

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

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to the Treaty extending the right of fishing, signed at Washington
on 5 June 1854**

8 April 1858

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* Reprinted from H. La Fontaine, *Pacific International: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Berne, 1902, Imprimerie Stampelli & CIE, p.437; and from John Bassett Moore, *International Arbitrations to which the United States has been a party*, vol. I, Washington 1898, Government Printing Office, p. 459.

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* * * * *

**Treaty extending the right of fishing, signed at Washington,
June 5, 1854. (Extract)**

The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain to avoid further misunderstanding between their respective citizens and subjects in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I of a convention between the United States and Great Britain signed at London on the 20th day of October 1818; and being also desirous to regulate the commerce and navigation between their respective territories and people, and more especially between Her Majesty's possessions in North America and the United States, in such manner as to render the same reciprocally beneficial and satisfactory, have, respectively, named Plenipotentiaries to confer and agree thereupon, that is to say:

The President of the United States of America, William M. Marcy, Secretary of State of the United States, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, James, Earl of Elgin and Kincardine, Lord Bruce and Elgin, a peer of the United Kingdom, Knight of the most ancient and most noble Order of the Thistle and Governor General in and over all Her Britannic Majesty's provinces on the continent of North America, and in and over the Island of Prince Edward;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. It is agreed by the high contracting parties that in addition to the liberty secured to the United States fishermen by the above-mentioned convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of Canada, New-

Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish: provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coast in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

And it is further agreed that, in order to prevent or settle any disputes as to the places to which the reservation of exclusive right to British fishermen contained in this article, and that of fishermen of the United States contained in the next succeeding article, apply, each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a Commissioner. The said Commissioners, before proceeding to any business, shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under this and the next succeeding article, and such declaration shall be entered on the record of their proceedings.

The Commissioners shall name some third person to act as an Arbitrator or Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person and it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in cases of difference or disagreement between the Commissioners. The person so to be chosen to be Arbitrator or Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on the record of their proceedings.

In the event of the death, absence, or incapacity of either of the Commissioners, or of the Arbitrator or Umpire, or of their or his omitting, declining, or ceasing, to act as such Commissioner, Arbitrator, or Umpire, in the place and stead of the person so originally appointed or named as aforesaid, and shall make and subscribe such declaration as aforesaid.

Such Commissioners shall proceed to examine the coasts of the North American provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein.

The decision of the Commissioners and of the Arbitrator or Umpire shall be given in writing in each case, and shall be signed by them respectively. The

high contracting parties hereby solemnly engage to consider the decision of the Commissioners conjointly or of the Arbitrator or Umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively.

ARTICLE II. It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern sea coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea coast and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish.

Provided, that in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery and that salmon and shad fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

[...]

ARTICLE VII. The present treaty shall be duly ratified, and the mutual exchange of ratifications shall take place in Washington within six months from the date hereof, or earlier if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in triplicate, at Washington, the fifth day of June, anno Domini one thousand eight hundred and fifty-four.

**Award of the Umpire dated at Saint John,
New Brunswick, April 8, 1858.**

By the third Article of the Treaty of 1783 between Great Britain and the United States it was stipulated, "That the people of the United States should continue to enjoy unmolested the right to take fish of every kind in the Grand Bank, and on all the other Banks of Newfoundland: also in the Gulph of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time theretofore to fish. That the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishery shall use (but not to cure or dry them on the island) and also on the coasts, bays and creeks of all His Majesty's dominions in America. And that the American fishermen shall have liberty to

dry and cure fish in any of the unsettled bays, harbours and creeks in Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled: but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.” The War of 1814, between Great Britain and the United States, was held by the former to have abrogated this stipulation, and the declaration of peace, and Treaty of Ghent, which subsequently followed, were entirely silent on the point. This silence was intentional – during the negotiations the question had been expressly raised – and the claim of the United States to the continued enjoyment of the rights secured by that stipulation denied. By the Convention of the 20th October 1818, the privilege of the Fisheries within certain limits was again conceded to the United States – and the United States by that Convention “renounced any liberty before enjoyed or claimed by them, or their inhabitants, to take, dry or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of any of the British dominions of America, not included within that part of the Southern Coast of Newfoundland extending from Cape Ray to the Rameau Islands: on the Western and Northern Coast of Newfoundland, from Cape Ray to the Quirpon Islands – on the shores of the Magdalen Islands – and also on the coasts, bays harbours, and creeks, from Mount Jolly on the South of Labrador, to and through the Straits of Bellisle, and thence Northerly along the Coast”. This concession was to be without prejudice to any of the exclusive rights of the Hudson Bay Company, and the American Fishermen were also to have the liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the Southern part of the Coast of Newfoundland therein described, and of the Coast of Labrador, but so soon as the same or any portion thereof should be settled, it should not be lawful for the said Fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground and was further subject to a proviso, that the American Fishermen should be permitted to enter the bays and harbours in His Britannic Majesty’s dominions in America, not included within those limits, for purpose of shelter, and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever.

But they should be under such restrictions as might be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them.

A difference arose between the two countries, Great Britain contending that the prescribed limits “of three marine miles”, the line of exclusion should be measured from headland to headland, while the United States Government contended it should be measured from the interior of the bays and the sinuosities of the coasts.

The mutual enforcement of these positions led to further misunderstandings between the two countries.

To do away with the causes of these misunderstandings, and to remove all grounds of future embroilment, by the treaty of Washington, June 5th, 1854, it was by Article 1st agreed:

“That in addition to the liberty secured to the United States Fishermen by the above-mentioned Convention of October 20th, 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind (except shell-fish) on the sea coasts and shores, and in the buys, harbours and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several Islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those Colonies, and the Inlands thereof, and also upon the Magdalen Islands for the purpose of drying their nets and curing their fish: provided that in so doing, they do not interfere with the rights of private property, or with British Fishermen in the peaceable use of any parts of the said Coast, in their occupancy for the same purpose.

“It is understood that the above-mentioned liberty applies solely to the Sea Fishery, and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and the mouths of River, are hereby reserved exclusively for British Fishermen”.

By Article the 2nd:

“It is agreed by the high contracting parties, that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind (except shell-fish), on the eastern sea coasts and shores of the United States, North of the 36th parallel of North Latitude, and on the shores of the several Islands thereunto adjacent, and in the bays, harbours and creeks of the said sea coasts and shores of the said United States, and of the said Islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the Islands aforesaid for the purpose of drying their nets and curing their fish: provided that in so doing they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose. It is understood that the above mentioned liberty applies solely to the Sea Fishery: and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and the mouths of Rivers, are hereby reserved exclusively for Fishermen of the United States”.

By the 1st Article it was also further agreed:

“That in order to prevent or settle any dispute as to the places to which the reservation of exclusive right to British Fishermen contained in this Article, and that of Fisherman of the United States contained in this second Article, should apply each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a Commissioner. The said Commissioners before proceeding to any business shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide to the best of their judgment, and according to justice and equity, without fear, favour, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under the said two articles. In case of disagreement, provision is made for an umpire, and the high

contracting parties solemnly engage to consider the decision of the commissioners conjointly, or of the arbitrator or umpire, as the case may be absolutely final and conclusive in each case decided upon by them, or him, respectively”.

