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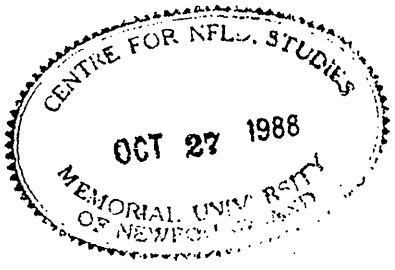

APPENDIX P.

No. 1.

In the Court of Vice Admiralty.

Judgment of His Honcr Judge Hazen in the case of the "White Fawn."

The following is a copy of the decision recently pronounced by His Honor Judge Hazen in this case.

At the last sitting of this Court, Mr. Tuck, B. C., Proctor for the Crown, applied, on behalf of Sir John A. McDonald, the Attorney-General of the Dominion, for a monition, calling upon the owners of the schooner and her cargo, to show cause why the *White Fawn* and the articles above enumerated with her tackle, etc., should not be considered as forfeited to the Crown for a violation of the Imperial Statute 59, George III., Cap. 38, and the Dominion Statutes 31 Vic., Cap. 61, and 33 Vic., Cap. 15.

The *White Fawn*, as it appears from her papers, was a new vessel of 64 tons, and registered at Gloucester, Massachusetts, in 1870, and owned in equal shares by Messrs. Somes, Friend, and Smith, of that place;

That she was duly licensed for one year, to be employed in the Coasting Trade and Fisheries, under the laws of the United States;

That by her "Fishery Shipping Paper," signed by the master and ten men, the usual agreement was entered into for pursuing the Cod and other Fisheries, with minute provisions for the division of the profits among the owners, skipper, and crew. These papers and other documents found on board, are all in perfect order, and not the slightest suspicion can be thrown upon them. The Seamen's Articles are dated 19th Nov., 1870:—On the 24th Nov., 1870, she arrived at Head Harbor, a small Bay in the eastern end of Campobello, in the County of Charlotte, in this Province.

Captain Betts, a Fishery Officer, in command of the *Water Lily*, a vessel in the service of the Dominion, states that on the 25th November he was lying with his vessel *at* Head Harbour. Several other vessels, and among them the *White Fawn*, were lying *in* the harbour; that he went on board the *White Fawn:* he states a number of particulars respecting the vessel from her papers, and adds that the said vessel, *White Fawn*, had arrived at Head Harbour on the 24th Nov., and had been engaged purchasing fresh herrings, to be used as bait in trawl fishing; that there were on board about 5,000 herrings, which had been obtained and taken on board at Head Harbour; also 15 tons of ice, and all the materials and appliances for trawl fishing, and that the master admitted to him that the herring had been obtained at Head Harbor by him for the purpose of being used as bait for fishing. There are then some remarks as to the master being deceived as to the fact of the cutter being in the neighborhood, which are not material; and, that deponent further understood that persons had been employed at Head Harbour to catch the herring for him; that he seized the schooner on the 2 th, [sic], and arrived with her the same evening at St. John, and delivered her on the next day to the Collector of the Customs.

No reason is given for the delay which has taken place of more than two months in proceeding against the vessel, which was seized, as alleged by Captain Betts, for a violation of the terms of the Convention and the Laws of Canada; her voyage was broken up, and her crew dispersed at the time of the seizure.

By the Imperial Statute, 59 George III., Cap. 38, it is declared that if any foreign vessel, or person on board thereof, "shall be found fishing, or to have been fishing, or preparing to fish within such "distance (three marine miles) of the coast, such vessel and cargo shall be forfeited."

The Dominion Statute, 31 Vic., Cap. 61, as amended by 33 Vic., Cap. 15, enacts: "If such for-"eign vessel is found fishing, or preparing to fish, or to have been fishing in British waters, within three "marine miles of the coast, such vessel, her tackle, etc., and cargo, shall be forfeited."

The *White Fawn* was a foreign vessel in British waters; in fact, within one of the Counties of this Province when she was seized. It is not alleged that she is subject to forfeiture for having entered Head Harbour for other purposes than shelter or obtaining wood and water. Under Section III, of the Imperial Act, no forfeiture but a penalty can be inflicted for such entry. Nor is it alleged that she committed any infraction of the Customs or Revenue Laws. It is not stated that she had fished within the prescribed limits, or had been found fishing, but that she was "preparing to fish," having bought bait (an article no doubt very material if not necessary for successful fishing) from the inhabitants of Campobello. Assuming that the fact of such purchase establishes a "preparing to fish" under the Statutes (which I do not admit), I think, before a forfeiture could be incurred, it must be shown that the preparations were for an illegal fishing in British waters: hence, for aught which appears, the intention of the Master may have been to prosecuting his fishing outside of the three-mile limit, in conformity with the Statutes; and it is not for the court to impute fraud or an intention to infringe the provisions of our statutes to any person, British or foreign, in the absence of evidence of such fraud. He had a right, in common with all other persons, to pass with his vessel through the three miles, from our coast to the fishing grounds outside, which he might lawfully use, and, as I have already stated, there is no evidence of any intention to fish before he reached such grounds.

The construction sought to be put upon the statutes by the Crown officers would appear to be thus:—"A foreign vessel, being in British waters and purchasing from a British subject any article which "may be used in prosecuting the fisheries, without its being shown that such article is to be used in illegal "fishing in British waters, is liable to forfeiture as preparing to fish in British waters."

I cannot adopt such a construction. I think it harsh and unreasonable, and not warranted by the words of the statutes. It would subject a foreign vessel, which might be of great value, as in the present case, to forfeiture, with her cargo and outfits, for purchasing (while she was pursuing her voyage in British waters, as she lawfully might do, within three miles of our coast) of a British subject any article, however small in value (a cod-line or net for instance) without its being shown that there was any intention of using such articles in illegal fishing in British waters before she reached the fishing ground to which she might legally resort for fishing under the terms of the Statutes.

