination of Tables (a) and (c), shows that natural causes reduce the 3-year-olds from 2,400 to 2,000 in a year, or 16⅔ per cent., and that the similar decrease of the 4-year-olds is 2,000 to 1,840, or 8 per cent. Now, from the Tables it is seen that in one year 3,200 male 2-year olds are reduced by natural causes to 2,400, and these 2,400 males are again reduced by land killing to 1,900, that is to say, 500 are land-killed. These 1,900 are next year reduced from natural causes by 16⅔ per cent., that is, to 1,587, and thus, in order to bring them down to the 1,000 shown in the Table, 587 must be killed on land. The 1,000 are again reduced by natural causes by 8 per cent., viz., to 920, of which if 620 are killed on land, we get the 300 5-year-olds shown in the Table. The total annual killing on land would thus be—

500	3-year-olds.
587	4 "
620	5 "
Total....1,707	

Table (e), showing the number of male seals of various ages represented in Diagram (C) as making up the herd of 23,680 male seals.

Pups	10,000		
1-year-olds	5,000		
2 "	3,200	6,100	
3 "	1,900		
4 "	1,000		
5 "	300	560	young bulls (green).
6 "	260		
7 "	205	1,980	breeding bulls (yellow).
8 "	202		
9 "	201		
10 "	199		
11 "	198		
12 "	195		
13 "	180		
14 "	160		
15 "	150		
16 "	120		
17 "	100		
18 "	70		
19 "	40		
20 "	0		
Total	23,680		

IV.

OBSERVATIONS OF THE UNITED STATES COUNSEL UPON THE PAPER SUBMITTED BY THE COUNSEL FOR GREAT BRITAIN TO THE ARBITRATOR SINCE THE CLOSE OF THE HEARING.

The Agent of the United States has received notice from the Agent of Great Britain of the submission of a new paper to the Arbitration.

The paper is entitled "Observations upon the Tables put in by Mr. Phelps on July 6, 1893". The paper therefore *purports* to be confined to observations upon certain tables which the counsel for Great Britain had not had previous opportunity of examining. This is apparently designed as a defence, or apology, for the action, certainly irregular, of submitting an argumentative paper after the hearing, and without leave. If the paper were confined to what purports to be the contents of it, namely, observations upon the tables referred to, there might be some excuse for it; but these observations occupy less than a page and a half of the document. The remaining six pages consist of a wholly new argument, designed to show that the annual taking of 100,000 males when the herd is in a normal condition tends to destroy the virile life of the herd.

The Counsel for the United States cannot help observing that the submission of such a document is wholly irregular: but a failure to take notice of it although quite justifiable, might be misinterpreted.

A careful examination by the Arbitrators of the contents of this paper, should they choose to give it any examination, would suggest the answer to it; but a few observations upon it, necessarily hasty, may be of service.

1. It is said on page 1 of these observations: "It is not of course denied that the killing of breeding females or males to a very large extent might in time produce a diminution in the herds, but it is contended that the effect sought to be established by Mr. Phelps' tables are incorrect and exaggerated."

But if the killing of females "to a very large extent" tends to produce a diminution in the herds, as every one can see that it must, and if, indeed, as every one can see, the killing of females to a small extent even must have such tendency, the material point is to ascertain to what an extent such killing of females can be carried without causing substantial diminution in the numbers; but this problem, the only material one, the counsel for Great Britain neither in this paper nor in the course of their argument make any effort to solve, unless by the suggestion in these observations, that it appears from the tables that the annual killing of 20,000 females would create no loss which would not be counter-acted and supplied by the increase of the surviving females.

The suggestion is that according to the rate of increase of each female upon which the tables submitted by Mr. Phelps is based, if

200,000 females out of a herd of 800,000 breeding females were killed in one year, the loss would be more than made up by the progeny of the remaining 600,000 at the end of ten years.

The error of this suggestion consists in this, that the diagrams of the United States Commissioners upon which the table submitted by Mr. Phelps was prepared assume the herd to be in its *normal condition of stability*, where the deaths are equal to the births; that is to say, a condition in which the herd will not increase in numbers; whereas the calculation in the paper referred to of the British counsel makes the herd increase, thus contradicting the assumption.

