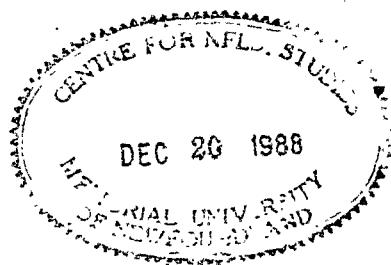


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Memorandum on the Canadian Fisheries Question.

Convention of 1818 revived by
determination of Reciprocity
Treaty.

1. THE determination of the Reciprocity Treaty contracted in 1854, between Great Britain and the United States, revived the First Article of the Convention of 1818 with various Imperial and Colonial Acts passed in connection with the Convention, but suspended during the continuance of the Reciprocity Treaty.

Fishery Article in Convention of
1818.
See Appendix 1.

2. The Article is printed entire in the Appendix hereto. It provides—

(1.) That American fishermen may fish "in common with the subjects of Her Britannic Majesty," in certain specified parts of Newfoundland and Labrador, and on the shores of the Magdalen Islands, with liberty to dry and cure fish on the shores of certain of the unsettled—or, with the consent of the inhabitants, of the settled bays, harbours, and creeks of Newfoundland and Labrador.

(2.) That except within the above limits American fishermen are not to take, dry, or cure fish on or within three miles of the coasts, bays, creeks, and harbours of British North America. But that they may enter such bays and harbours to obtain shelter, repairs, wood, or water, and for no other purpose whatever, under such restrictions as may be necessary to prevent abuse by fishing or otherwise.

Imperial and Colonial Laws in
connection with the Convention.

3. The rights of the parties being thus defined by the Convention, it remained for each nation to give effect to it by Municipal Law, *i.e.*, as far as Great Britain and the Colonies were concerned—

(1.) To prevent American fishermen from fishing &c., within three marine miles of the coasts, bays, and harbours ;

(2.) To impose upon American fishermen entering bays or harbours for the allowed purposes, such restrictions as should prevent abuse ;

(3.) Or, if necessary, to prohibit absolutely, and punish any such entry, not being for the allowed purposes.

4. The first Act passed in connection with the Convention is the Imperial Act, 59 George III, cap. 38 (1819). It is printed entire in the Appendix. The effect may be thus stated—

Imperial Act, 59 Geo. III. cap. 38
See Appendix 2.

(1.) It enables the King, by Orders in Council, to make regulations for establishing the liberty of taking, drying, and curing of fish, given by the Convention to the inhabitants of the United States within certain limits. Sect. 1.

(2.) It prohibits persons on board foreign vessels from fishing, &c., within three marine miles of any coasts, bays, creeks, or harbours whatever in any part of His Majesty's Dominions in America, not included within the limits specified in the Convention, and imposes the penalty of forfeiture of any vessel found fishing, or to have been fishing, or preparing to fish within such distance. Sect. 2.

(3.) It provides that it shall be lawful for United States' fishermen to enter into any of such bays or harbours "for the purpose of shelter and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever, subject, however, to such restrictions as may be necessary to prevent such fishermen from taking, drying, or curing fish in the said bays or harbours, and as shall be imposed by any Order in Council or by Regulations issued by any Governor in pursuance of any Order in Council." Sect. 3.

(4.) It imposes a penalty of 200*l.* upon any person refusing to depart from such bays or harbours upon requisition of any Governor, or refusing to conform to any (such ?) Regulations. Sect. 4.

5. By an Order in Council of 19th June, 1819, it was ordered that the Governor of Newfoundland should give notice to all His Majesty's Subjects not to interrupt the fishery allowed by the Treaty to be Order in Council of June 19, 1819.

carried on by the inhabitants of the United States, and that he should conform himself to the said Treaty.

Colonial Acts in connection with the Convention.

Address of Legislature of Nova Scotia.

Nova Scotia.

6. It seems probable that for some years the powers given by the Imperial Act were sufficient to check the fishermen in encroaching on prohibited waters or defrauding the Customs Revenue. But in 1836 the Council and House of Assembly of Nova Scotia complained that the colonists had experienced great inconvenience and loss in this branch of industry (fisheries) by foreign interference; and that the Revenue was "injuriously affected by the illicit trade carried on by vessels ostensibly engaged in the fisheries who hover on the coast, and in many cases combine trade with the fishery;" and in the same year the first Colonial Act was passed in that province (6 Wm. IV, cap. 8). The Act, after reciting in effect that persons engaged in smuggling or illicit fishery in the prohibited waters escape confiscation by professing to have come thither for the purpose of shelter and repairing damage, or to obtain wood and water, provided,—

(1.) That Customs Officers, Magistrates, and Commissioners appointed by the Lieutenant-Governor may board any vessel within any port, bay, or harbour of the Province, or hovering within three marine miles of any such port, bay, or harbour.

(2.) That if such vessel be bound elsewhere, and after being required to depart continues hovering for twenty-four hours, she may be brought into port, the cargo searched, and the master examined.

(3.) That if there be any goods on board prohibited to be imported into the Province, the vessel and cargo shall be forfeited.

(4.) That if the vessel be foreign, and not navigated according to the laws of Great Britain and Ireland, and shall have been found fishing or preparing to fish or to have been fishing within such distance of such coasts, bays, or harbours of the Province, she and her cargo shall be forfeited.

(5.) That if the master untruly answers the questions to him he shall forfeit 100*l*.

This Act was confirmed by Order in Council of the 15th June, 1836, and by another Order of 6th July, 1836, it was declared that the provisions of the Act should be the fishery rules, restrictions, and regulations of Nova Scotia.

7. The Act was repealed by cap. 170 of the Revised Statutes of Nova Scotia of 1851, but the Revised Fishery Act (14 and 15 Vict., cap. 94), contains substantially the same provisions. A copy of this Act will be found in the Appendix.

14 & 15 Vict., c. 94.
Of the Coast and Deep Sea
Fisheries.
Appendix 3.

8. A complaint was made in 1841 by Mr. Stevenson, the American Minister here, of the provisions of the Nova Scotia Act of 1836; and in 1853, a question was raised whether the Imperial Act of 59 George III, cap. 38, gave power to His Majesty to impose the Rules and Regulations in the Local Act, they being more severe than the Imperial Act seemed to contemplate, but the Law Officers (Sir J. Harding, Sir A. Cockburn, and Sir R. Bethell) reported that even if the Imperial Act were insufficient to impose any of the Regulations, the express enactment of the Local Legislature was sufficient to make them valid.