I construe the Statutes simply thus:—If a foreign vessel is found—1st, having taken fish; 2nd, fishing, although no fish have been taken; 3rd, "preparing to fish," (i. e.), with her crew arranging her nets, lines, and fishing tackle for fishing, though not actually applied to fishing, in British waters, in either of those cases specified in the statutes the forfeiture attaches.

I think the words "preparing to fish" were introduced for the purpose of preventing the escape of a foreign vessel which, though with intent of illegal fishing in British waters, had not taken fish or engaged in fishing by setting nets and lines, but was seized in the very act of putting out her lines, nets, etc., into the water, and so preparing to fish. Without these a vessel so situated would escape seizure, inasmuch as the crew had neither caught fish nor been found fishing.

Taking this view of the Statutes, I am of the opinion that the facts disclosed by the affidavits do not furnish legal grounds for the seizure of the American schooner *White Fawn*, by Captain Betts, the commander of the Dominion vessel *Water Lily*, and do not make out a *prima facie* case for condemnation in this Court, of the schooner, her tackle, &c., and cargo.

I may add that as the construction I have put upon the Statute differs from that adopted by the Crown Officers of the Dominion, it is satisfactory to know that the judgment of the Supreme Court may be obtained by information, filed there, as the Imparial Act 59, George III., Cap. 38, gave concurrent jurisdiction to that Court in cases of this nature.

No. 2.

[Extract from the Halifax Daily Reporter and Times, Dec. 7, 1870.]

In the Vice Admiralty Court at Halifax.

The "Wampatuck."—Case No. 254.—Sir William Young, Judge.—6th Dec., 1870.

This is an American fishing vessel of 46 tons burthen, owned at Plymouth, in the State of Massachusetts, and sailing under a fishing license, issued by the Collector there on the 25th of April last. On the 27th of June she was seized by Capt. Tory, of the Dominion cutter *Ida E.*, for a violation of the Dominion Fishery Acts of 1868 and 1870, and her nationality and character appear from her enrolment and other papers delivered up by her master, and on file in this Court. A monition having issued in the usual form on the 27th of July, a libel was filed on the 10th of August, and a claim having been put in by the owners with a bond for costs, as required by the Act, they filed their responsive allegation on the 18th of August. The fish and salt on board at the time of seizure being perishable, were sold under an order of the Court, and the proceeds, with the vessel herself, remain subject to its decree. The evidence was completed early in September, but the case, being the first of the several fishing cases that has been tried, was not brought before the Court for a hearing till the 26th ult., when it was fully argued, and stands now for judgment. Although it presents few or none of the nicer and more perplexing questions that will arise in the other cases, now also ripe for a hearing, it will be regarded with the deepest interest by the community and the profession, and on that account demands a more cautious and thorough examination than it might require simply on its own merits.

"An attempt was made at the argument to import into it wider and more comprehensive inquiries than properly belong to it. I am here to administer the law as I find it, not to determine its expediency or its justice, still less to inquire into the wisdom of a Treaty deliberately made by the two Governments of Great Britain and the United States, and acknowledged by both. If the people of the United States, inadvertently, as it is alleged, or unwisely (which I by no means admit) renounced their inherent rights, and ought to fall back on the Treaty of 1783, rather than abide by the existing Treaty of 1818, that is a matter for negotiation between the two contracting powers—it belongs to the higher region of international and political action, and not to the humbler, but still the highly responsible and honorable duty now imposed on me, of interpreting and enforcing the law as it is.

"By the first Article of the Treaty of 1818, after certain privileges or rights within certain limits conceded to American fishermen, it is declared, that "the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America, not included within the above mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of 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 their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

"Every word of this Article should be studied and understood by the people of these Provinces. They perfectly appreciate the value of their exclusive right to the inshore fishery, thus formally and clearly recognized, and they must take care temperately but firmly to preserve and guard it. It was argued in this case, that the restriction applied only to fishing vessels; that is, vessels fitted out for the purposes of fishing—that it did not extend to other vessels which might find it convenient or profitable to fish within the limits. But that is not the language of the Treaty nor of the Acts founded on it. The United States renounce the liberty enjoyed or claimed by the inhabitants, not merely by the fishermen thereof, and any vessel, fishing or otherwise, within the limits prescribed by the Treaty, is liable to forfeiture.

"Extreme cases were put to me at the hearing, and I have seen them frequently stated elsewhere, of a trading vessel or an American citizen catching a few fish for food or for pleasure, and the Court was asked whether in such and the like cases it would impose forfeitures or penalties. When such cases arise there will be no difficulty, I think, in dealing with them. Neither the Government nor the Courts of the Dominion would favor a narrow and illiberal construction, or sanction a forfeiture or penalty inconsistent with national comity and usage, and with the plain object and intent of the Treaty. The rights of a people, as of an individual, are never so much respected as when they are exercised in a spirit of fairness and moderation. Besides, by a clause of the Dominion Act of 1868, which is not to be found in the Imperial Act of 1819, nor in our Nova Scotia Act of 1836, which formed the code of rules and regulations under the Treaty of 1818, with the sanction of His Majesty, the Governor-General in Council, in cases of seizure under the Act, may, by order, direct a stay of proceedings; and, in cases of condemnation, may relieve from the penalty, in whole or in part, and on such terms as may be deemed right. Any undue

straining of the law, or harshness in its application may thus be softened or redressed, and although I was told that little confidence was to be placed in the moderation of Governments, it is obvious that confidence is placed in it by the authorities and by the people of the United States; and it is a fact honorable to both parties, that the naval forces employed on the fishing grounds in the past season, have acted in perfect harmony, and carried out the provisions of the Treaty in good faith. The organs of public opinion, indeed, in the United States, of the highest stamp, have denounced open and deliberate violation of the Treaty in terms as decided as we ourselves could use.