By Article 3, the Treaty was to “take effect as soon as the laws required to carry it into operation should be passed by the Imperial Parliament of Great Britain, and by the Provincial Parliaments of those British North American Colonies which are affected by this Treaty, on the one hand, and by the Congress of the United States on the other”.

It is understood that, in making this last Treaty, neither Government admitted itself to have been in error, with reference to the position it had before maintained. The Treaty was emphatically an arrangement for the future: “The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain (as declared in the preamble) to avoid further misunderstanding between their respective citizens and subjects, in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I of a Convention between the United States and Great Britain, signed at London on the 20th day of October 1818”.

The Commissioners appointed under the provisions of this Treaty, proceeded to examine and decide upon the places intended to be reserved and excluded from the common liberty of fishing under the 1st and 2nd Articles. They differed in opinion as to the places hereinafter named, and it has been submitted to me as umpire under the provisions of that Treaty, to determine those differences.

The copies of the Records of disagreement between the Commissioners, transmitted to me, are as follows:

RECORD N^o 1. We, the undersigned, Commissioners respectively on the part of Great Britain and the United States, under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having met at Halifax, in the Province of Nova Scotia, on the 17th day of August, A. D. 1855, thence proceeded to sea in the British Brigantine “Halifax” and passing through the Strait of Canso, first examined the River Buctouche, in the Province of New Brunswick.

A survey was made of the mouth of the said River Buctouche by the surveyors attached to the Commission, George H. Perley, on the part of Great Britain, and Richard D. Cutts, on the part of the United States, a plan of which, marked N^o 1, and signed by the Commissioners respectively, will be found in Record Book N^o 2. We, the Commissioners, are unable to agree upon a line defining the mouth of said River.

Her Majesty’s Commissioner claims that a line from Glover’s Point to the Southern extremity of the Sand Bar (marked in red upon the foresaid Plan N^o 1) designates the mouth of the said River Buctouche: the United States Commissioner claims that a line from Chapel Point, bearing South, 4^o West

(magnetic), marked in blue on the aforesaid Plan N° 1, designates the mouth of said river: and of this disagreement record is here made accordingly.

Dated at Buctouche, in the Province of New Brunswick, this 19th day of September, A. D. 1856.

RECORD N° 2. We, the undersigned Commissioners respectively, on the part of Great Britain and the United States, under the reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the river Miramichi, in the Province of New Brunswick, are unable to agree upon a line defining the mouth of said River.

Her Majesty's Commissioner claims that a line connecting Fox and Portage Islands, marked in red, Plan 2, Record Book N° 2, designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point, marked in blue on Plan N° 2, Record Book N° 2, designates the mouth of said River; and of this disagreement record is here made accordingly.

Dated at Chatham, on the Miramichi, in the Province of New Brunswick, on this 27th day of September A. D. 1855.

RECORD N° 9. We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Elliot River, emptying into Hillsborough Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, do hereby agree and decide, that a line bearing North, 85° East (Magnetic) drawn from Block House Point, to Sea Trout Point, as shown on Plan 7, Record Book N° 2, shall mark the mouth, or outer limit, of the said Elliot River; and that all the waters within, or to the Northward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of Treaty aforesaid.

Her Majesty's Commissioner, in marking the above line, claims the same as defining the joint mouth of the Elliot, York, and Hillsborough Rivers.

The United States Commissioner agrees to the above line as the mouth of the Elliot River only, not recognizing or acknowledging any other River.

Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

RECORD N° 10. We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Montague River, emptying into Cardigan Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, do hereby agree and decide, that a line bearing North, 72° East (magnetic), drawn from Grave Point to Cardigan Point, as shown on Plan 7, Record Book N° 2, shall mark the mouth, or outer limit, of the said Montague River; and that all the waters

within, or to the Westward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second Articles of the Treaty aforesaid.

Her Majesty's Commissioner, in marking the above line, claims the same as defining the joint mouth of the Montague and Brudenell Rivers.

The United States Commissioner agrees to the above line, as marking the mouth of the Montague only, not recognizing, or acknowledging any other River.

Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

RECORD N° 11. We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Coasts of Prince Edward Island, one of the British North American Colonies, are unable to agree in the following respect:

Her Majesty's Commissioner claims, that the undermentioned places are Rivers, and that their mouths should be marked, and defined, under the provisions of the said Treaty:

Vernon, Orwell, Seal, Pinnette, Murray, Cardigan, Boughton, Fortune, Souris, S^t Peter's (designated S^t Peters Bay on the Map of the Island), Tryon, Crapaud, Winter, Hunter, Stanley, Ellis, Foxley, Pierre Jacques, Brae, Percival, Enmore, Ox, Haldiman, Sable.

The United States Commissioner denies that the above-mentioned places are Rivers, or such places as are intended to be reserved and excluded from the common liberty of fishing.

Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

It will thus be seen that the differences between the Commissioners resolve themselves into two divisions:

1st. – Whether the twenty-four places named in Prince Edward Island, or any of them, as is contended by Her Majesty's Commissioner, are to be deemed Rivers, and therefore reserved and excluded from the common liberty of the Fishery? Or whether, as is contended by the United States Commissioner, these places, or some of them, are not Rivers, and therefore open to the common liberty of the Fishery?

2nd. – The Miramichi and Buctouche in New Brunswick, being admitted to be Rivers, by what lines are the mouths of those Rivers respectively to be determined?

In coming to any conclusion on these points, it is unquestionably the duty of the Umpire, to look at the spirit and object of the Treaty, – the causes of difficulty it was intended to remove, – the mode of removal proposed.

The classes of fish sought for in the deep sea Fisheries strike within “three marine miles” from the shore; the “Bays” within the headlands are their places of resort, but unlike the salmon or the shad, they do not ascend the Rivers, or particularly seek their entrances. To prosecute the Mackerel Fishery with success, the right of fishing “on the sea coast and shores” within three marine miles, and within the “Bays” with the privilege of landing for drying nets and curing fish was absolutely necessary: the convenience of a “Harbour”, and the right of fishing therein, desirable.

A “creek”, which Webster and Maunders both define to be, according to English usage and etymology, “a small inlet, bay or cove, a recess in the shore of the sea, or of a river” and which though in some of the American States, “meaning a small River, Webster says, is contrary to English usage, and not justified by etymology”, would also in many instances afford accommodation. A right to the “sea coast and shores” – to the “Harbours” and the “Creeks” would thus afford the fisherman all that he would require, and leave to the Rivers, rising far in the interior of the respective countries, and flowing by the homes and the hearths of a different nation, the sacred character which would save them from the stranger’s intrusion.

PART FIRST.

The question then that first presents itself, are the twenty-four places named, or any and which of them, in Prince Edward Island, to be deemed Rivers?