Report of Law Officers (August
6, 1853) upon the Nova Scotia
Act, and authority of local
Legislature.

They added that the authority of the Local Legislature extended (like that of the Imperial Parliament) over the space of the three miles upon the high seas next the coast, which is by the comity of nations part of the country to which it is adjacent; and that upon this general principle, and irrespective of the Convention, the Imperial Statute, or the Regulations of the Sovereign in Council, the Colonial Legislature was legally entitled to legislate as it had done relative to the fisheries.

9. In New Brunswick the Act of 1853 (16th Victoria, cap. 69), confirmed in like manner by Order in Council of 24th October 1853, contains the same provisions as the Nova Scotia Act of 1836.

New Brunswick.

The Acts of Nova Scotia and New Brunswick are kept alive by the Fisheries Act of the Dominion of Canada.

10. In Prince Edward Island the only Act in force in connection with the Convention was passed in 1843 (6th Victoria, cap. 14). It is precisely the same as the Nova Scotia Act of 1836.

Prince Edward Island

It was confirmed by an Order in Council of the 3rd September, 1844, and, by another Order of the same date, its provisions were declared to be the

Fishery Rules and Regulations for Prince Edward Island.

Newfoundland.

11. In Newfoundland no local statutes are in force for the Regulation of the Fisheries, and the Order in Council of June 19, 1819, is the only Regulation in force with reference to the Fisheries.

Canada—

1. Before Dominion.

12. In Canada no special Act in connection with the Convention appears to have been passed before the establishment of the Dominion.

Under the Consolidated Statutes, cap. 62, Regulations of 7th May, 1859, were made relating to Fisheries at and around the Magdalen Islands, and these are kept alive by the Fisheries Act of the Dominion.

2. After Dominion.

After the establishment of the Dominion the Canadian Act (31 Vict., cap. 61), as amended by a recent Act (33 Vict., cap. 15), respecting fishing by foreign vessels, provides as follows:—

(1.) The Governor may grant licenses to foreign vessels, to fish for, or take, dry, or cure fish in British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included in the 1st Article of the Convention of 1818.

(2.) Officers of Her Majesty's Navy, Magistrates, Custom-house officers, and others, may board any vessel within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours, and stay on board.

By the 3rd Section of 31 Vict., cap. 61, twenty-four hours' warning to depart had to be given, as in the Nova Scotia and New Brunswick Acts.

(3.) Such vessel may be brought into port, her cargo searched, and her master examined, and if the vessel is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and has been found fishing (in British waters) within three marine miles of any of the coasts, bays, or harbours of Canada not included in the above-mentioned limits, the vessel, cargo, &c., shall be forfeited.

Canadian Customs Act.
31 Vict., cap. 6.

13. The penalties of this Act, it will be observed, are strictly confined to fisheries, but a vessel hovering for 24 hours after warning to depart, if prohibited goods are found on board, is forfeited on seizure under the 83rd Section of the Canadian Customs Act, 31 Victoria, cap. 6.

14. The effect of these Acts seems to be as follows:—

Under the Imperial Act a vessel is liable to be forfeited if fishing, &c., within the three miles.

Under the Colonial Acts a vessel is liable to be forfeited—

(1.) If fishing, &c., within the three miles.

(2.) If having prohibited goods on board, it will not depart from the port or cease hovering within three miles after notice.

It will be observed throughout the Colonial Acts that the only prohibition which is exclusively directed against foreign vessels is that which imposes the penalty of forfeiture for fishing within British waters. The provisions which authorize detention, search, and, in case of prohibited goods being on board, seizure, are equally applicable to British and foreign, to trading and fishing vessels.

15. It may be convenient to state that, in September 1852, the Law Officers (Sir John Harding, Sir F. Theziger, and Sir Fitzroy Kelly), reported as to the powers of seizure, &c., under the Imperial Act—

Report of Law Officers (September 25, 1852) upon the power to seize, &c., under the Imperial Act.

See Appendix 4.

First. That the officers of Her Majesty's ships might seize fishing-vessels only in the cases mentioned in the 2nd Section of the 59th George III, cap. 38, viz., if found fishing, &c., within the prescribed limits; but that they might, by virtue of their instructions, enforce the terms of the Convention by interrupting intruders, warning them off, and compelling them to desist from fishing.

Secondly. That fishing-vessels of the United States resorting to British harbours, in violation of the Convention, but without the taking, curing, or drying of fish, could not be seized, but were only punishable under the 4th Section of the Statute.

Thirdly. That, independently of the express provisions of the Statute, vessels so offending might be warned off, and, in default of obedience, might be compelled to depart by the exercise of whatever force was reasonably necessary for that purpose.

A copy of this opinion and of the questions submitted to the Law Officers is appended for reference.

16. In this state of things, two questions have arisen—

Nature of questions at issue upon the Convention.

(a.) The United States claim, though with some indistinctness, the right of fishing in all waters not within three miles of the coast ; while Great Britain and Canada construe the Treaty as forbidding them to fish within three miles of a line drawn from headland to headland of any British bay.

(b.) Canada argues that the prohibition of entering bays is absolute except in the cases specifically provided for, namely, in search of shelter, for repairing damages, for fuel and water ; and they allege that this was the practice before the Reciprocity Treaty.

The United States deny the practice, and allege that United States' fishermen ought not to be prevented from resorting to the British ports of entry on the same footing as ordinary trading-vessels, and should be allowed, subject, of course, to Customs Regulations, to tranship fish, purchase stores, hire seamen, &c.

(1) As to limits of rights of fishing.
Report of Queen's Advocate,
October 31, 1837.

17. On the first question an opinion in favour of the British view was given in October 1837 by the then Queen's Advocate (Sir J. Dodson), who reported, "That the citizens of America have no right to calculate, as it is asserted they do, their three marine miles as being a line curving and corresponding with the coast."

Report of Law Officers, August
30, 1841.

18. A similar opinion was given by the Law Officers (Sir J. Dodson and Sir T. Wilde) in 1841, the effect of which, however, is a little injured by a mistaken assumption that the word "headland" is specifically mentioned in the Treaty.

Report of Sir Travers Twiss,
1854.
See Appendix 5.

19. The question was again fully considered, and the British view unequivocally supported by the present Queen's Advocate (Sir Travers Twiss) in his Report in 1854, a copy of which is annexed.

Opinion of Mr. Webster when
Secretary of State.
July 6, 1852. Extract from the
"Boston Courier."