"These considerations have prepared us for a review of the pleadings and of the evidence taken in this case. The libel contains six articles. The first sets out in the briefest possible terms, the first article already cited of the Treaty of 20th Oct., 1818. The second gives the title of the Imperial Act 59 Geo. 3, chap. 38. The third that of the British North American Act 1867, the 30th and 31st Vic. chap. The fourth, those of the Dominion Acts of 1868 and 1870, the 31st Vic., chap. 61 and the 33 Vic. chap. 15. The fifth alleges that on the 27th of June last, the *Wampatuck*, her master and crew, within the limits reserved in the Treaty, were discovered fishing at Aspy Bay in British waters, within three marine miles of the coast, without license for that purpose, and that the vessel and cargo were thereupon seized by Capt. Tory, being a fishery officer in command of the *Ida E.*, a vessel in the service of the Government of Canada, for a breach of the provisions of the Convention, or of the Statutes in that behalf, and delivered into the custody of the principal officer of Customs at Sydney, Cape Breton. The concluding article prays for a condemnation of the vessel and cargo, as forfeited to the Crown.

"The responsive allegation admits the Convention, and the several Statutes as pleaded, raising no question thereon. It admits that the *Wampatuck*, being an American vessel, left the port of Plymouth on a fishing voyage to the Grand Bank, beyond the limits of any rights reserved by the Convention of 1818, and alleges that she was not intended to fish on the coasts or in the bays of British North America that on the 27th day of June, while pursuing her said voyage, becoming short of water, she ran into Aspy Bay for the purpose of procuring a supply thereof, and for no other purpose whatsoever; that the master, with two of the crew, rowed ashore to get a supply of water as aforesaid, and directed the crew on board to work the vessel inshore to a convenient distance for watering, and that the master and crew were not discovered fishing within three marine miles of the coast as alleged. The sixth article, repeating the same allegations, proceeds to state further—that 'as the owners are informed, while the said master was on shore as aforesaid, the steward of the said vessel, and being one of the crew of the same, while the said vessel was lying becalmed in the said bay, did with a fishing line, being part of the tackle of the said vessel, catch seven codfish for the purpose of cooking them, then and there, for the food of the crew of the said vessel, and not for the purpose of curing or preserving them, as part of the cargo of the said vessel; that the said fish were so caught without the knowledge, against the will, and in the absence of the master of the said vessel and part of her crew,' and for this offence only the vessel and cargo had been seized.

"I observe that this last allegation was repeated in an affidavit of one of the owners on file, and, as we must infer, was consistent with his belief at the time, and probably led to the claim being put in under the 11th and 12th sections of the Act of 1868. Had the evidence sustained it, the case would have assumed a very different complexion; but, as we shall presently see, it is utterly at variance with the acts and the admissions of the parties on board.

"It is a remarkable circumstance that neither the master nor crew of the vessel have been examined, nor any evidence adduced on the defence, although a Commission was granted on the 7th September for that purpose. At the hearing, indeed, two papers were tendered by the Defendant's counsel—one an *ex parte* examination of Forrest E. Rollin, one of the crew, taken on the 27th September, in the State of Maine; the other, a deposition of Daniel Goodwin, the master, made on the 2nd of July—neither of which I could receive by the rules that govern this Court, and neither of which I have read. The latter, indeed, had never been filed, nor had the deponent been subjected to cross-examination.

"The case, therefore, was heard solely upon the evidence for the prosecution, consisting of the depositions of Captain Tory, Martin Sullivan, his second mate, and five others of the crew of the *Ida E.* From these it appears that the latter entered Aspy Bay about 10 o'clock on the morning of June 27th, and was engaged all day in boarding the vessels lying there; and what seems very strange, but is plainly shown, that her presence and character were known to the master and crew of the *Wampatuck*, and as one would have thought, would have made them cautious in their proceedings. She had entered the Bay on the same morning, and remained hovering about the shore all that day, about 4 or 5 miles from the *Ida E.* Gibson, one of the crew, states that Captain Tory and four of his crew, including the witness, left the *Ida E.*, between 6 and 7 o'clock in the evening to go to the *Wampatuck*, which latter vessel was then about 1½ miles or a little more from the shore. When they reached her they saw several cod-fish about 15 or 20, on deck, very lately caught—some of which were alive, jumping on the deck. They also saw some codfish lines on deck, not wound up, apparently just taken out of the water. Captain Tory states that several of the crew were engaged in fishing codfish—that they saw several codfish unsplit, very recently caught, on her deck, some of which were alive. In his cross-examination he says that he saw three or four men with lines overboard, apparently in the act of fishing, and that there were more than 8 or 10 newly caught fish on the deck,—he judged from 15 to 20. Graham states that they saw several codfish very recently caught, on the deck, some of which were alive,—saw also several codfish lines on deck, and one of the crew of the *Wampatuck* haul a line in—there were 5 or 6 men on board of her at the time. These statements are generally confirmed by the other four witnesses, and being uncon-

tradicted, leave no doubt of the fact of a fishing within the reserved limits, for the purpose of curing, and not of procuring food only, as was averred.

"The admissions of Captain Goodwin are equally emphatic. He came on board immediately after the seizure, and Sullivan heard him say that he could not blame Captain Tory,—his crew was so crazy to catch fish that they would not stop. Graham heard Captain Goodwin say that he knew he had broken the rules and was inside of the limits, and that the vessel was a lawful prize, that Captain Tory had done no more than his duty, that he could not blame him. This witness, in his cross-examination, says that about an hour after Captain Goodwin came on board he heard him say that he told the crew not to catch fish inside while he was away, but it was no use to talk, that fishermen would catch fish wherever they would get them to bite. The same witness says that he asked the crew, as they knew it was the cutter's boat coming, why they did not throw the fish overboard, and one of them said they might have done so, but it did not come in their minds. Captain Tory testifies that Captain Goodwin repeatedly admitted to him that he was aware that their fishing in shore was a violation of the law, and pleaded that he would not be severe on him. In his cross-examination, Captain Tory says that at the time of such admissions he does not recollect Captain Goodwin saying that the fishing was done without his knowledge or against his orders. Captain Tory does not think that he said so, as witness believes the Captain was aware the *Wampatuck* went out from the harbor to fish, and that he saw her within the limits. Gibson also testifies that on their way across the Bay he heard Captain Goodwin tell Captain Tory that he could not blame him—it was not his fault—that he blamed himself, and that he knew he had violated the law.