It may, indeed, be true that a hypothetical herd of females assumed by the American Commissioners, and the ratio of diminution assumed by their tables, may be too small or too large, one or both, for there is no evidence upon which the correctness of such assumptions can be determined. This is expressely stated by the Commissioners, and their diagrams are framed only for the purpose of illustrating, on the one hand, the effect upon the numbers of the herd produced by natural causes which are not under the control of man, and, on the other hand, the effect produced by those same causes in conjunction with another cause, which is under the control of man, namely, the killing by the hand of man.

It is stated in this paper that the 600,000 breeding females left in the herd after the killing of 200,000 would become in the course of ten years 1,312,200. This may be true, but, at the same time, the 200,000 killed would, on the same hypothesis, become at the end of ten years 437,800, that is to say, would augment the herd by 237,800. Thus it is seen that this killing of females would vastly diminish the *increase* of the herd. If we assume, as the United States Commissioners assumed in framing their diagrams, and as we have every reason to believe the fact was when the hand of man was first interposed, that the herd had reached its normal stationary condition, this diminution in the increase occasioned by the killing of females immediately becomes a diminution below the normal numbers of the herd.

If it were possible to ascertain what the exact numbers of the herd were in its normal condition, and also what the ratio of decrease from natural causes was, the diminution created by the slaughter of females might be accurately represented in numbers; but, in the absence of knowledge upon this point, we are compelled to resort to conjectural assumptions, which, while they fail to afford us the means of stating the diminution in accordance with the fact, nevertheless enable us to illustrate such diminution.

2. It is further said, on page 1 of this paper: "Thus Mr. Phelps' Table A shows that the seal does not differ from other polygamous animals, such as deer, of which a reasonable proportion of females are annually killed, in carefully managed preserves without injury".

This may be true in respect to a "carefully managed preserve", but the implication is, and surely the fact must be, that such a course cannot be taken anywhere else except in a "carefully managed preserve". A *preserve* can only support and accommodate a certain number, and if the natural increase tends to exceed that number, it is proper, and may indeed be necessary, to reduce the herd by the killing of females. If the learned counsel for Great Britain had indicated by what rules, regulations, limitations and restrictions this herd of seals, when on the seas, could be treated as a "carefully managed preserve", their observations might be more instructive.

3. It is further observed, on page 2 of the paper: "The argument that the killing of every breeding female decreases the herd *pro tanto* in a geometrical ratio, is obviously untenable, otherwise those "indiscriminate pelagic sealers" the killer whales and the native Indians, would have long since destroyed the herd."

These observations indicate great misapprehension. There is an enormous tendency to increase in all animal life; this tendency is moderated and diminished by the various enemies to which such life is subjected, and, in the case of seals, by such enemies as killer whales, deficiency of food and the killing by native Indians pursued long anterior to the discovery of the islands, and which is treated by the United States Commissioners, as it properly should have been, as one among the *natural causes* of diminution. Killing by the hand of man in the sea and upon the land are *additional causes* brought to operate upon the herd *after it had reached its normal condition of stability* under the operation of all other causes of diminution.

4. The residue of the paper seems designed to show that the annual taking of 100,000 young males in the manner practiced by the United States was too great a draft upon the herd, even in its condition before pelagic sealing was practiced. If there is any force in this view, it must be in the assertion, or suggestion, that the reduction in a hypothetical herd (numbering of all sexes and ages, 80,000), from 13,620 breeding bulls to 1980, brought about by a killing of young males in the manner and to the extent practiced on the islands, is fatally excessive, as impairing the virile power of the herd. It is enough to say, in answer to this, that the reduced number of 1980 gives one breeding bull to ten females, there being in this hypothetical herd 20,960 females. The known capacity of each breeding bull ranges, as the evidence shows, from 20 to 50 females.

5. It is observed in this paper (p. 5): "It is asserted by the United States Commissioners that the 1980 bulls left can fertilize the cows as effectively as 13,620. It seems hard to believe that, if this be so, Nature should have created so many bulls to serve no purpose, or that natural life can be interfered with to so large an extent without injuring the reproductive powers of the herd."