It is difficult to lay down any general proposition the application of which would determine the question. There is no limitation as to size or volume: the Mississippi and the Amazon roll their waters over one fourth of the circumference of the earth. The “Tamar”, the “Ex” and the “Tweed” would hardly add a ripple to the S^t Lawrence: yet all alike bear the designation, are vested with the privileges, and governed by the laws and regulations of Rivers. It is not the absence of prevalence of fresh or salt, water: that distinction has been expressly ignored in the celebrated case of Horne against McKenzie on appeal in the House of Lords. It is not the height or lowness of the banks: the Rhine is still the same River, whether flowing amid the mountains of Germany or fertilizing the low plains of Holland. It is not the rise or fall of tide, or the fact that there may be little, or any water, when the tide is out. The Stour and Orwell in England, are dry at low water, yet they have always been recognized and treated as Rivers. The Petitcodiac in New Brunswick, the Avon in Nova Scotia, owe their width, their waters, their utility, entirely to the Bay of Fundy; yet their claim to be classed among Rivers has never been doubted. The permanent or extraordinary extent of the stream, in cases where not at all or but little influenced by the tides is no criterion. The periodical thaws and freshets of Spring and Autumn in America make rivers of vast

magnitude, useful for a thousand commercial purposes, in places where, when those thousand freshets have passed away, their dry beds are visible for weeks. The term "flottable" applied to such streams, is well recognized in the Courts of the United States, classing them among rivers, and clothing the inhabitants upon their banks with the rights of riparian proprietors, and the public at large with the privilege of accommodation.

An important test may be said to be the existence or nonexistence of bars at the mouths of waters or streams running into the sea. The existence of such bars necessarily presupposes a conflict of antagonistic powers. An interior water forcing its way out, yet not of sufficient strength to plough a direct passage through the sands accumulated by the inward rolling of the sea, would necessarily diverge, and thus leave a bar in front of its passage, just at that distance where the force of its direct action would be expended. Some rivers, such as the Mississippi and the Nile, make deltas, and run into the sea.

In these cases, the extreme land would give a natural outlet. Others again run straight into the sea, without any delta, and without any estuary. In these cases, the bar at the mouth would give a natural limit: but the bar at the mouth is equally characteristic of its being a river. There are cases again, where the estuary gradually widening into the sea, leaves neither bar nor delta to mark its outlet, or determine its character. In such cases, for the latter object, other grounds must be sought on which to base a decision: and in making the former, the exercise of a sound discretion could be the only guide.

The decision upon any such question must, after all, be more or less arbitrary. The physical features of the surrounding country, the impressions created by local inspection, the recognized and admitted character the disputed places have always borne, constitute material elements in forming conclusion. The possibility that the privileges conceded by this Treaty may be abused, can have no weight. There will doubtless be found in both countries men who will disregard its solemn obligations, and take advantage of its concessions, to defraud the revenue, violate local laws, and infringe private rights, and in thus disgracing themselves, affect the character of the nation to which they belong: they will, however, meet with no consideration at the hands of the honourable and right thinking people of either country. The framers of this Treaty would not permit such minor difficulties to stand in the way of the great object they had in view, to cement the alliance, and further the commercial prosperity of two Empires. Such difficulties can be obviated, if necessary, by national or local legislation.

The Rivers of Prince Edward Island, whether one or one hundred in number, must, as to length, necessarily be small. The Island is in no part much over thirty miles in width, and the streams run through it, more or less transversely, not longitudinally. Captain (now Admiral) Bayfield, the accomplished hydrographer, and Surveyor of the Gulf of S^t Lawrence, thus describes it:

“Prince Edward Island, separated from the Southern shore of the Gulf of the S^t Lawrence by Northumberland straits, is one hundred and two miles long, and in one part about thirty miles broad: but the breadth is rendered extremely irregular by large Bays, inlets, and rivers, or rather sea creeks, which penetrate the Island, so that no part of it is distant more than seven or eight miles from navigable water. Its shape is an irregular crescent, concave towards the Gulf, the Northern shore forming a great Bay, ninety-one miles wide and twenty-two miles deep, out of which, the set of the tides and the heavy sea render it very difficult to extricate a ship, when caught in the Northeast gales which frequently occur towards the fall of the year, occasionally blowing with great strength and duration, and at such times proving fatal to many vessels.”

This passage has been particularly called to my attention in a very elaborate and able statement of his views, placed before me by the United States Commissioner, who further adds, that Sir Charles A. Fitzroy, the Lieut. Governor of the Island of Prince Edward, in an official communication to the British Government, calls the Island Rivers “strictly speaking, narrows arms of the sea”; and that Lord Glenelg, in his reply, alludes to them as “inlets of the sea.”

On examining the Records referred to by the Commissioner, I find the first to be a Dispatch (in January, 1858) from Sir Charles Fitzroy, to the Colonial Secretary, Lord Glenelg, with reference to the reserves for Fisheries, contained in the original grants in the Island, arising out of the Order in Council, under which those grants were issued, and which was as follows:

“That in order to promote and encourage the Fishing, for which many parts of the Islands are conveniently situated, there be a clause in the grants of each Township that abuts upon the sea shore, containing a reservation of liberty to all Her Majesty’s subjects in general, of carrying on a free fishery on the coasts of the said Townships, and of erecting stages and other necessary buildings for the said fishery, within the distance of five hundred feet from high water mark.”

He then states he enclosed for the information of the Government – “a return showing the several reserves for this purpose contained in the different Townships, from which it will appear that the reservation as contemplated in the Order of Council has been strictly followed in only twelve Townships. In thirty-two Townships the reservation is as follows – ‘and further saving and reserving for the disposal of His Majesty, his heirs and successors, five hundred feet from high water mark, on the coast of the tract of land hereby granted, to erect stages and other necessary buildings for carrying on the Fishery’: of the remaining twenty-three Townships, eighteen contain no fishery reservation; and of five no grants whatever are on record.” And he then remarks: – “By reference to apian of the Island annexed to the return, your Lordship will perceive that several of the Townships which do contain reservations abut upon rivers only, or more strictly speaking, narrow arms of the Sea.”

Lord Glenelg, in his reply (May, 1858), says: “It appears to me that the reservation made of lands adjacent to the sea coast, or to the shores of inlets

from the sea, for the purpose of fishing, so far as the right has been reserved to the Queen's subjects collectively, constitute(s) a property, over which the power of the Crown is exceedingly questionable."

It does not appear to me that these passages bear the construction put upon them, or were intended to designate the Island rivers generally, or in any way determine their character. Is it not rather a mere qualified mode of expression used at the time, without any definite object, or perhaps if any, to avoid being concluded by either term? But if the use of a term by one or two of the local authorities is to be deemed of such weight, of how much more weight would be the continued use by the legislature for years of a contrary term? There are Acts of the Assembly vesting rights, imposing penalties, and creating privileges with reference to these waters, under the name and designation of Rivers, to a series of which I call attention, namely: 10 Geo. IV., c. II; 2 Win. IV., c. 2 and 13; 3 Wm. IV., c. 8, 9 and 10; 5 Wm. IV., 3 and 7; 6 Wm. IV., c. 25; 7 Wm. IV., c. 23; 1 Vic., c. 19; 2 Vic., c. 10; 3 Vic., c. 12; 4 Vic., c. 16; 4 Vic., c. 18; 5 Vic., c. 9; 7 Vic., c. 3; 8 Vic., c. 20; 12 Vic., c. 18, 35 and 22; 15 Vic., c. 34; 16 Vic., c. 28. Also to the various reports of the Annual Appropriations and Expenditures, to be found in the Journals of the Legislature.