20. It may further be observed that Mr. Webster, when Secretary of State, admitted in an official paper that—

"It would appear that, by a strict and rigid construction of the Article, fishing-vessels of the United States are precluded from entering into the bays and harbours of the British provinces except for the purpose of shelter, repairing damages and obtaining

wood and water. . . . The British authorities insist that England has a right to draw a line from headland to headland and to capture all American fishermen who may follow their pursuits inside of that line. It was undoubtedly an oversight in the Convention of 1818 to make so large a concession to England, since the United States had usually considered that those vast inlets or recesses of the ocean ought to be open to American fishermen as freely as the sea itself to within three marine miles of the shore."

He added, "Not agreeing that the construction thus put upon the Treaty is conformable to the intentions of the Contracting Parties, this information is made public to the end that those concerned may perceive how the case at present stands and be upon their guard."

But that this construction was, in truth, conformable to the intentions of the Contracting Parties, appears from the instructions given to the American Plenipotentiaries, Messrs. Gallatin and Rush in 1818. Writing to them Mr. Adams states, "The President authorizes you to agree to an Article whereby the United States will desist from the liberty of fishing, and curing and drying fish within the British jurisdiction *generally*, upon condition that it shall be secured as a permanent right not liable to be impaired by any future war, from Cape Ray to the Ramian Islands and from Mount Joli, on the Labrador coast, through the Strait of Belle Isle indefinitely north along the coast, the right to extend as well to curing and drying the fish as to fishing.

State Papers, vol. vii, page 162.

21. With regard to the extent of natural, and therefore of British, jurisdiction in neighbouring waters, the American doctrine, as stated by Chancellor Kent, who refers to various authorities in support of his view, is as follows:—

Opinions of Chancellor Kent.
1 Kent's Commentaries, pages 25, 29, and 30.

"Navigable rivers which flow through a territory and the sea-coast adjoining it, and the navigable waters included in bays and between headlands and arms of the sea belong to the Sovereign of the adjoining territory, as being necessary to the safety of the nation and to the undisturbed use of the neighbouring shores.

"Considering the great extent of the line of the American coasts, we have a right to claim for fiscal

and defensive regulations a liberal extension of maritime jurisdiction ; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Arm to Cape Cod, and from Nantucket to Montawk Point, and from that Point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi.

“ It ought, at least, to be insisted that the extent of the nautical immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within the Chambers* formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another.

“ It is difficult to draw any precise or determined conclusion, amidst the variety of opinions, as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbours, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as a cannon-shot will reach, and no further ; and this is generally calculated to be a marine league, and the Congress of the United States have recognized† this limitation, &c.”

Mr. Cardwell to Admiralty, in 1866. See Appendix 6.

22. In 1866 Mr. Cardwell stated the opinion of Her Majesty's Government to be that “ American fishermen should not be interfered with either by notice or otherwise, unless they are found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839.”

Instructions were issued by the Canadian Government adopting this limit ; but subsequently, in

* These arms of the sea are called “ King's Chambers ” by old authorities.

† Act, June 5, 1794, section 50.

1870, the Colonial Office instructions of 1866 were modified, and the Canadian Government were informed that Her Majesty's Government thought it advisable that United States' fishermen "should not be excluded from any waters except within three miles of shore, or in the unusual case of a bay which is less than six miles wide at its mouth, but spreads out to a greater width within."

Lord Kimberley to Sir John Young, June 6, 1870.

The Canadian Government have since issued instructions in conformity with this opinion of Her Majesty's Government.

As to the second question, viz., the right of fishing vessels to enter ports on the same footing as trading vessels :—

(2) As to right of fishing-vessels to enter for trading purposes.

23. It is not easy to ascertain what was the practice before the Convention of 1818, upon this point.

Practice before 1818.

By instructions sent to the Governor of Newfoundland on June 17, 1815, the Governor was directed, amongst other things, to exclude United States' fishing-vessels from the bays, harbours and creeks of all His Majesty's possessions; and the following Admiralty Order for the governance of His Majesty's officers engaged in the protection of fisheries was issued by Rear-Admiral Milne on the 12th May, 1817. "On your meeting with any foreign vessel, fishing, or at anchor, in any of the harbours or creeks in His Majesty's North American Provinces, or within Our Maritime Jurisdiction, you will seize and send such vessel, so trespassing, to Halifax, for adjudication, unless it should clearly appear that they have been obliged to put in there in consequence of distress; acquainting me with the cause of such seizure, and every other particular, to enable me to give all information to the Lords Commissioners of the Admiralty."

Instructions to Governor of Newfoundland, June 17, 1815.

State Papers, vol. vii, page 139.

24. In a Report by Mr. Whitcher, Commissioner of Fisheries of Canada, it is stated that, after the Treaty of Ghent, 1814, the British Government avowed their determination to withhold the privileges granted by the Treaty of 1783; that, however, United States' vessels swarmed over the Fisheries; that twenty United States' vessels were seized for trespass on the limits of British maritime jurisdic-

Report of Mr. Whitcher, Ottawa, 1870.

tion, and that this led to overtures which resulted in the Convention of 1818.

Seizure of vessels off Ragged Island.

25. It appears from the State Papers, vol. vii, page 138, that a number of United States' vessels were seized in 1817 off Ragged Island, for "occupying the settled harbours of His Majesty's Dominions in violation of the orders at all times enforced against all foreign vessels detected in making similar encroachments."

State Papers, vol. vii, page 162.

These vessels were restored; and the ground of the decision in their favour in the Halifax Court appears to have been that the Court had no power to condemn them without an Imperial Act.

It appears from page 217 of the same volume that there had been other captures of fishing-vessels followed by sentences of condemnation.

American View of Convention.

26. As to the effect of the Convention, the Americans rely upon the Protocol of the fifth Conference, as showing that it was not intended by the Convention to put any restrictions upon trading.

State Papers, vol. vii, pages 196 and 199.

The Fishery Article proposed by the British Plenipotentiaries contained two special clauses, providing:

(1.) That the liberty of taking and drying fish should not be construed to extend to any privilege of carrying on trade with any of His Majesty's subjects for any of the purposes aforesaid.

(2.) That, to prevent smuggling, United States' vessels should only have on board food, &c., necessary for the prosecution of the fishery and support of the fishermen, and that a contravention of this regulation should subject the vessel to confiscation.

The American Plenipotentiaries objected that they were not prepared to accept the fishing on a tenure, or on conditions different from those on which it had been held before; that they did not anticipate that any new term or restriction would be imposed; and that the clause making vessels liable to confiscation in case of articles not wanted for the fishery being found on board was of that description and would expose the fishermen to endless vexation.