"This mass of testimony having been open to the inspection of the defendants and their counsel since the beginning of September, it is very significant that they produced no witness in reply, and that it stood at the hearing, wholly uncontradicted. As neither want of ability, nor of zeal, can be imputed to the counsel, the necessary inference is, that the facts testified to are substantially true.

"Two or three arguments were urged at the hearing, which it is incumbent on me to notice.

"It was said that there could be no forfeiture, unless an intent to violate the law were clearly shown on the part of the prosecution. The answer is, that the intent was shown by the admissions in proof, and that, independently of the admissions, where acts are illegal, the intent is to be gathered from the acts themselves.

"It was next said that the captain of the *Ida E.* ought to have notified the master of the *Wampatuck*, but it was admitted in the same breath that notice was not required in the Statute, the Act of 1870 being somewhat more stringent in that respect than the Act of 1868, while the private instructions to the captain of the cutter were not in proof.

"The main objection, however, was, that the fishing having been done in the absence and without the authority of Capt. Goodwin, the vessel was not liable to forfeiture. Now, it is to be noted that there is no evidence, nothing under oath, of the master having prohibited, or been ignorant of, the fishing. I have stated his disclaimer as accompanying, or qualifying, his admissions; but if the prohibition or want of authority would constitute a defence, it should have been proved. It is to be observed, too, that under the shipping paper, showing a crew of nine persons in all, seven besides the skipper and salter, the men were not shipped by wages, nor by the thousand of fish caught, but were sharesmen having an interest in the voyage, and whose acts as fishermen, necessarily compromised the vessel. They were inhabitants of the United States, fishing in violation of the Treaty, and the Act of 1870 declares that if any foreign ship or vessel have been found fishing, or preparing to fish, or to have been fishing (in British waters) within the prescribed limits, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof, shall be forfeited. But supposing the doctrine as, between master and servant, or as between principal and agent, to apply, for which no authority was cited, it would not avail the defendants. The last point, as to agency, was examined thoroughly in the Supreme Court of this Province, in the case of Pope vs. the Pictou Steamboat Company, in 1865, and was decided against the principal, And as to the analogy of master and servant—the responsibility of the master for the act of the servant, where, as in this case, the servant was acting within the scope of his employment, I would content myself with citing the decision of the Exchequer Chamber in the case of Limpus vs. the General Omnibus Company, 7 Law Term, Reports, N. S., 641, where the rule is laid down by Blackburn, J., in these words:—'It is agreed by all that a master is responsible for the improper act of his servant, even if it be wilful, reckless or improper, provided the act is the act of the servant in the scope of his employment, and in executing the matter for which he was engaged at the time.'

"These objections, therefore, having failed, and the fishing by the crew within the reserved limits having been abundantly proved, this Court condemns the *Wampatuck*, her tackle, apparel, furniture, stores and cargo as forfeited under the Dominion Acts, the vessel to be sold at public auction, and the proceeds to be distributed, along with the proceeds of the cargo, as directed by the Act of 1868."

No. 3.

[Extract from the Halifax Daily Reporter and Times, Feb. 11, 1871.]

In the Vice Admiralty Court, 10th Feb'y, 1871.

The "A. H. Wanson," Fishing Vessel.—Sir William Young, Judge Vice Admiralty.

"This is a schooner of 63 tons burthen, belonging to Gloucester, in the State of Massachusetts, sailing under an enrolment of 4th June, 1868, and a fishing license of 27th June last. On the 3rd Sept., she was seized by Capt. Carmichael, of the *Sweepstakes*, one of the Dominion cutters, for fishing within three marine miles of the coast of Cape Breton, at Broad Cove, and was libelled therefor in the usual form on the 17th. On the 19th her owners put in their responsive allegation, and at the same time her master and four of her crew were examined thereon. For the prosecution there were examined by the 30th Sept., the Captain, the first officer, three of the other officers, and ten of the crew of the *Sweepstakes;* and on the 21st and 22nd October there were examined under commission at Canso, the master and two of the seamen of the *Dusky Lake*, a fishing schooner belonging to Margaree. All the witnesses on both sides in these 23 depositions were subjected to cross-examination, and the evidence, as was perhaps to be expected, is conflicting. The case, as it will be perceived, was ready for trial by the end of October; but the intervening terms of the Supreme Court, and the incessant engagements both of Judge and Counsel rendered it impossible to bring it on for a hearing until the 4th inst. The legal principles applicable to the case having been fully discussed in that of the *Wampatuck*, the argument was confined to the effect of the evidence; and the decision will turn solely on questions of fact.

"On the 2d September, the cutter, a sailing vessel, and scarcely distinguishable from the usual class of fishing craft, arrived at Broad Cove about ten o'clock at night, and next morning a little before 5 o'clock, according to Captain Carmichael, who is confirmed in all essential particulars by his officers and crew, he discovered a number of vessels, some say as many as 70, fishing close to them, and hove to under their mainsails. Some of these were American, and Evans, the boatswain, says he saw the captain of the American vessel nearest to them stand on the house and wave his hat to the other vessels near at hand, and they immediately hoisted their jibs and made off from shore. None of these were caught; but Captain Carmichael discovered the *A. H. Wanson* about a third of a mile distant. She was hove to under her mainsail, with her rail manned, and fishing on the starboard side, according to the established usage. The morning was clear, and he could see the men on her deck distinctly, casting their lines and throwing bait; he also looked at her through his spyglass, and described certain marks on her to his men, that they might easily distinguish and board her. He then steered in the direction of the *A. H. Wanson*, and when about fifty yards of her, hoisted his colors, and fired a blank cartridge. The vessel then showed American colors, and Nickerson, the first officer, and boat's crew, went on board.