On an examination of these Acts, it will be found that the Legislature of the Island has by a continued series of enactments, extending over a period of thirty years, legislated upon the "Rivers", "Bays", "Creeks", "Harbours" and "lesser streams" of the Island, recognizing their existence and difference, appropriating the local revenues to their improvement, establishing rights, and creating private interests with reference to them, entirely inconsistent with their being aught but the internal waters and rivers of the Island, and directly at variance with the terms and character of legislation, which would have been used had they been considered "arms" or mere "inlets in the sea". Such Acts by the Congress of the United States, or by the respective Legislatures of the several States, on any matter within their jurisdiction would be regarded as conclusive of the character of the subject legislated upon. The legislation of Prince Edward Island, *in pari materia*, is entitled to the same consideration. The British Government at the present day, neither legislates away, nor interferes with the local administration of the affairs of the Colonies. This very treaty is depended upon the action of the Provincial Parliaments, and based upon the preservation of private rights. Can it be contended, or shall it be admitted, that this Treaty abrogates the Legislation of years, ignores the Laws of the Island, and by implication annuls rights and privileges the most sacred a Colony can possess? Certainly not. If it be desirable from the peculiar conformation of this Island and its waters, that the latter should be viewed in a light different from that in which they have been hitherto regarded, the local Legislature can so determine.

In a very important decision of the Supreme Court of Iowa, reported in the American Law Register, issued at Philadelphia, in August 1857, it was determined, "that the real test of navigability in the United States was

ascertained by *use*, or by *public act of declaration*; and that the Acts and Declarations of the United States, declare and constitute the Mississippi River, a public highway, in the highest and broadest intendment possible". Shall not therefore the public Acts and Declarations of the Legislature of Prince Edward Island be considered of some authority in determining what are the Rivers of that Island? And particularly when those Acts and Declarations were made long anterior to the present question being raised? But might it not also be assumed, that where a country had, by a long series of public documents, legislative enactments, grants and proclamations, defined certain waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a Treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the Treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions previously used, and adopted, would be mutually binding in interpreting the Treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might.

Admiral Bayfield did not intend by the term "sea creeks", as he informs me in reply to a communication on this subject, to convey the impression contended for by the United States Commissioner, that they were not Rivers. He says, under date of 3^d September, 1857: "With reference to the term 'sea creeks', to which your attention has been called as having been used by me at page 92, and various other parts of the Directions, I have used that term in order to distinguish the inlets from the small streams (disproportionably small in summer) that flow through them to the sea.

In the instances referred to, I mean by "sea creeks", inlets formed by the combined action of the Rivers and the Tides, and through which those rivers flow in the channels, more or less direct, and more or less plainly defined by shoals on either side. Wherever there are bars across the inlets, as is very generally the case, I consider the channels through those bars, to form the common entrances from the sea to both Inlets and Rivers; for it appears to me that a River is not the less a River, because it flows through a creek, an inlet, or an estuary. The point where the fresh water enters the estuary, and mixes with the tide waters, may be miles inland, but it does not, I think, cease to be a River until it flows over its bar into the sea.

This view of Admiral Bayfield, that such waters do not lose their character of Rivers because flowing through an inlet, or an estuary, is confirmed by the principles laid down to determine what are "navigable" Rivers, in the technical sense of the term, as distinguished from its common acceptation. To the extent that fresh waters are backwardly propelled by the ingress and pressure of the tide, they are denominated navigable *Rivers*; and to determine whether or not a River is navigable both in the common law, and in

the Admiralty acceptance of the term, regard must be had to the ebbing and flowing of the tide. In the celebrated case of the River Bann, in Ireland, the Sea is spoken of as *ebbing and flowing in the River*. These principles are recognized in the Courts of the United States, and the authorities collated, and most ably commented upon by Angel.

Indeed, it would seem that the Commissioners themselves have not attached to this term "sea creek" as used by Admiral Bayfield, the force or character which it is now alleged it should bear, as they have by their Record N° 10, under date of 27th of September 1856, transmitted to me, with the other official documents in this matter, pronounced the "Montague" to be a River and determined upon its mouth, though Captain Bayfield, in his Sailing Directions, before referred to, page 123, speaks of it as a "sea creek". It has been urged, that if these places are declared to be Rivers, and not creeks or harbours, then where are the creeks and harbours, contemplated by the Treaty. To this it may be answered, that this treaty does not contemplate Prince Edward Island alone – and even though none such might be found within its narrow circle – yet they may be found in numbers along the five thousand miles of coast, exclusive of Newfoundland, which this Treaty covers, extending from 36th parallel of north latitude in the United States, to the furthest limits of Labrador.

With these preliminary observations, I shall take up the disputed places in Prince Edward Islands, and proceed to decide upon them, in the order in which they have been submitted.*

NO. 1. – VERNON

Determining what constitutes a river – sufficient water for navigation at low tide – salinity of water – proximity of ship building facilities - sufficient breadth to require a bridge crossing – surrounding land of the same general formation as other rivers – prior description as a river in Henry Molesley Bayfield's Sailing Directions and in various Acts of Assembly.

Détermination de ce qui constitue un fleuve – niveau d'eau suffisant pour la navigation à marée basse – salinité de l'eau – proximité des chantiers navals – largeur suffisante pour nécessiter un pont de traversée – terrain environnant de même facture générale que celui des rives des autres fleuves – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield Sailing Directions et dans divers actes du Parlement.

* * * * *

* Secretariat note: The following awards were omitted from the instant publication because of their technical or duplicative nature; they are: No. 8 – Fortune; No. 9 – Souris; No. 11 – Tryon; No. 12 – Crapaud; No. 14 – Hunter; No. 18 – Pierre Jacques; No. 19 – Brae; No. 22 – Ox and No. 24 – Sable. They are reproduced in John Bassett Moore, *International Arbitrations to which the United States has been a party*, Vol. I, Washington 1898, Government Printing Office, pp. 461-467.

I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Vernon, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Vernon is entitled to be considered a River.

It has, at low tide, water for boat and shallop navigation. It has good breadth, requiring long and strong bridge to cross it. Vessels are built two miles from its mouth. As you drive along its banks, there would be no hesitation in speaking of it, were no question raised, as a River. It would appear as if the salt water were an intrusion into a channel, formed and supplied by a running stream, enlarging and deepening the channel, but finding it there, the banks and surrounding lands all bearing towards the Vernon the same relative formation as the banks towards admitted Rivers. It is spoken of in Bayfield's Sailing Directions as a River, and as such in various Acts of Assembly.

As such Arbitrator or Umpire, I decide that the Vernon is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A.D. 1858.

JOHN HAMILTON GRAY.

NO. 2. – ORWELL.