The clauses, which appear to have been proposed *ex majori cautela*, and to have been hardly suited, especially the confiscation clause, to a Convention, were not insisted on. Nothing can fairly be inferred from the fact that they were withdrawn.

27. The view of His Majesty's Government upon the meaning of the Convention was stated as follows by Lord Bathurst in June 1819, when transmitting the Imperial Act to the Governor of Canada :—" You will observe that the privilege granted to the citizens of the United States is one purely of fishery, and of drying and curing fish within the limits severally specified in the Convention. It is the pleasure of His Royal Highness that this privilege, as limited by the Convention, should be fully and freely enjoyed by them without any hinderance or interference; but you will at the same time remark that all attempts to carry on trade, or to introduce articles for sale or barter into His Majesty's possession under the pretence of exercising the rights conferred by the Convention, is in every respect at variance with its stipulations. You will, therefore, promulgate, as publicly as possible, the nature of the indulgence which you are, under the Convention instructed to allow them; and in case any of the inhabitants of the United States should be found attempting to carry on a trade not authorized by the Convention, you will in the first instance warn them of the illegality of such a proceeding, and in the event of their being afterwards engaged in it, you will not hesitate to adopt with respect to them the same means of control and the same punishments and forfeitures as would be legally applicable in the trade of any other foreign nation possessing no privilege of fishery whatever.

Earl Bathurst to Governor Hamilton, June 21, 1819.

"You will also give such directions as may be necessary for securing to the American fishermen the privileges of entering the Harbours of Newfoundland for the purpose of shelter and of repairing damages therein, of purchasing wood and obtaining water, but for no other purpose whatever; and I must on this point also, direct your particular attention to the necessity of exercising great vigilance in order to prevent the abuse of these privileges in any manner whatever, and more especially for the purpose

of carrying on an unauthorized fishery or an illegal trade.”

Report of Sir J. Dodson, October
31, 1837.

28. In 1837 Sir John Dodson, Queen’s Advocate, reported “that the fishermen of the United States cannot claim the privilege of coming within the harbours either to buy bait from the inhabitants or to take it for themselves; by the terms of the Treaty they may enter for the purpose of shelter and repairing damages therein, of purchasing wood, and of obtaining water, but for no other purpose whatever.”

Report of Law Officers,
March 16, 1866.

29. In March 1866 the Law Officers (Sir. R. Palmer, Sir R. Collier, and Sir R. Phillimore) reported that they concurred generally in the opinions given by the Law Officers in 1841, and by Dr. Twiss in 1854; and that the provisions of the Colonial Acts did not appear to be substantially different from those of the Imperial Statutes in *pari materid.* They suggested, however, one or two alterations in them for the consideration of the Colonial authorities.

Instructions by Mr. Cardwell,
April 12, 1866.
See Appendix 6.

30. In April 1866, after the determination of the Reciprocity Treaty, Mr. Cardwell, then Secretary of State for the Colonies, in a letter respecting the instructions to be sent to the Admiral on the North American Station, observed: “That Her Majesty’s Government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights.”

Instructions by Lord Kimberley,
October 12, 1870.

31. And Lord Kimberley has quite recently informed the Governments of Canada and Prince Edward Island that Her Majesty’s Government adhere to the views expressed by Mr. Cardwell; that the Lords of the Admiralty have been requested to call Admiral Fanshawe’s attention to the passage in Mr. Cardwell’s letter, and to inform him that the transhipment of fish and obtaining supplies by American fishing-vessels cannot be regarded as a “substantial invasion of British rights,” such as is contemplated by these Instructions, and that unless there is some further ground of interference than the Convention of 1818 and

the consequent Enactments of 59 George III, cap. 38 (Imperial), and 6 Victoria, cap. 14 (Prince Edward Island), he is not to prevent United States' fishermen from entering British bays for such purposes.

It is added that, if the Admiral should be of opinion that this admission of United States' vessels renders it difficult, practically, to enforce the Law against fishing in British waters, he will be instructed to report that opinion, and the grounds on which he has formed it, and Her Majesty's Government will then consider whether it is necessary that any further steps should be taken for the more effectual prevention of encroachment on the Colonial Fisheries by foreign vessels.

32. Adopting, however, the strictest construction General view of this question of the Convention and Imperial Act, no penalty is imposed by the latter upon the entry of a fishing-vessel, nor upon its trading, but only the penalty of 200*l.* for refusing to leave the harbour, or for non-compliance with Rules and Regulations made in execution of the Act.

These Rules and Regulations are in truth comprised in the local Acts above referred to, and do not appear to contemplate anything beyond the prevention of smuggling and fishing.

33. Though the United States' fishermen cannot, as Sir J. Dodson reports, claim any privilege of coming within the harbour to buy bait, transship fish, &c. ; yet when they have once entered, there seems to be no reason why they should not buy bait, &c., subject to any local Act forbidding such proceeding, and subject to their being required to quit the harbour.

34. The Colonial authorities would probably be within their strict legal rights if they were to pass Acts forbidding the United States' fishermen to purchase bait or transship fish, or if they were to prevent such proceedings by giving those fishermen immediate warning to quit in every case unless they were in the harbour for any purpose specifically conceded by the Convention ; and instructions, now withdrawn, have, in fact, been given by Mr. Mitchell, the Canadian Minister of Marine, to Canadian

See despatch of October 12, 1870, to Lord Lisgar. officers directed to enforce prohibition against entering British bays on the extreme construction of the Treaty, if not in excess of it.

It only remains to observe one or two other points connected with the Convention, upon which the Law Officers have reported.

MAGDALEN ISLANDS.

Report of Queen's Advocate, January 7, 1828.

35. In January 1828, Sir C. Robinson reported upon the right of drying fish on the Magdalen Islands, that it would not be consistent with a liberal construction of the Treaty to exclude American fishermen altogether from drying fish on the Islands so long as the accommodation can be afforded without prejudice to the rights of sovereignty.

Report of Queen's Advocate, October 1, 1837.

36. In October 1837, Sir J. Dodson reported, with respect to a complaint that the United States' fishermen landed on the Magdalen Islands and pursued their fishing therefrom, that the contracting parties may have intended some material distinction when they used the word "shores" as applicable to these Islands, and the word "coast" with reference to the other parts of the Territories mentioned, and possibly may have meant to confer upon American citizens, in concurrence with British subjects, a right to land upon the shores of the Magdalen Islands for the purpose of taking fish, but that he was inclined to think otherwise.

Report of Law Officers, August 30, 1841.