"Nickerson testifies that he also distinctly saw the men casting and hauling in their lines, and throwing bait, until the cutter was within three hundred yards of them. He observed them at this work for about fifteen minutes. After going on deck, he observed four lines over the rail in the water, on the starboard side; he saw several of the hooks baited with fresh bait; he saw the bait on the lines in the water after being hauled in; he also saw scales of fresh mackerel on the deck, and over the inside of the strike barrels then on the deck; also two bait-boxes, with fresh bait in them—pogies and clams. He then signalled for the captain of the Cutter, who came on board, and asked some of the crew why they did not get under weigh when they saw his vessel, having had plenty of time to get off. Some of them replied that they did not see him; they were not thinking of Cutters, only of Steamers, having arrived only the evening before. The vessel was then in 17 fathoms of water, by the lead, less than two miles from Cape Breton shore, and Sea Wolf Island bearing about North by the compass. When seized she was drifting, with mainsail guyed off, in the direction of Sea Wolf Island, forging a trifle ahead.

"It would be a waste of time to go through the depositions of the other officers and crew of the Cutter, which are more or less affirmative of, and none of them contradict the above. Jones says he saw one man forward of the main rigging throw a scoop of bait into the water. This is confirmed by five others—Grant, Langley, Cleas, Evans, and Hennesy.

"Rose says that the crew ceased casting their lines about a minute before the *Sweepstakes* rounded to. The *A. H. Wanson* was then inside of two miles from Cape Breton shore, and drifting in, in a Northwesterly course.

"From the direction in which the Cutter came, veiling her approach, and with the Nova Scotia vessels intervening, none of the persons on board saw the fish actually taken and hauled up, and the further evidence of the three men on board the *Dusky Lake* becomes very material. Thos. E. Nickerson says there were about 100 yards from the *A. H. Wanson*, lying between her and the shore. He did not see any fish taken or caught by her, he could not see the men hauling any lines or throwing bait from the way the sails hid them, but in answer to the 11th question, he says that he saw the Cutter approaching—she approached the *A. H. Wanson* from the south-west, and the witness observed her men standing at the rail, and saw them take their strike-barrels to leeward, and throw round mackerel overboard, and when the *Sweepstakes* was rounding to, they hauled in their main sheet, and after the *Sweepstakes* fired a gun, they hoisted their colors to the main peak. The next witness, Joseph H. Grant, says the *A. H. Wanson* was lying to under mainsail and foresail; they appeared to be fishing; he did not see them catch any; as the *Sweepstakes* approached, he observed them take their strike barrels to leeward, and throw the mackerel overboard, he could not see any one throwing bait; but saw the tole of bait in the water, as is usual when bait is throwing, in order to raise mackerel.

"By the ninth cross interrogatory he was asked 'would not any vessel drifting along use the same sails and appear in the same position as the *A. H. Wanson?* Is there anything particular in the use of their sails by vessels employed in mackerel fishing more than in any other vessels?' To which his answer is: 'I cannot say—never saw any vessel in that position unless she was fishing. There is quite a difference.' He had previously said that he had been two years engaged in the hook and line mackerel fishing in the Gulf of St. Lawrence, and was quite familiar with the way in which the fish are caught.

"The remaining witness, Thomas Roberts, who was described at the hearing as the master, says the *A. H. Wanson* was lying north-west, and about 200 yards from the *Dusky Lake*, they (that is the men of the *A. H. Wanson*) catching mackerel, lying head to the southward, under her mainsail. They were fishing, and the witness saw them catch fish—mackerel. She was inside of three miles. He further says:—'I observed lines on the starboard side. I saw the men handling the lines—sixteen or seventeen men. They hauled them in with fish on them, and slatted them off, and threw them out again. . . . I saw them throwing bait in the manner usual for attracting mackerel.' In his thirteenth answer, he says: 'I can positively swear they were catching mackerel, and were within three marine miles of the shores of Cape Breton.' When the *Sweepstakes* ran down upon them from the south-west they gave up fishing, and carried their strike-barrels to leeward, and threw the fish overboard." In answer to the eleventh and thirteenth cross-interrogatories, he says: 'I saw them heaving bait, casting lines, catching mackerel, and dumping them overboard, and coiling up their lines. They were slatting fish off of their lines after hauling them in.'

"Let us consider the effect of this mass of evidence, which I have gone into with a particularity very unusual with me, and only to be justified by the nature of the charge, and the necessity of vindicating every judgment that is pronounced. Here is a fleet of vessels, Nova Scotian and American, on a fine clear morning, busily engaged in fishing, the mackerel rising all around, and no hostile cutter supposed to be near. The Americans think little of the prohibition which the new and more vigorous policy of the Dominion has imposed. They are impatient of the exclusive right claimed by the Canadian people on the principles of international law, and the faith of treaties; and violate it without scruple whenever the opportunity occurs. Hence the eagerness, and the openness too, with which these American fishermen are plying their task on this particular morning. What should we say, if we were told that one vessel only was virtuous or strong enough to resist the temptations, and to hold their hands from touching their neighbour's goods? The captain of the *Wampatuck*, when caught in the act, excused himself, on the ground, that his crew were so crazy to catch fish, that they would not stop. But, here on the decks of the *A. H. Wanson* was a model crew, who would not catch mackerel within the three miles, though swarming around them. That is the sole defence in this case. They admit that they were within three miles of the shore—that they were lying guyed off under mainsail, and with their anchor up, heading south-south east towards the shore in the very position for fishing—they were not aware of the arrival of the cutter—and yet they would have this Court believe that they were not fishing. It would be a great stretch of credulity to believe this in the absence of evidence to the contrary. But with the mass of testimony just recited—the 8 or 10 men upon the rail—the casting and hauling in of the mackerel lines—the throwing of bait—the emptying of the strike barrels on the approach of the cutter, and the clear and positive evidence of three disinterested witnesses from the *Dusky Lake*—what is to said of such a defence? In the face of it all, the master and four of the crew of the *A. H. Wanson*—five out of the 16 or 17 men, said to be on board, have sworn that said schooner, or the captain or crew thereof, did not fish, or prepare to fish, within three marine miles of the coasts, bays, harbors, or creeks of Canada, or of that part of the coasts and bays thereof know as Broadcove and as Seawelf Island on the north-west coast of Cape Breton, on the 3rd day of September last, or at any other time during said season. This might be supposed to be a mere formal denial, repeated, however wrongfully and incautiously, by all five, in the very words of the responsive allegation, but in the body of their evidence they assert that none of the men were fishing, or had been fishing that morning, or at any time after going into Broadcove, or were preparing to fish. By what strange casuistry these men reconcile such an assertion to their consciences, and sense of right, it is difficult to tell. The human mind practices singular delusions upon itself, and