Determining what constitutes a river – prior description as a river by Bayfield, in Public Acts and in ancient land grants.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield, dans des actes officiels et dans d'anciens actes de concessions territoriales.

* * * * *

I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Orwell, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as is disclosed in Record No. 11 of their proceedings, am of opinion that the Orwell is entitled to be considered River.

It is spoken of by Bayfield, in conjunction with the Vernon, as a River; has been recognized as such in the Public Acts of the Island; and described under that designation, as boundary in the ancient grants, as far back as 1769.

As such Arbitrator or Umpire, I decide that the Orwell is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 3. – SEAL.

Determining what constitutes a river – prior description as a river by Bayfield and in Public Acts – small tributary constitutes a river.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans des actes officiels – un petit affluent peut constituer un fleuve.

* * * * *

I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Seal, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Seal is entitled to be considered a River.

The Seal is spoken of by Bayfield as a River, and recognized as such in the Public Acts of the Island. It is small tributary of the Vernon, and as such Arbitrator or Umpire, I decide it is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 4. – PINNETTE.

Determining what constitutes a river – tidal basin or harbour is not a river.

Détermination de ce qui constitue un fleuve – un bassin de marée ou un port ne constituent pas un fleuve.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Pinnette, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as

disclosed in Record No. 11 of their proceedings, am of opinion that the Pinnette is tidal basin or harbour; and as such Arbitrator or Umpire, I decide that it is not a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 5 – MURRAY.

Determining what constitutes a river – abundant supply of fresh water, its formation and a deep and navigable channel – ancient land grants distinguish between the river, the harbour and the sea coast – prior recognition as a river in Public Acts of appropriation of the island.

Détermination de ce qui constitue un fleuve – distribution abondante d’eau fraîche, forme et chenal profond et navigable – les concessions territoriales antérieures font la distinction entre le fleuve, le port et la côte maritime – reconnaissance antérieure en tant que rivière dans les actes officiels d’acquisition de l’île.

* * * * *

I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Murray, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty’s Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Murray is entitled to be considered a River.

The Murray is a River, and entitled to be so considered, in view of its abundant supply of fresh water, its formation, and deep and navigable channel. By reference to the original grants in 1769, of Lots 63 and 64, bordering on the “Murray,” it will be seen that the Crown at that early day drew the distinction between the river, the harbour, and the sea coast, and bounds these lots by the harbour and river, and by the sea coast respectively. It is also recognized in the Public Acts of appropriation of the Island, under that designation.

As such Arbitrator or Umpire, I decide that the Murray is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 6 – CARDIGAN.

Determining what constitutes a river – prior description as a river by Bayfield, in ancient land grants and repeatedly by the legislature – resemblance to other rivers.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield, dans d'anciens actes de concessions territoriales et de manière répétée par le Parlement – ressemblance avec les autres fleuves.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Cardigan, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Cardigan is entitled to be considered a River.

It is so described by Bayfield. It bears close resemblance to the Montague and the Elliot, which have been declared by both Commissioners, as appears by Records Nos. 9 and 10, to be Rivers. It is so designated by the Crown, in the grant of Lot 34 in 1769; and has been repeatedly recognized as such by the Legislature.

As such Arbitrator or Umpire, I decide the Cardigan is a River.

Dated at Saint John, in the province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 7. – BOUGHTON.

Determining what constitutes a river – deep, broad and navigable – ship building facilities – narrow entrance and bar across mouth – prior description as a river by Bayfield, in ancient land grants and repeatedly by the legislature.

Détermination de ce qui constitue un fleuve – profondeur, largeur et navigabilité – proximité des chantiers navals – entrée étroite et présence de banc de sable à l'embouchure – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield, dans d'anciens actes de concessions territoriales et de manière répétée par le Parlement.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th of June, A. D. 1854, having proceeded to and examined the Boughton, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Boughton is entitled to be considered a River.

It is deep and broad, affording accommodation for vessels, and facilities for ship building, far in the interior. Its comparatively narrow entrance, and bar across its mouth, are observable and striking characteristics. It is described as such by the Crown, in the grant of Lot 56 in 1769; has been repeatedly recognized by the Legislature, under the name of Grand River; and by Bayfield in his Sailing Directions.

As such Arbitrator or Umpire, I decide that the Boughton is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 10. – ST. PETER’S.

Determining what constitutes a river – inlet of the sea or harbour does not constitute a river – prior description in ancient land grants and legislation as St. Peter’s Bay.

Détermination de ce qui constitue un fleuve – un bras de mer ou un port ne constituent pas un fleuve – désignation antérieure en tant que fleuve dans d’anciens actes de concessions territoriales et lois de la Baie de St. Peter.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June A. D. 1854, having proceeded to and examined St. Peter’s, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty’s Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that St. Peter’s is not entitled to be considered a River.

It is claimed by Her Majesty’s Commissioner, as a River; by the United States Commissioner, as an inlet of the Sea, or at most a harbour. I think the view taken by the United States Commissioner correct. It is certainly not formed by the Morel, the Midgie, or the Marie, which run into it; and the little stream called Saint Peter’s at its head, is entirely unequal to the task. It is also to be observed, that in the ancient grant of Lot 39, in 1769, it is given as boundary under the designation of St. Peter’s Bay; and in the grants of Lots 40 and 41, in the same year (1769), partly bordering on, and partly embracing within their boundaries. Saint Peter’s Bay, it is described (though inaccurately as a boundary) as “the Sea”. I do not find it any where recognized in the legislation of the Island as a River; but always as Saint Peter’s Bay.

As such Arbitrator or Umpire, I decide that Saint Peter's is not a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 13. – WINTER.

Determining what constitutes a river – rise in the interior – abundant fresh water – channel through Bedford Bay bounded by shoals – continuous flow of water from the interior to the sea – breach in the sands by the sea shore formed by the water seeking an outlet of sufficient strength to form a bay or harbour.

Détermination de ce qui constitue un fleuve – élévation interne - eau fraîche en abondance – chenal dans la Baie de Bedford borné par des bancs de sable – flux d'eau continu depuis le cours d'eau jusqu'à la mer – les brèches dans le sable de la plage engendrées par l'eau cherchant un écoulement sont suffisantes pour créer une baie ou un port.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Winter, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Winter is entitled to be considered a River.

Apart from its rise in the interior, and its abundant fresh water, its channel through Bedford Bay, (as it is called,) is marked and distinct – showing a continuous flow or current of water, from the interior towards the Sea; a channel bounded by shoals; and proving by its deflected course, that the breach in the sands on the sea shore, forming the entrance to the so-called Bedford Bay, has been formed by the water seeking an outlet for itself, not from the Sea making a passage in. In fact, if there were no River or stream in the interior, of sufficient strength to make the outlet, and keep it open, the water of the Sea would only make the embankment more solid, and there would be no bay or harbour at all.

As such, Arbitrator or Umpire, I decide the Winter to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 15. – STANLEY.

Determining what constitutes a river – full deep stream with two or three heads, several affluents, numerous feeders and large tributaries – prior description as a river in ancient land grants and by legislature.