37. Subsequently, however, in a Report of August 1841, the Law Officers (Sir J. Dodson and Sir T. Wilde) reported that the American citizens had no right to land or conduct the fishery from the shores of the Magdalen Islands.

Report of Law Officers, September 25, 1852.

38. In 1852, the then Law Officers (Sir J. Harding, Sir F. Thesiger, and Sir Fitzroy Kelly) reported that, as to the right of fishing from the shores of these islands, they were disposed to agree with the opinion of Sir J. Dodson and Sir Thomas Wilde, in 1841; and that, if it should be considered advisable to prevent the commission of any such acts (*i.e.*, fishing, drying, or curing fish) upon the Magdalen Islands (which were, in their opinion, contrary to the Convention), it might be done after

warning, and without seizing vessels, by interrupting the fishermen and compelling them to depart.

In 1866 Mr. Cardwell stated that, although the privilege of drying and curing fish on the Magdalen Islands is not expressly given to American fishermen, Her Majesty's Government have no desire at present to exclude them from it, nor to impose any narrow construction on the word "unsettled."

Instructions by Mr. Cardwell,
April 12, 1866.

39. In March 1838 Sir J. Dodson reported that the terms of the Convention did not deprive the citizens of America of the right of passing through the Gut of Canso for the purpose of taking fish, in common with British subjects in the Gulf of Saint Lawrence.

GUT OF CANSO.
Report of Sir J. Dodson,
March 10, 1838.

But subsequently, and after a further examination of the question, he, conjointly with Sir T. Wilde, reported that the Convention did not concede the right of using or navigating the Gut of Canso, and that, independently of Treaty, no foreign nation has the right to use or navigate this passage.

40. In 1845 Her Majesty's Government announced to the Government of the United States that, though satisfied that the Bay of Fundy has been rightly claimed by Great Britain as a bay within the Treaty of 1818, they conceived that the relaxation of that right would be attended by mutual advantage to both countries, and that American citizens should be allowed to fish in any part of that bay, provided they did not approach, except in cases specified in the Treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.

BAY OF FUNDY.

In 1854 the present Queen's Advocate reported at length upon the right of Americans to fish within the Bay of Fundy, and negatived such right.

Report of Sir T. Twiss, April 28,
1854.

H. T. H.

APPENDIX.

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APPENDIX.

1.

CONVENTION between GREAT BRITAIN and the UNITED STATES, Signed at London,
October 20, 1818.

(Extract.)

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

2.

UNITED STATES.

Act of British Parliament, "to enable His Majesty to make Regulations with respect to the taking and curing Fish on certain parts on the Coasts of Newfoundland, Labrador, and His Majesty's other Possessions in North America, according to a Convention made between His Majesty and the United States of America."

[59 Geo. III, cap. 38.]

[14th June, 1819.]

WHEREAS a Convention between His Majesty and the United States of America, was made and signed at London, on the 20th day of October, 1818; and by the 1st Article of the said Convention, reciting that differences had arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish in certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America; it is agreed, that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Ramean Islands, on the Western and Northern Coasts of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joli on the Southern Coasts of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and it was also by the said Article of the said Convention agreed, that the American fishermen should have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the Coast of Newfoundland above described, and of the Coast of Labrador; but that 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 whereas, it is expedient that His Majesty should be enabled to carry into

execution so much of the said Convention as is above recited, and to make regulations for that purpose; be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, it shall and may be lawful for His Majesty, by and with the advice of His Majesty's Privy Council, by any Order or Orders in Council, to be from time to time made for that purpose, to make such regulations, and to give such directions, orders, and instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons whomsoever, as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of the said Convention, with relation to the taking, drying, and curing of fish by the inhabitants of the United States of America, in common with British subjects, within the limits set forth in the said Article of the said Convention, and hereinbefore recited; any Act or Acts of Parliament, or any law, custom, or usage to the contrary in anywise notwithstanding.

II. And be it further enacted, that from and after the passing of this Act, it shall not be lawful for any person or persons, not being a natural-born subject of His Majesty, in any foreign ship, vessel or boat, nor for any person in any ship, vessel, or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry, or cure any fish of any kind whatever, within three marine miles of any coasts, bays, creeks, or harbours whatever, in any part of His Majesty's dominions in America, not included within the limits specified and described in the 1st Article of the said Convention, and hereinbefore recited; and that if any such foreign ship, vessel, or boat, or any persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish within such distance of such coasts, bays, creeks, or harbours within such parts of His Majesty's dominions in America out of the said limits as aforesaid, all such ships, vessels, and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture, and stores shall be forfeited, and shall and may be seized, taken, sued for, prosecuted, recovered, and condemned by such and the like ways, means, and methods, and in the same Courts, as ships, vessels, or boats, may be forfeited, seized, prosecuted, and condemned for any offence against any laws relating to the revenue of Customs, or the laws of trade and navigation, under any Act or Acts of the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland; provided that nothing in this Act contained shall apply, or be construed to apply, to the ships or subjects of any Prince, Power, or State, in amity with His Majesty, who are entitled by Treaty with His Majesty to any privilege of taking, drying, or curing fish on the coasts, bays, creeks, or harbours, or within the limits in this Act described.

III. Provided always, and be it enacted, that it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbours of His Britannic Majesty's dominions in America as are last mentioned, for the purpose of shelter and repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purpose whatever; subject, nevertheless, to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying, or curing fish in the said bays or harbours, or in any other manner whatever abusing the said privileges by the said Treaty and this Act reserved to them, and as shall for that purpose be imposed by any Order or Orders to be from time to time made by His Majesty in Council under the authority of this Act, and by any regulations which shall be issued by the Governor or person exercising the office of Governor, in any such parts of His Majesty's dominions in America, under or in pursuance of any such Order in Council as aforesaid.

IV. And be it further enacted, that if any person or persons, upon requisition made by the Governor of Newfoundland, or the person exercising the office of Governor, or by any Governor, or person exercising the office of Governor, in any other parts of His Majesty's dominions in America as aforesaid, or by any officer or officers acting under such Governor, or person exercising the office of Governor, in the execution of any orders or instructions from His Majesty in Council, shall refuse to depart from such bays or harbours; or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act; every such person so refusing or otherwise offending against this Act shall forfeit the sum of 200*l.*, to be recovered in the Superior Court of Judicature of the Island of Newfoundland, or in the Superior Court of Judicature of the Colony or Settlement within or near to which such offence shall be committed, or by bill, plaint, or information in any of His Majesty's Courts of Record in Westminster; one moiety of such penalty to belong to His Majesty, his heirs and successors, and the other moiety to such person or persons as shall sue or prosecute for the same: Provided always, that any such suit or prosecution, if the same be committed in Newfoundland, or in any other Colony or Settlement, shall be commenced within three calendar months; and, if commenced in any of His Majesty's Courts at Westminster, within twelve calendar months from the time of the commission of such offence.