the spectacle of conflicting evidence is only too common in courts of justice. It is enough, in the present case, to say that the evidence for the prosecution is overwhelming and irresistible. The allegation that the men were only clearing out their tangled lines, besides being inconsistent with the usage and habits of expert fishermen, is wholly insufficient to account for the actions of these men while on the rail, as seen and testified to by so many of the witnesses.

"I pronounce therefore, for the condemnation of the *A. H. Wonson*, her tackle, apparel, furniture, stores, and cargo, as forfeited under the Dominion Acts, and the same having been bailed at the appraised value of $3,500, I direct that the amount shall be paid into court, to be distributed as directed by the Act of 1868. I pronounce also for the costs secured by the first bond, on the defence being put in."

No. 4.

[Extract from the Halifax Daily Reporter and Times, February 13th, 1871.]

In the Vice Admiralty Court, 10th Feb'y, 1871.

The "A. J. Franklin."—Sir William Young, Judge Vice Admiralty.

"This is a schooner of 53 tons burthen, owned at Gloucester, in the State of Massachusetts, under an enrolment of 4th February, 1868, and sailing under a fishing license of 28th January, 1870. Attached to her papers are also printed copies of the Treasury Circulars issued at Washington on 16th May and 9th June last, apprising the owners and masters of fishing vessels of the first article of the Treaty of 1818, of the Dominion Acts of 1868 and 1870, and of the equipment of Canadian sailing vessels for the enforcement thereof. This vessel—the *A. J. Franklin*—having been warned by Captain Tory, of the cutter *Ida E.*, against fishing within the prescribed limits, and having been found on the 11th October in the midst of a mackerel fleet at Broad Cove, was overhauled and visited by the cutter, and was then let go; but, on further information that she had been fishing on that day, she was seized on the 15th October, in the Strait of Canso, and libelled in the usual form on the 2nd November, and a responsive allegation put in. The vessel and cargo were afterwards liberated on bail at the appraised value of $2,500, and depositions were taken on both sides, and cross-interrogatories filed. Some irregularities appear on the face of them, which were waived by consent as indorsed, and the case came before me on the 6th instant, on the pleadings, and eighteen depositions, those of the master, second mate, and six of the crew of the *Ida E.*, and of six of the crew of two Lunenburg vessels, produced on the part of the prosecution, and those of the first mate of the *Ida E.*, and of the master and two of the crew of the *A. J. Franklin*, produced on the defence.

"Captain Tory states that on the morning of the 11th October, he saw the mackerel fleet close to the shore in Broad Cove, engaged in fishing, and having run outside until he got about midway, he fired a blank shot, for the purpose of ascertaining, by their returning the signal, what vessels were British and what not. The *A. J. Franklin* then came out from the centre of the fleet, and immediately set all sail and ran direct from the land, as if trying to avoid detection. To prevent her escape the captain ordered a shot to be fired across her bow, when she hauled down her jib, and hove to. The two vessels were then about 2½ miles from Marsh Point in Broad Cove, and less than 2 miles from Sea Wolf Island. The captain at once boarded the *A. J. Franklin*, and found some mackerel lines coiled up on the rail that were wet, the hooks attached thereto being newly or fresh baited, and fresh fish-blood and mackerel gills on deck; he saw also other lines coiled up under the rail, which were dry. Captain Tory charged Captain Nass with fishing that morning inside the limits, and he admitted that he was lying to with his jib down and sheets off when the first gun was fired, but denied that he had caught any mackerel. He said, however, that he had caught two or three codfish. He accounted for his lines being so recently wet by the washing of the deck. His attention was then called to the gills, blood, and bait on deck, but no fresh mackerel being found, and Nass solemnly denying having caught any, and appealing to two vessels, which he named, for confirmation of his statement, Capt. Tory released him, warning him, however, that if he ascertained that he had been fishing, or trying to fish, within the limits that morning, that he would seize him wherever he caught him, within three miles of the coast.

"This statement is confirmed by the other men who boarded the vessel with Capt. Tory. Matson thinks the *A. J. Franklin* was not more than one and a-half miles from the shore when they first saw her. Nass at first denied that he had his jib down, but afterwards admitted it, and said he was waiting to see if the other vessels caught any mackerel. Although this circumstance, and his being so near the shore were suspicious, it is obvious that on the facts as they then appeared, the seizure of the vessel could not have been justified, especially if it be true, as stated in the defendants' evidence, that she was then outside of the three miles.