Détermination de ce qui constitue un fleuve – un ruisseau profond avec deux ou trois sources, plusieurs affluents variés – désignation antérieure en tant que fleuve dans d'anciens actes de concessions territoriales et de manière répétée par le Parlement.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Stanley in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Stanley is entitled to be considered a River.

The Stanley is a full deep stream, having, if the expression may be used, two or three heads and several affluents, and is surrounded, from its sources to its outlet, by a succession of hills of rapid elevation and descent, converging in many different parts towards the River, and affording by their slopes, and the courses at their base, numerous feeders. Its large tributaries, the Trout and Old Mill Rivers, help to swell its volume. It is described as one of the boundaries of Lot 21 in the ancient grant of 1769, and recognized by the Legislature under the designation of Stanley River.

As such Arbitrator or Umpire, I decide the Stanley to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 16. – ELLIS.

Determining what constitutes a river – existence of a broad, deep channel and abundant supply of fresh water – importance of the extent of its drainage basin – repeated prior description as a river by legislative enactments.

Détermination de ce qui constitue un fleuve – existence d'un chenal large, profond et abondamment pourvu en eau fraîche – importance de l'existence d'un bassin de drainage – désignation antérieure en tant que fleuve de manière répétée dans les dispositions législatives.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Ellis, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Ellis is a River.

In the grants of Lots 14 and 16 in 1769, it is so described. A long succession of Legislative enactments so recognizes it. Its broad, deep channel; its abundant supply of fresh water; and the extent of country it drains, leaves no question about it.

As such Arbitrator or Umpire, I decide the Ellis to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 17. – FOXLEY.

Determining what constitutes a river – prior description as a river in ancient land grants.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans d'anciens actes de concessions territoriales.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th of June, A. D. 1854, having proceeded to and examined the Foxley, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Foxley is entitled to be considered a River.

The Foxley is described as a River in the ancient grants in 1769.

As such Arbitrator or Umpire, I decide the Foxley to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 20. – PERCIVAL.

Determining what constitutes a river – prior description as a river by Bayfield and in ancient land grants – reliance on resemblance to other rivers which owe their waters entirely to the sea.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans d'anciens actes de concessions territoriales – confiance dans sa ressemblance avec les autres fleuves dont les eaux vont exclusivement à la mer.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Percival, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Percival is a River.

The Percival is spoken of by Bayfield as a River. It is so described in the grant of Lot 10, in 1769; and like the Stour and the Orwell in England, owes its waters almost entirely to the Sea.

As such Arbitrator or Umpire, I decide the Percival to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 21. – ENMORE.

Determining what constitutes a river – prior description as a river by Bayfield and in ancient land grants – bar at its mouth formed by the conflict of tides and the descending stream.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans d'anciens actes de concessions territoriales – banc de sable à l'embouchure formé par l'opposition entre le flux des marées et le cours d'eau descendant.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Enmore, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Enmore is entitled to be considered a River.

The Enmore was treated as a River in the grants of Lots 10 and 13, in 1769; is so recognized by Bayfield; and has a bar at its mouth, formed by the conflict of the tides and the descending stream.

As such Arbitrator or Umpire, I decide the Enmore to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 23. – HALDIMAN.

Determining what constitutes a river – prior description as a river by Bayfield and in ancient land grants.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans d'anciens actes de concessions territoriales.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Haldiman, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Haldiman is entitled to be considered a River.

The Haldiman is described as a River in the grant of Lot 15, in 1769, and is so regarded by Bayfield.

As such Arbitrator or Umpire, I decide the Haldiman to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

PART SECOND.

I now come to the second division, namely: the Miramichi and the Buctouche, being admitted to be Rivers, which of the lines pointed out by the Commissioners shall respectively designate the mouths of those Rivers?

THE MIRAMICHI. — I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th, day of June, A. D. 1854, having proceeded to and examined the mouth of the Miramichi, in the Province of New Brunswick, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, and disclosed in Record N° 2 of their proceedings, declare as follows: —

With reference to the Miramichi, it will be seen by Record N° 2 — Her Majesty's Commissioner claims, that a line connecting Fox and Portage

Islands (marked in red, Plan N° 2, Record Book N° 2) designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point (marked in blue, Plan N° 2, Record Book N° 2) designates the mouth of said River.

By the Treaty it is provided, that “the above mentioned liberty applies solely to the sea fishery: and that the salmon and shad Fisheries, and all Fisheries in Rivers, and mouths of Rivers, are reserved exclusively, etc. etc.”

The preceding portion of Article 1st gives the right to fish “on the sea coasts and shores, and in the bays, harbours and creeks”.

The Inner Bay of the Miramichi, and the Harbour of Buctouche, are among other grounds, claimed as coming within the definition of “Bays and Harbours”, and it has been urged, that the clause just referred to, is conclusive in favor of that claim, whether such bay or harbour does or does not constitute the mouth of a River.

It is therefore necessary, before deciding which of the lines above designated as the mouth of the Miramichi, is the correct one, to dispose of this preliminary question, namely: — Does the mouth of a River forfeit its exclusive character, under this Treaty, because it may constitute a bay, or harbour? Is the restriction imposed, limited to particular fish, or locality? The spirit with which this Treaty was made, and the object it has in view, demand for it the most liberal construction: but, consistently with the most liberal construction, there are many wise and judicious reasons why the exception should be made. The joint, or common Fishery in those places where the forbidden fish resort, would be a prolific cause of dispute. The very fact, that after the forbidden fish are named, there should follow the significant expression that *all* fisheries in those places should be reserved, is conclusive as to the idea predominant in the minds of the framers of the Treaty. They wanted peace; they would not put the fishermen of the two nations together, on the same ground, where they would have unequal rights. Considerations of a national, administrative, or fiscal character, may have determined them to exclude the entrances of the great thoroughfares into the respective countries, from common possession. There are large and magnificent bays and harbours, unconnected with Rivers; there are bays and harbours dependent upon and formed by mouths of Rivers. The terms are not indicative of locality. Bays and harbours may be found far up in the interior of a country; in lakes or in rivers, and on the sea board. The “mouths of Rivers” are found only in one locality, namely, in that part of the River by which its waters are discharged into the sea or ocean, or into a lake, and that part of the River is by the express language of this Treaty excluded. Is the use of a term which may be applicable to many places, to supersede that which can only be applied to a particular place, when the latter is pointedly, *lo nomine*, excluded? But why should such a construction be required, when the object of the Treaty can be obtained without it?

The cause of the difficulty was not the refusal to permit a common fishery within the mouths of Rivers, but within three marine miles of the sea coast. That difficulty is entirely removed, by the liberty to take fish "on the sea coast and shores, and in the bays, harbours and creeks, without being restricted to any distance from the shore".

The position taken by the Commissioner of the United States is further pressed upon the ground. — "That the terms of a grant are always to be construed most strongly against the granting party". The application of that principle to the present case is not very perceptible. This is rather the case of two contracting parties exchanging equal advantages: and the contract must be governed by the ordinary rules of interpretation. Vattel says, — "In the interpretation of Treaties, compacts, and promises, we ought not to deviate from the common use of the language, unless we have very strong reasons for it". And, "When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning". It is plain that the framers of this Treaty intended to exclude the "mouths of Rivers" from the common possession.