3.

CHAPTER 94.—OF THE COAST AND DEEP SEA FISHERIES.

Revenue officers may board vessels hovering within three miles of the coast.

Proceedings where the master bound

1. OFFICERS of the colonial revenue, sheriffs, magistrates, and any other person duly commissioned for that purpose, may go on board any vessel or boat within any harbour in the province, or hovering within three marine miles of any of the coasts or harbours thereof, and stay on board so long as she may remain within such place or distance.

2. If such vessel or boat be bound elsewhere, and shall continue within such harbour or so hovering for twenty-four hours after the master shall have been required to depart, any one of the officers above mentioned may bring such vessel or boat into port and search her cargo, and also

examine the master upon oath touching the cargo and voyage; and if the master or person in command shall not truly answer the questions demanded of him in such examination he shall forfeit four hundred dollars; and if there be any prohibited goods on board, then such vessel or boat, and the cargo thereof, shall be forfeited.

3. If the vessel or boat shall be foreign and not navigated according to the laws of Great Britain and Ireland, and shall have been found fishing or preparing to fish, or to have been fishing within three marine miles of such coasts or harbours, such vessel or boat and the cargo shall be forfeited.

4. All goods, vessels and boats liable to forfeiture may be seized and secured by any of such officers or persons so commissioned; and every person opposing them, or any one aiding such opposition, shall forfeit eight hundred dollars.

5. Goods, vessels and boats, seized as liable to forfeiture under this chapter shall be forthwith delivered into the custody of the officers of the colonial revenue next to the place where seized, to be secured and kept as other vessels, boats and goods seized, are directed to be secured and kept by law.

6. All goods, vessels and boats condemned as forfeited under this chapter shall, by direction of the principal officer of the colonial revenue where the seizure shall have been secured, be sold at public auction, and the proceeds of such sale shall be applied as follows: the amount chargeable for the custody of the property seized shall first be deducted and paid over for that service, one-half of the remainder shall be paid to the officer or person seizing the same without deduction, and the other half, after first deducting therefrom all costs incurred, shall be paid into the treasury of the province; but the board of revenue may nevertheless direct that any vessel, boat or goods, seized and forfeited, shall be destroyed or reserved for the public service.

7. All penalties or forfeitures hereunder shall be prosecuted and recovered in the Court of Vice-Admiralty.

8. If any goods, vessel or boat shall be seized as forfeited under this chapter, the Judge of the Vice-Admiralty, with the consent of the persons seizing the same, may order re-delivery thereof, on security by bond to be made by the party, with two sureties, to the use of Her Majesty. In case the property shall be condemned, the value thereof shall be paid into the Court and distributed as above directed.

9. All suits for the recovery of penalties or forfeitures shall be in the name of Her Majesty, and shall be prosecuted by the Advocate-General, or, in case of his absence, by the Solicitor-General. If a dispute arise whether any person is authorized to seize under this chapter, oral evidence may be heard thereupon.

10. If any seizure take place under this chapter, and a dispute arise, the proof touching the illegality thereof shall be upon the owner or claimant.

11. No claim to anything seized under this chapter, and returned into the Court of Vice-Admiralty for adjudication, shall be admitted unless the claim be entered under oath, with the name of the owner, his residence and occupation, and the description of the property claimed; which oath shall be made by the owner, his attorney or agent, and to the best of his knowledge and belief.

12. No person shall enter a claim to anything seized under this chapter until security shall have been given in a penalty not exceeding two hundred and forty dollars to answer and pay costs occasioned by such claim; and in default of such security the things seized shall be adjudged forfeited, and shall be condemned.

13. No writ shall be sued out against any officer or other person authorized to seize under this chapter for anything done thereunder until one month after notice in writing, delivered to him or left at his usual place of abode by the person intending to sue out such writ, his attorney or agent; in which notice shall be contained the cause of action, the name and place of abode of the person who is to bring the action, and of his attorney or agent; and no evidence of any cause of action shall be produced except such as shall be contained in such notice.

14. Every such action shall be brought within three months after the cause thereof has arisen.

15. If on any information or suit brought to trial under this chapter on account of any seizure, judgment shall be given for the claimant, and the Judge or Court shall certify on the record that there was probable cause of seizure, the claimant shall not recover costs, nor shall the person who made the seizure be liable to any indictment or suit on account thereof. And if any suit or prosecution be brought against any person on account of such seizure, and judgment shall be given against him, and the Judge or Court shall certify that there was probable cause for the seizure, then the Plaintiff, besides the thing seized or its value, shall not recover more than three and a half cents damages, nor any costs of suit, nor shall the Defendant be fined more than twenty cents.

16. The seizing officer may, within one month after notice of action received, tender amends to the party complaining, or his attorney or agent, and plead such tender.

17. All actions for the recovery of penalties or forfeitures imposed by this chapter must be commenced within three years after the offence committed.

elsewhere refuses on notice to depart.

Foreign vessels fishing or preparing to fish, and their cargoes, forfeited.

Vessels and goods forfeited liable to seizure; penalty for obstructing officers.

Custody of vessels and goods seized.

Condemned vessels and goods, how disposed of, and the proceeds how applied.

Penalties and forfeitures, how prosecuted.

Vessels and goods to be re-delivered on security.

Suits, how brought and prosecuted; oral evidence admissible as authority of seizing officers.

Burden of proof in cases of seizure to rest with claimant.

Claims of property seized to be under oath.

Security to be given before claim entered.

Month's notice to officer before action.

Limitation of action against seizing officers.

Certificate of probable cause of seizure shall prevent the recovery of costs.

Amends may be tendered within one month.

Limitation of actions for penalties, &c

Appeals, within what time to be prosecuted.

Coasting vessels to have a narrow piece of plank or iron extending aft of the stern post.

Forfeiture for destroying nets where coasters are not so provided.

Definition of terms.

Suspension of first eighteen sections.

Agreement to be entered into between master and crew.

Terms of agreement.

Penalties for desertion

18. No appeal shall be prosecuted from any decree or sentence of any Court in this province, touching any penalty or forfeiture imposed hereby, unless the inhibition be applied for and decreed within twelve months from the decree or sentence being pronounced.