"The evidence of the Lunenburg men is, therefore, very material, and we must see what it amounts to. There were two vessels, the *Cherub* and the *Nimble*, and the *A. J. Franklin* lay within 60 to 100 yards of them. The crews spoke together while trying to fish. Arnburg saw three of the crew of the *A. J. Franklin* fishing,—saw them catch cod-fish—three he is sure of; she was in the position to catch

mackerel, and was then about a mile from the shore. The witness saw no mackerel caught, and no fish thrown overboard. Rodenizer states that the *A. J. Franklin* and his vessel lay 100 yards apart. The skipper of the *A. J. Franklin* said "mackerel were scarce; he did not do much yet." He was at the bait box. The crew were preparing for fishing on the starboard side, which is the invariable usage. David Heckman says "we were on the starboard bow of the *A. J. Franklin*. She had her mackerel lines out, and they were heaving bait. She continued trying for mackerel till after the *Ida E.* fired the second time, when the crew hauled in their mackerel lines, hoisted jib, trimmed their sails, and stood off out from the fleet, and set staysail. Thomas Herman says, four of the crew of the *A. J. Franklin* were fishing for cod-fish—the skipper was throwing bait for mackerel, and threw his mackerel lines —others were on the rail on the starboard side, looking over. She was hove to, jib down, foresail and mainsail up, and sheets off on port side. Peter Heckman states that he saw some of the crew of the *A. J. Franklin* trying to catch mackerel—they threw their lines over the starboard side—they threw bait over to raise mackerel—they were throwing bait with lines over, trying for mackerel, as the *Ida E.* approached—the crew, after she fired, hauled in the lines, hoisted jib, and stood off the shore. The crew cheered and shouted as they got out of the fleet, and set their staysail. George W. Nass says that he saw some of the crew of the *A. J. Franklin* heaving bait, and they had mackerel lines out on the starboard side. She was hove to, jib down, mainsail and foresail to port, as is usual in fishing for mackerel—she was then within two miles of Broad Cove shore, and about three miles to westward of Seawolf Island. When the *Ida E.* came from the westward, the witnesss heard skipper Nass call out something to one of the other vessels—the reply to him was that it was one of the cutters. The *A. J. Franklin* then hauled in her mackerel lines, and hoisted her jib, and stood to the northward, and then set her staysail.

"Neither this witness nor any of the others saw any mackerel caught, nor any fish thrown over from the *A. J. Franklin*.

"The case for the prosecution is strengthened by certain declarations of the crew, which were not objected to at the hearing, and being against their interest as sharesmen, are receivable, I think, in evidence.

"Captain Tory testifies that he heard several of the crew of the *A. J. Franklin* say on the day of the seizure at the Strait of Canso, that after he left their vessel at Broad Cove, they advised Captain Nass to clear out of the Bay, and go immediately home—that Capt. Tory would find out they had been fishing, and seize them, and that they would lose their fish, to which Capt. Nass replied, that he would like to try a few days longer—that Capt. Tory had been aboard, and was not likely to trouble them again, or such like words.

"Sullivan heard one of the crew make a like declaration; and McMaster heard one of the crew say, that after the *A. J. Franklin* was seized, that they had caught mackerel the morning Capt. Tory boarded them off Broad Cove.

"Of the depositions for the defence, that of Regis Raimond, who was first mate of the *Ida E.*, merely repeats what has been already stated—that Capt. Tory, after he boarded the *A. J. Franklin*, assigned as his reason for not seizing her, that he had found no fish taken that morning, and did not think they had been fishing. The seizure, obviously, resulted from information subsequently received.

"The depositions of Capt. Nass and two of his crew, go much further, and deny a fishing, or preparing to fish altogether. They allege that the jib was let down to prevent their running into another vessel that was ahead. On no day, say they, between the 1st and 15th October, had the *A. J. Franklin*, or any of her crew been fishing or preparing to fish, or had fished, within three marine miles of the North West coast of Cape Breton. On the morning of the 11th they sailed from Port Hood towards Broadcove. After hoisting their jib to go to East Point, and having got outside of the fleet, a gun was fired from the *Ida E.* They continued on their course, and, after running about half-a-mile, a second gun was fired, when the *A. J. Franklin* hove to, and was boarded, and, after enquiry, was let go. This is the substance of Captain Nass's affidavit, who states also that Captain Tory was doubtful or reluctant to serve him, and in his statement of what occurred on the 11th he is confirmed by Morash and Mitchell.

"These three deponents, in fact, are in direct conflict with the six men who have given evidence from Lunenburg. All the minute circumstances they have detailed—the first, that the *A. J. Franklin* was in the centre of the fleet,—that, within 100 yards of the Nova Scotia vessels she was in the position for fishing, throwing bait to attract the mackerel, and with her lines down,—her hasty retreat on the approach of the cutter—all are to be rejected as fabrications, and the six witnesses from Lunenburg, who have no interest in the matter, to be disbelieved. I need not say that no Court could come to such a conclusion, and for all the purposes of this suit, the evidence of these Lunenburg men must be taken as substantially true.

"To what result, then, does it tend. On the charge of preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the treaty—I shall say little in this judgment, because it will be the main enquiry in the judgment I am to pronounce in a few days in the far more important case of the *J. H. Nickerson*. Had I considered the facts in this case to amount to nothing more than a preparing to fish, I would have postponed my decision till the other was prepared and delivered. But I look upon the throwing of bait—the heaving to with sheets off, and the jib down, and the vessel thus lying in the position to catch mackerel, with the mackerel lines out, and hauled in on the approach of the cutter—these circumstances, coupled with the declaration and actions of Captain Nass, bring the case clearly, as I think, within the meaning of the Dominion Acts of 1868 and 1870, as a fishing, and subject the vessel

and her cargo to forfeiture, although no mackerel are proved, except by the declarations of the crew, to have been taken. If I am wrong in this conclusion, an appeal to the High Court of Admiralty, under the Imperial Act of 1863, will afford the Defendants redress, and I shall not be sorry to see such appeal prosecuted. Or the Dominion Government may see fit to relieve from the penalty in whole or in part, as they have a right to do, under the Act of 1868, Sec. 19. Personally, I may say—if a Judge has a right to express any personal feeling—as the vessel was appraised at $800, and the cargo, in which the crew were largely interested, at a much larger sum, I would be well pleased to see the penalty in this case largely mitigated.