Nature undoubtedly has many inscrutable mysteries, but this does not seem to be among the number of them. Does not nature do the same thing in the case of horses and cows and bovine cattle, and many other animals? In all these instances the same number of males and females are born, and yet one male suffices for a much larger number of females than even in the case of the seals. The purpose seems to be plain enough. At all events, we know what the consequence is, and it is fair to presume that such was the intended purpose of nature. It easily enables a husbandry to be carried on by taking the superfluous male life which would otherwise be expended in internecine conflicts, and devoting it to the purpose of man. Whenever in the case of these domestic animals the numbers are increased, as they easily may be, to such an extent as to become unprofitable, economic laws furnish a remedy, and the owners proceed by the killing of females to diminish the herds which have become too abundant for profit. These are the conditions and the only conditions under which it is ever permissible to slaughter the females of useful animals. Such conditions can never arise in the case of the seals. The annual demand for them far exceeds the supply, and even if this demand should cease, the feeding of the herd is no burden upon the resources of man.

6. The rather fanciful suggestion has been made that drafts upon male life, caused by these internecine conflicts, involve the survival of the "fittest", and that by making large drafts from the males these conflicts are prevented. We have better means of knowing whether the contests are still carried on among the males than *a priori* reasoning affords. The *fact* is open to observation. It is overwhelmingly proved, and without any dissent, except that of Elliott, that such contests are still earnestly waged. But aside from this, is it reasonable to suppose that males engaged in frequent contests, lasting for hours and sometimes all day, and frequently resulting in death, are better fitted for the office of reproduction than other males in a herd in which their proportion to that of females, and consequently the occasion for such contests, was much less?

7. Finally, the question whether the annual draft of 100,000 which has been practiced upon the island is excessive or not, is also susceptible of a conclusive answer, not affected by the incertainties of *a priori* reasoning. The experience of this herd for half a century leaves no room for doubt upon this point. We know that the Russians, whose drafts were governed, not by the capacities of the herd, but by the demand in the market, took during the later period of their occupation from fifty to seventy thousand young males annually, and that, under this draft, the herd not only maintained its numbers, but very largely increased, and was, at the time of the transfer to the United States, in a condition of abounding prosperity. We know that the United States, thereafter, in the face of an excessive and somewhat indiscriminate slaughter of 240,000 in the year 1868 regularly made the draft of 100,000 up to the year 1884, without effecting any diminution in the normal numbers of the herd. It is indeed probable that the effects of pelagic sealing had then begun to make themselves manifest in a slight degree, and it is certain that from that time they began to have a decisive influence. The United States has never pretended that it could safely continue to make the draft of 100,000 after the birth-rate became diminished by the effects of pelagic sealing. Had the Government known, prior to 1890, the extent of the diminution thus effected, it would undoubtedly have diminished its drafts and pressed more earnestly for the suppression of this destructive pursuit.

But what is to be said of the consistency of those who, in the case of a polygamous animal like the seal, insist that the annual taking of 100,000 young *males* is too large, and tends to a diminution of the herd, and yet insist upon the continuance of a practice which, even when restricted and regulated as proposed by them, would necessarily involve the annual slaughter of 40,000 *females*, and probably many more?

O

Waukegan Public Library and Reading Room.

EXTRACTS FROM RULES.

I. One volume only can be taken on one account

II. No person shall lend a book drawn from the library to anyone not a member of same household.

III. Books can be retained two weeks, and may be renewed for one week.

IV. A fine of five cents a day shall be paid on each book or work which is not returned according to the provisions of the above rules. To this fine shall be added the expense of collecting and serving notice. No book shall be issued to any person incurring such fine until it has been paid.

V. Writing or marking, or in any way defacing or mutilating books, is prohibited; and all injuries to books beyond reasonable wear, and all losses, shall be promptly adjusted to the satisfaction of the Board of Directors or Librarian.

VI. An application for all books must be presented to the attendant; no person will be allowed admission to the shelves unless vouched for by one of the Trustees.

Acme Library Card Pocket.

Under Pat. Sept. 26, '76, "Ref. Index File"

MADE BY LIBRARY BUREAU.

CHICAGO. NEW YORK. BOSTON

Keep your Card in this Pocket.

HR
SY 238
F8
1895
v.15
c.1