19. All coasting vessels under sixty tons burthen owned in this province, and engaged in the coasting trade thereof, shall be furnished with a narrow piece of plank or iron affixed to the bottom of the keel, and level therewith, extending aft at least six inches beyond the aperture between the stern post and the rudder, and well secured on the keel. But this section shall not extend to vessels in which the main or false keel extends six inches beyond the aperture between the stern post and rudder.

20. Any owner or master of a coasting vessel not so furnished or built, running foul of any net, set off the harbours, bays, and rivers of the coast, shall, upon due proof thereof, forfeit twenty dollars, to be recovered by the party injured to his own use as a private debt, leaving to the party aggrieved nevertheless, his rights at common law for any further damage.

21. In this chapter "vessels" shall include ships; and "harbours" shall include ports, bays, and creeks.

22. The first eighteen sections are suspended as regards citizens and inhabitants of the United States of America, and shall continue so suspended and not in force so long as the Treaty between Her Majesty and that country, signed on the 5th day of June, 1854, shall continue and be in force.

23. The master of any vessel registered and belonging to this province, and bound from any port therein, to be employed in the deep sea fishery, shall, before proceeding on such fishing voyage, enter into an agreement in writing with every person on board, apprentices excepted, which agreement shall express whether the same is to continue for one voyage, or for the fishing season; and shall also express that the fish, or the proceeds of such fishing voyage or voyages, which may appertain to the crew of such vessel, shall be divided among them in proportion to the quantity or number of fish which they may respectively have caught; which agreement, in addition to the signatures of the master and crew, shall be countersigned by the owner of such fishing vessel, or his agent, and shall be as nearly as possible in the form given in the annexed schedule.

24. Any person having engaged for a voyage or for the fishing season, as before provided, who shall, while the agreement therefor continues in force, desert or absent himself from the vessel in which he shipped, without leave of the master, shall be liable to the same penalties and forfeitures imposed on the like offences under chapter seventy-five; and every master of a fishing vessel taking any person on a deep sea voyage without entering into the before required agreement, shall be liable to the penalty imposed on that offence by the same chapter.

Schedule in this Chapter referred to.

Form of agreement.

An agreement made, in pursuance of chapter ninety-four of an Act of the General Assembly of Nova Scotia, passed in the twenty-seventh year of the reign of Her Majesty Queen Victoria, entitled "An Act for Revising and Consolidating the General Statutes of Nova Scotia," between ———, master of the ship ———, of the port of ———, of the burthen of ——— tons, and the several persons whose names are subscribed hereto.

It is agreed by and on the part of the said persons, and they severally hereby engage to serve on board said ship in the capacities set opposite their respective names, on a fishing voyage from the port ——— to ——— [*here the intended voyage is to be described, and the duration of the same, and the nature of the same as nearly as can be done, and if the same is to continue for the fishing season*], and back to the port of ———; and the said crew agree to conduct themselves in an orderly, faithful, honest, careful and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in every thing relating to the said ship, and the materials, stores and cargo thereof; in consideration of which services to be duly, honestly, faithfully and carefully performed, the said master doth hereby promise and agree with the said crew [*here insert the particular agreement with reference to the division of the fish among the sharesmen at end of voyage*]. In witness whereof the said parties have hereto subscribed their names on the days against their respective signatures mentioned.

Place and Time of Entry.			Men's Names.	Age.	Place of Birth.	Quality.	Amount of Shares.	Sureties.	Witness to Execution.
Day.	Month.	Year.							

MEMORANDUM of Legal Questions relative to the North American Fisheries.

"Cumberland," Halifax, July 8, 1852.

1. WHETHER under the Act 59 Geo. III, cap. 38, the Commanding Officers of Her Majesty's ships or vessels require any commission from the Governors, or Officers Administering the Government of the Colonies, to carry out the stipulations of the Convention of 1818 with the United States relative to the fisheries on their respective coasts, either in seizing fishing vessels infringing the

Regulations, or in compelling them to quit any port or harbour when they are not there for the purposes defined by the Convention; or whether the orders under which such Commanding Officers are acting under competent authority from the Imperial Government, are sufficient to enable them to enforce the terms of the Convention?

2. The fishing vessels of the United States are found in great numbers at Port Hood, and adjacent harbours in Cape Breton, New Brunswick, and those of Prince Edward Island, where they pass their Sundays, and the men land in great numbers, which leads to illegal traffic and to an undue influence over the inhabitants, and from their numbers, are beyond control. Such entry not being included under the causes admitted by the 3rd Clause of 59 Geo. III, cap. 38, can a vessel so offending be seized by Her Majesty's ships for a contravention of the Act (or if she remains or returns after receiving due notice of the illegality of the practice), or is the offence only punishable under the 4th Clause by the Colonial Authorities, after notice has been given, by the imposition of penalty, recoverable in the Supreme Court of the Colony? and how are offenders to be detained in the latter case?

3. It being agreed in the Convention of 1818, that the inhabitants of the United States may take fish of every kind on the shores of the Magdalen Islands, Sir John Dodson and Mr. Wilde gave an opinion in their letter to Viscount Palmerston, in August 1841, that American citizens have no right to land on those Islands, or to conduct the fishery from its shores.

Nevertheless, I find that an Instruction has been issued on the North American Station, by successive Commanders-in-chief commencing in 1828, that practical interference with the United States' fishermen on the Magdalen Islands should be avoided, although their right to fish from the shores, or to dry and cure their fish there, should not be acknowledged. It is now reported that the crews of the United States' vessels interrupt the fisheries of Her Majesty's subjects at the Magdalen Islands.

I have to request instructions whether United States' vessels so fishing from the shores of the Magdalen Islands, or in drying and curing fish on the said Islands, shall be seized, and whether with or without warning, for infraction of the Treaty?

The Magdalen Islands are under the Government of Canada, and considered to make part of the county of Gaspé, but I understand there are at present no means whatever of enforcing measures by Civil power.

(Signed) G. F. SEYMOUR,
Vice-Admiral and Commander-in-chief.

I subjoin some Queries on points respecting the construction of the Convention, which were held doubtful in this Province when the late instructions to their vessels were framed.

1. Has an American fishing-vessel a right to enter a harbour of Nova Scotia in severe weather, and afterwards proceed to sea without purchasing wood and water, or is she liable to seizure under existing laws?

2. If an American fishing-vessel should approach within the limit, and thus violate the terms of the Convention and the existing laws, and escape beyond three miles, can she be seized by a provincial cutter on the high seas beyond the three marine miles?