Ought we, by construing the terms of the Treaty most strongly against the nation where the River in dispute may happen to be, to "wrest their words to a contrary meaning"? I think not.

Mr. Andrews, for many years the United States Consul in New Brunswick and in Canada, a gentleman whose great researches and untiring energies were materially instrumental in bringing about this Treaty and to whom the British Colonies are much indebted for the benefits they are now deriving and may yet derive from its adoption, thus speaks of the Miramichi in his Report to his Government in 1852: —

"The extensive harbour of Miramichi is formed by the estuary of the beautiful River of that name, which is two hundred and twenty miles in length. At its entrance into the Gulf this River is nine miles in width.

"There is a bar at the entrance of the Miramichi, but the River is of such great size, and pours forth such a volume of water, that the bar offers no impediment to navigation, there being sufficient depth of water on it at all times for ships of six and seven hundred tons, or even more. The tide flows nearly forty miles up the Miramichi, from the Gulf. The River is navigable for vessels of the largest class full thirty miles of that distance, there being from five to eight fathoms of water in the channel; but schooners and small craft can proceed nearly to the head of the tide. Owing to the size and depth of the Miramichi, ships can load along its banks for miles".

In Brook's Gazetteer, an American work of authority, the width of the Potomac, at its entrance into the Chesapeake, is given at seven and a half miles.

In the same work, the mouth of the Amazon is given at "one hundred and fifty-nine miles broad".

In Harper's Gazetteer (Edition of 1855), the width of the Severn, at its junction with the Bristol Channel, is given at ten miles across. That of the Humber, at its mouth, at six or seven miles; and that of the Thames, at its junction with the North sea at the Nore, between the Isle of Sheppey and Foulness Point, or between Sheerness and Southend, at fifteen miles across. And the Saint Lawrence, in two different places in the same work, is described as entering "the Gulf of Saint Lawrence at Gaspe Point, by a mouth one hundred miles wide". And also that "at its mouth, the Gulf from Cape Rosier to Mingan settlement in Labrador, is one hundred and five miles in length".

Thus width is no objection. The real entrance to the Miramichi is, however, but one and a half miles wide. Captain Bayfield may, apparently, be cited by both Commissioners as authority. He says, pages 30, 31 and 32: —

"Miramichi Bay is nearly fourteen miles wide from the sand-bars off Point Blackland to Point Escumenac beacon, and six and a half miles deep from that line across its mouth to the main entrance of the Miramichi, between Portage and Fox Islands. The bay is formed by a semicircular range of low sandy islands, between which there are three small passages and one main or ship channel leading into the inner bay or estuary of the Miramichi. The Negowac Gully, between the sand bar of the same name and a small one to the S. W., is 280 fathoms wide and 3 fathoms deep: but a sandy bar of the usual mutable character lies off it, nearly a mile to the S. S. E., and had about 9 feet over it at low water at the time of our survey. Within the Gully a very narrow channel only fit for boats or very small craft, leads westward up the inner bay. The shoal water extends 1¼ miles off this Gully, but there is excellent warning by the lead here and everywhere in this bay, as will be seen by the chart. Shoals nearly dry at low water extend from the Negowac Gully to Portage Island, a distance of 1¼ miles to the S. W. Portage Island is 4 miles long in a S. W. by S. direction: narrow, low, and partially wooded with small spruce trees and bushes. The ship channel between this Island and Fox Island, is 1½ miles wide.

"Fox Island, 3¾ miles long, in a S. S. E. direction, is narrow and partially wooded, like Portage Island: it is formed of parallel ranges of sand hills which contain imbedded drift timber, and have evidently been thrown up by the sea in the course of ages. The islands are merely sand bars on a large scale, and nowhere rise higher than 50 feet above the sea. They are incapable of agricultural cultivation, but yet they abound in plants and shrubs suited to such a locality, and in wild fruits, such as the blueberry, strawberry and raspberry. Wild fowl of various kinds are also plentiful in their season: and so also are salmon, which are taken in nets and weirs along the beaches outside the islands, as well as in the gullies.

"The next and last of these islands is Huckleberry Island, which is nearly 1½ miles long, in a S. E. direction. Fox Gully between Huckleberry and Fox Islands is about 150 fathoms wide at high water, and from 2 to 2½ fathoms deep, but there is a bar outside with 7 feet at low water. Huckleberry Gully, between the island of the same name and the mainland, is about 200 fathoms wide, but is not quite as deep as Fox Gully. They are both only fit for boats or very small craft; and the channels leading from them to the westward, up a bay of the main within Huckleberry Island or across to the French river and village, are narrow and

intricate, between flats of sand, mud and eel-grass, and with only water enough for boats. Six and a quarter miles from the Huckleberry Gully, along the low shore of the mainland, in an E. S. E. $\frac{1}{2}$ E. direction, brings us to the beacon at point Escumenac, and completes the circuit of the bay.

“The Bar of Miramichi commences from the S. E. end of Portage Island, and extends across the main entrance and parallel to Fox Island, nearly 6 miles in a S. E. by S. direction. It consists of sand, and has not more than a foot or two of water over it in some parts, at low spring tides.”

He also says pp. 37 and 39:

“The Inner Bay of Miramichi is of great extent, being about thirteen miles long from its entrance at Fox Island to Sheldrake Island (where the river may properly be said to commence) and 7 or 8 miles wide. The depth of water across the bay is sufficient for the largest vessels that can cross the inner bar being $2\frac{3}{4}$ fathoms at low water in ordinary springtides, with muddy bottom. Sheldrake Island lies off Napan Point, at the distance of rather more than 3 quarters of a mile, and bears from Point Cheval N. W. by W. $1\frac{3}{4}$ miles. Shallow water extends far off this island in every direction, westward to Bartiboque Island, and eastward to Oak Point. It also sweeps round to the south and southeast, so as to leave only a very narrow channel between it and the shoal, which fills Napan Bay, and trending away to the eastward past Point Cheval, forms the Middle Ground already mentioned. Murdoch Spit and Murdoch Point are two sandy points, a third of a mile apart, with a cove between them, and about a mile W. S. W. of Sheldrake Island. The entrance of Miramichi River is 3 quarters of a mile wide between these points and Moody Point, which has a small Indian church upon it, and is the east Point of entrance of Bartiboque River, a mile N. W. by W. $\frac{1}{2}$ W. from Sheldrake Island.”

But a strong, and I may add, a conclusive point in showing the passage between Fox and Portage Islands, to be the main entrance, or mouth of the Miramichi, is the peculiar action of the tides. It is thus described by Bayfield p. 35:

“The stream of the tides is not strong in the open bay outside the bar of Miramichi. The flood draws in towards the entrance as into a funnel, coming both from the N. E. and S. E. alongshore of Tabisintac, as well as from Point Escumenac. It sets fairly through the ship channel at the rate of about $1\frac{1}{2}$ knots at the black buoy increasing to 2 or $2\frac{1}{2}$ knots in strong springtides between Portage and Fox Islands, where it is strongest. The principal part of the stream continues to flow westward, in the direction of the buoys of the Horse Shoe Shoal, although some part of it flows to the northward between that shoal and Portage Island”.

