

of the crew, to take her to North Sydney, the captain of the "Nickerson" remaining on board. Witness, on the passage, heard said captain say (and this several of the other men confirm in words to the like effect) that he had purchased 700 or 800 herrings that morning. He also said that he wanted more bait,—that it was of no use going out with that much. McMaster says that on the passage to Sydney, he heard some of the crew of the "Nickerson" say that they had bought seven barrels of fresh herring bait that morning and that they wanted more. Four of the seamen testify to another conversation with Captain McDonald, in which he said he would not have come in a second time had he known the cutter was at hand, that all the bait he had would not bait his trawls once, and that it was not worth while for him to go off to the Banks with that much. These depositions were taken on the 1st of September, 1870, and the only reply is the examination of John Wills, the steward of the "Nickerson," taken in October under a commission at Boston, which undertakes to deny altogether the purchasing or procuring bait,—nullifying the numerous admissions in proof and supporting the responsive allegation as a whole. Neither the master nor any of the crew of the "J. H. Nickerson" were examined, and I need scarcely say that the evidence of the steward alone, as opposed to the mass of testimony I have cited, is unworthy of credit.

"It being, then, clearly established that the "J. H. Nickerson" entered a British port and was anchored within three marine miles of the coast off Cape Breton, for the purpose of purchasing or procuring bait, and did there purchase or procure it in June, 1870, the single question arises on the Treaty of 1818 and the Acts of the Imperial and Dominion Parliaments. Is this a sufficient ground for seizure and condemnation? This was said at the hearing to be a test case,—the most important that had come before the Court since the termination of the Reciprocity Treaty of 1854. But it has lost much of its importance since the hearing in February, and the present aspect of the question would scarcely justify the elaborate review which might otherwise have been reasonably expected. If the law should remain as it is, and the instructions issued from Downing street on the 30th of April and by the Dominion Government on the 27th June, 1870, as communicated to Parliament, were to continue, no future seizure like the present could occur; and if the Treaty of 1818 and the Acts consequent thereon are superseded, this judgment ceases to have any value beyond its operation on the case in hand.

"The first Article of the Convention of 1818 must be construed, as all other instruments are, with a view to the surrounding circumstances and according to the plain meaning of the words employed. The subtleties and refinements that have been applied to it will find little favor with a Court governed by the rules of sound reason, nor will it attach too much value to the protocols and drafts or the history of the negotiations that preceded it. We must assume that it was drawn by able men and ratified by the Governments of two great powers, who knew perfectly well what they were respectively gaining or conceding, and took care to express what they meant. After a formal renunciation by the United States of the liberty of fishing, theretofore enjoyed or claimed, within the prescribed limits of three marine miles of any of our bays or harbors, they guard themselves by this proviso: 'Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and repairing damage therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent them taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.'

"These privileges are explicitly and clearly defined, and to make assurance doubly sure, they are accompanied by a negative declaration excluding any other purpose beyond the purpose expressed. I confine myself to the single point that is before me. There is no charge here of taking fish for bait or otherwise, nor of drying or curing fish, nor of obtaining supplies or trading. The defendants allege that the "Nickerson" entered the Bay of Ingonish and anchored within three marine miles of the shore for the purpose of obtaining water and taking off two of her men who had friends on shore. Neither the master nor the crew on board thereof, in the words of the responsive allegation, "fishing, preparing to fish, nor procuring bait wherewith to fish, nor having been fishing in British waters, within three marine miles of the coast." Had this been proved, it would have been a complete defence, nor would the Court have been disposed to narrow it as respects either water, provisions or wood. But the evidence conclusively shows that the allegation put in is untrue. The defendants have not claimed in their plea what their counsel claimed at the hearing, and their evidence has utterly failed them. The vessel went in, not to obtain water or men, as the allegation says, nor to obtain water and provisions, as their witness says; but to purchase or procure bait (which, as I take it, is a preparing to fish), and it was contended that they had a right to do so, and that no forfeiture accrued on such entering. The answer is, that if a privilege to enter our harbors for bait was to be conceded to American fishermen, it ought to have been in the Treaty, and it is too important a matter to have been accidentally overlooked. We know, indeed, from the State Papers that it was not overlooked,—that it was suggested and declined. But the Court, as I have already intimated, does not insist upon that as a reason for its judgment. What may be justly and fairly insisted on is that beyond the four purposes specified in the Treaty—shelter, repairs, water and wood,—here is another purpose or claim not specified; while the Treaty itself declares that no such other purpose or claim shall be received to justify an entry. It appears to me an inevitable conclusion that the "J. H. Nickerson," in entering the Bay of Ingonish for the purpose of procuring bait, and evincing that purpose by purchasing or procuring bait while there, became liable to forfeiture, and upon the true construction of the Treaty and Acts of Parliament, was legally seized.

"I direct, therefore, the usual decree to be filed for condemnation of vessel and cargo, and for distribution of the proceeds according to the Dominion Act of 1871."