"It is not the policy, as I take it, of the Dominion Government, nor is it the disposition of this Court, to press with undue severity upon the American fishermen, even when they trench upon our undoubted rights. The Court has been accused, I am told, of condemning the *Wampatuck*, because the steward, in the absence of the master, had caught seven codfish within the limits, for the purposes of cooking. Such, it is true, was the defence that was set up, and, had it been established, there would certainly have been no condemnation. But the evidence showed that there was a fishing by three or four men, having lines overboard, as was admitted by the master, and several codfish caught for the purpose of curing, and not of procuring food only, as was averred. So, in this case, three or four codfish are admitted to have been taken within the limits; but I have not taken that circumstance at all into account, considering it too trifling to be a ground of condemnation.

"In the case of the *Reward*,—2 Dodson Adm. Repts., 269, 270—Sir William Scott, observed: "The Court is not bound to a strictness at once harsh and pedantic in the application of Statutes. The Court permits the qualification implied in the ancient maxim, '*De minimus non curat lex.*' When there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, (and the catching of a few codfish for a meal is such), weighing little or nothing in the public interest, it might properly be overlooked."

"Upon the other grounds, however, on which I have enlarged, I conceive it my duty to declare the *A. J. Franklin*, her apparel and cargo, forfeited, with costs, and her value, when collected from the Bail, distributed under the Act of 1868."

No. 5.

[Extract from the Halifax Daily Reporter and Times, Novr. 15, 1871.]

In the Vice Admiralty Court, 1871.

The "J. H. Nickerson."

"Sir William Young, Judge Vice Admirality, pronounced the following judgment in the above cause :—

"This is an American Fishing vessel of seventy tons burthen, owned at Salem, Massachusetts, and sailing under a Fishing License issued by the Collector of that Port, and dated March 25th, A. D., 1869. In the month of June 1870, she was seized by Captain Tory of the Dominion Schooner *Ida E.*, while in the North Bay of Ingonish, Cape Breton, about three or four cable lengths from the shore; and it appeared the offence charged against her was that she had run into that Bay for the purpose of procuring bait, had persisted in remaining there for that purpose after warning to depart therefrom, and not to return, and had procured or purchased bait while there. This case, therefore, differs essentially from the cases I have already decided. It comes within the charge of a preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the Treaty of 1818. In giving judgment 10th February last, in the case of the *A. J. Franklin*, I referred to the case in hand, and stated that I would pronounce judgment in this also in a few days, which I was prepared to do. But it was intimated to the Court that some compromise or settlement might possibly take place in reference to the instructions that had been issued from time to time to the cruisers, and to the negociations pending between the two Governments, and I have accordingly suspended judgment until now, when it has been formally moved for.

"The same arguments were urged at the hearing of this cause as in the case of the *Wampatuck* on the wisdom of the Treaty of 1818, and some severe strictures were passed on the spirit and tendency of the Two Dominion Acts of 1868 and 1870. To all such arguments and strictures the same answer must be given in this as in my former judgments. The libel sets out in separate articles these two acts with the Treaty, and the Imperial Acts of 1819 and 1867, all of which are admitted without any question raised thereon in the responsive allegation. I must take them, therefore, both on general principles and on the pleading, as binding on this Court; and it is of no consequence whether the Judge approves or disapproves of them. A Judge may sometimes intimate a desire that the enactments he is called upon to enforce should be modified or changed; but until they are repealed in whole or in part, they constitute the law, which it is his business and his duty to administer.

"Our present enquiry is, what was the law as it stood on the Statute Book on the 30th June, 1870, when the seizure was made? The Court, as I take it, has nothing to do with the instructions of the Government to its officers, and which, if in their possession on that day, might have induced them to abstain from the seizure of this vessel, or may induce the Government now to exercise the power conferred on them by the 19th section of the Acts of 1868.

"But before pursuing this inquiry, let us first of all ascertain the facts as they appear in evidence. For the prosecution, there were exhibited the examinations duly taken under the rules of 1859, of Capt Tory and thirteen of his crew, all of whom were examined on cross interrogatories.

"Capt. Tory testifies that he boarded the vessel at Ingonish, on the 25th of June, and the master being on shore, that he asked the crew then on board, what they were doing there, and they said they were after bait, and had procured some while they were there after coming in, and wanted more. About an hour after he saw the master, and told him he had violated the law, that he had no power to allow the vessel to remain, and that he had better leave. On the 26th the vessel was still there in the harbor, and Capt. Tory boarded her and saw fresh herring bait in the ice house; and Capt. McDonald, the master, admitted that he had procured said bait since his arrival; and he afterwards admitted that he had violated the law, and hoped that Captain Tory would not be too severe with him; and as he promised to leave with his vessel, Capt. Tory did not then seize her. She went to sea the same night, but on the 30th was found again at anchor in the same place where Capt Tory boarded her; and judging from the appearance of her deck, that she had very recently procured more bait, which he saw the next morning, he seized her. In his cross-examination, he says that the herrings he saw on the first occasion in the ice-house on board were fresh, but had been a night or two in the nets, which caused them to be a little damaged; and were large, fat herring, and similar to those caught in the vicinity of Ingonish at that season of the year. The herrings he saw on the second occasion were also fresh, newly caught, with blood on them, of the same description, except that they were sound.

"This evidence, in its main features, is confirmed by several of the crew. Grant went into the ice-house by order of his captain, and there saw about five or six barrels of fresh herring bait and a few fresh mackerel. There were scales of fresh fish on the rails, from which witness judged that they had taken fish that morning. Capt. Tory then seized the "Nickerson" and placed witness on board as one

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 negociations 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 habors 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."