The effect of this is thus singularly felt. A boat leaving Negowac to ascend to Miramichi with the flood tide is absolutely met by the tide flowing northerly against it until coming abreast of the Horse Shoe Shoal, or in the line of the main entrance; and the boat at the Horse Shoe Shoal, steering for Negowac, with the ebb tide making, would have the current against it, though Negowac is on a line as far seaward as the entrance to the Portage and Fox Islands; thus showing conclusively that the main inlet and outlet of the tidal

waters, to and from the mouth or entrance of the Miramichi, is between Portage and Fox Islands.

As such Arbitrator or Umpire, I decide that a line connecting Fox and Portage Islands (marked in red, Plan N° 2, Record Book N° 2) designates the mouth of the Miramichi River.

THE BUCTOUCHE. — I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the mouth of the River Buctouche, in the Province of New Brunswick, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record N° 1 of their proceedings. With reference to the Buctouche it will be seen by Record N° 1: Her Majesty's Commissioner claims that a line from Glover's Point to the Southern extremity of the Sand Bar, marked in red on the Plan N° 1, designates the mouth of the said River Buctouche. The United States Commissioner claims, that a line from Chapel Point, bearing South 4° West (magnetic), marked in blue on said Plan N° 1, designates the mouth of said River.

On the subject of this River the United States Commissioner addresses me as follows: "The red line extending from Glover's Point, to the Point of the Sand Bar, is the line marked by Her Majesty's Commissioner as designating the mouth of the River: in that line I could not concur because it excludes from the common right of fishing the whole of Buctouche Harbour in contravention of the express words of the Treaty. If it had been the duty and office of the Commissioners to indicate the point which constitutes the mouth of the Harbour, I should have been disposed to acquiesce in the point and line thus denoted: but from the proposition that it marks the entrance of these Rivers, or any one of them, into the Sea or Bay, or Harbour, and constitutes their mouth, I entirely dissent".

With the views I have already expressed that the mouth of a River does not lose its treaty character because it constitutes a harbour, it becomes important to determine which is the principal agent in forming this harbour, the River or the Sea. If it is a mere indentation of the coast, formed by the sea, a creek, a bay, or harbour, unformed by and unconnected with any River, one of those indentations in a coast, indebted to the sea mainly for its waters, then plainly it is not intended or entitled to be reserved; but if on the contrary it is formed by the escape of waters from the interior, by a River seeking its outlet to the deep, showing by the width and depth of its channel at low water that it is not to the sea it owes its formation, then plainly it is the mouth of a River and intended to be reserved.

Captain Bayfield describes the Buctouche as follows, pp. 53 and 54:

"Buctouche Roadstead, off the entrance of Buctouche River and in the widest part of the channel within the outer bar, is perfectly safe for a vessel with good anchors and cables; the ground being a stiff tenacious clay, and the outer bar

preventing any very heavy sea from coming into the anchorage. It is here that vessels, of too great draft of water to enter the river, lie moored to take in cargoes of lumber.

“Buctouche River enters the sea to the S. E., through the shallow bay within the Buctouche sand-bar, as will be seen in the chart. The two white beacons which I have mentioned, as pointing out the best anchorage in the roadstead, are intended to lead in over the bar of sand and flat sandstone, in the best water, namely, 8 feet at low water and 12 feet at high water in ordinary spring tides. But the channel is so narrow, intricate, and encumbered with oyster beds, that written directions are as useless as the assistance of a pilot is absolutely necessary to take a vessel safely into the River. Within the bar is a wide part of the channel in which vessel may ride safely in 2½ and 3 fathoms over mud bottom; but off Giddis Point the channel becomes as difficult, narrow, and shallow as the bar. It is in its course through the bay that the Buctouche is so shallow and intricate; higher up its channel being free from obstruction, and in some places 5 fathoms deep. Having crossed the bar, a vessel may ascend about 10 miles further, and boats 13 or 14 miles to where the tide water ends”.

By an examination of the Channel we find miles up this River a deep continuous channel of twelve, fifteen, twenty, twenty-four and thirty feet, down to Priest Point, varying from eighteen to twenty-four feet to Giddis Point, and thence to a line drawn across from the Sand Bar to Glover’s Point, from seven to twenty feet, but of greater width. On the outside of this channel, which is clearly defined, and between the Sand Bar and the channel, we find mud flats with dry patches and oyster beds, “flats of mud and ell-grass, with dry patches at low water”; with depths from Priest Point to the Sand Bar, varying from four to six feet and from the channel of Giddis Point to the bar, from one foot to three. On the other side of the channel, from Priest Point and Giddis Point we find “flats of mud and weeds, with dry patches and oyster beds”. What has given depth and breadth to this channel? The tide rises in this vicinity about four feet: would that rise create a channel of the average depth above named? Can there be any doubt that it is created by the great body of the river water finding its way to the sea? The line from “Glover’s Point to the southern extremity of the Sand Bar, marked in red on plan N° 1”, is claimed by Her Majesty’s Commissioner as the mouth of the River, and admitted by the United States Commissioner as the mouth of the Harbour; but if there no River here, would there be any harbour at all? I think not, and this line therefore, while it constitutes the mouth of the harbour, also constitutes the mouth of the River.

This conclusion is consonant with the conclusion at which the Commissioners themselves arrived in the cases of the Elliot and Montague Rivers in Prince Edward Island, as shown by Records N^{os} 9 and 10. The harbours of Charlottetown and Georgetown are clearly within the lines they have marked and designated as the mouths of those Rivers respectively, and thus within the lines of exclusion: but if the express words of the Treaty gave a right to such harbours, because “harbours”, then why did the Commissioners exclude them? And why should not the same principle which governed the

Commissioners in their decision with regard to those “harbours”, not (*sic*) also govern with regard to Buctouche Harbour?

As Arbitrator or Umpire, I decide that a line from Glover’s Point to the southern extremity of the Sand Bar, marked in red on Plan N^o 1, in Record N^o 2, designates the mouth of the River Buctouche.

It may not come within the exact line of my duty, but I cannot forbear remarking, that the true benefits of this Treaty can only be realized to the inhabitants of both countries by a course of mutual forbearance, and enlightened liberality. Captious objections, fancied violations and insults, should be discountenanced; and above all, there should be an abstinence from attributing to either nations or people, as a national feeling, the spirit of aggression which may occasionally lead individuals to act in direct contravention of its terms. Every friend of humanity would regret further misunderstanding between Great Britain and the United States. The march of improvement which is to bring the broad regions of North America, between the Atlantic and Pacific, within the pale of civilization, is committed by Providence to their direction: fearful will be the responsibility of that nation which mars so noble a heritage.

Dated at Saint John, in the Province of New Brunswick, this 8th day of April, 1858¹.

¹ J. B. MOORE, *History and Digest of International Arbitrations*, 1898, pp. 449-473.