3. How far do the Regulations passed by His Majesty in Council in 1836 extend? Can a vessel commissioned by the Province of Nova Scotia enforce the observance of these Regulations in the waters around the Provinces of Nova Scotia, New Brunswick, or Prince Edward Island? Can a cutter commissioned by the Government of Nova Scotia enforce the 59 Geo. III, cap. 38?

(Signed) G. F. SEYMOUR.

The LAW OFFICERS of the CROWN to the Earl of MALMESBURY.

My Lord,

Doctors' Commons, September 25, 1852.

WE are honoured with your Lordship's commands signified in Mr. Addington's letter of the 16th instant, stating that with reference to the Queen's Advocate's letter of the 30th of July last, requesting to be furnished with certain documents relating to the North American Fisheries, to enable the Law Officers of the Crown to furnish your Lordship with a Report upon certain points connected with that subject, he was directed to transmit to us therewith two letters and their enclosures, from the Admiralty and from the Colonial Office, containing the information specified in the Queen's Advocate's letter above referred to; and Mr. Addington is pleased to request that we would report to your Lordship at our earliest convenience, upon the points stated in Vice-Admiral Sir George Seymour's Memorandum, which was referred to us on the 26th of July last.

In obedience to your Lordship's commands we have the honour to report:—

First.—That we are of opinion that the Commanding Officers of Her Majesty's ships or vessels are empowered to seize fishing-vessels only in the cases mentioned in the second section of the 59 Geo. III, cap. 38, viz.: if found fishing or to have been fishing, or preparing to fish, within the prescribed limits; and that they do not require any commission from the Governors or Officers administering the Government of the Colonies, to carry out the stipulations of the Convention of 1818, but that they may by virtue of their instructions enforce the terms of the Convention, by interrupting intruders, warning them off, and compelling them to desist from fishing.

Secondly.—With respect to the resort of fishing-vessels of the United States to British harbours, in violation of the Convention, but without the taking or curing or drying of fish, we are of opinion that the vessels so offending cannot be seized by Her Majesty's Naval Officers, but that such offence is only punishable under the 4th section of the Statute 59 Geo. III, cap. 38. Whether persons so

offending may or may not be detained during the proceedings depends upon the local laws of each Colony.

We are also of opinion that, independently of the express provisions of the Statute, vessels so offending may be warned off, and in default of obedience may be compelled to depart by the exercise of whatever force is reasonably necessary for that purpose; and this may be done either by the Governor, or those acting under his orders, or by the Commanders of Her Majesty's ships acting under the instructions of Sir George Seymour.

If it be deemed expedient that a power to seize vessels in such cases should be conferred upon Naval Officers or others, this must be done by Order in Council.

Thirdly.—We are of opinion that neither the drying and curing fish at the Magdalen Islands, nor the fishing from the shores of those Islands (if the persons so fishing are on the land when fishing) will render vessels liable to seizure for infraction of the Treaty.

Upon the general question as to the right of fishing from the shores of the Magdalen Islands, we are disposed to agree with the opinion thereon expressed by Sir John Dodson and Sir Thomas Wilde, in their Report dated August 30, 1841.

If it should be considered advisable to prevent the commission of any such acts upon the Magdalen Islands (which are in our opinion, in contravention of the Convention), it may be done after warning, and without seizing vessels, by interrupting the fishermen and compelling them to depart.

With reference to the further or additional Queries or points subjoined to the Memorandum of Vice-Admiral Sir George Seymour, we have the honour to report as follows:—

First (additional).—We presume that the harbour of Nova Scotia, here referred to, is among the waters forbidden by the Convention. If this be so, a fishing-vessel of the United States cannot lawfully enter it at all in severe weather, or otherwise than for shelter. If such a vessel should enter in violation of the Convention it may be dealt with (not by seizure) but by interruption or compelling the fishermen to depart, or by proceeding under sect. 4 of 59 Geo. III, cap. 38.

Second (additional).—An American fishing-vessel, if found either actually fishing or preparing to fish, or to have been fishing, within the waters prohibited, may be pursued by any Officer having competent local authority, under the stat. 59 Geo. III, cap. 38, in any vessel (whether Colonial or of Her Majesty's Navy) beyond the limits of prohibition, and may be by any such Officer seized on the high seas; but we should recommend this course to be adopted only in very clear cases and with extreme caution.

Third (additional).—We think that under the Colonial Act (Nova Scotia) 6 Wm. IV, cap. 8, and the Order in Council of June 15, 1836, the right to enforce the observance of the regulations in question is limited to the Officers specified in that Act, and to the coasts of that Colony, and that it cannot be exercised beyond those limits, by any vessel commissioned by the Governor of Nova Scotia only.

We have, &c.,
(Signed) J. D. HARDING.
FRED. THESIGER.
FITZROY KELLY.

No. 5.

My Lord,

Doctors' Commons, April 28, 1854.

HAVING been requested by Mr. Addington, under the directions of your Lordship, to take into consideration the provisions of the 1st Article of the Convention of the 20th October, 1818, concluded between Great Britain and the United States of North America, and to give my unbiassed opinion as to the true and correct interpretation to be put upon the expressions employed in that Article, with reference to the controversy for some time past existing between the two Governments on the subject of the Fisheries, I beg to state, for your Lordship's information, that I have read the various papers submitted to me, and consulted such other sources of information as suggested themselves to me in the course of the investigation, and have endeavoured to form an impartial judgment on the subject, the result of which I shall proceed to state at length to your Lordship, with the reasons for the conclusions at which I have arrived.

The controversy turns upon the true effect of the renunciation on the part of the United States, "of any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America," not included within certain abovementioned limits.

On the side of Great Britain it is maintained, that the United States' fishermen are prohibited from fishing within three marine miles of the *entrance* of any of such bays, creeks, or harbours of His Britannic Majesty's dominions in America, while the United States' Government contend that the United States' fishermen are permitted by that Article to fish in the said bays, creeks, or harbours, provided they do not approach within three miles of the *shore* in the pursuit of their trade.

The particular expressions in the 1st Article of the Convention, which have furnished the occasion of a disputed construction, are "on or within three marine miles of any of the coasts, creeks, or harbours, of His Britannic Majesty's dominions." For the solution of this difficulty it will be convenient, in the first place, to state certain principles of interpretation to which recourse may be had, when there is any ambiguity in the terms of a Treaty.

In the first place it is an universal rule, dictated by common sense, for the interpretation of contracts, and equally applicable to all instruments, that if there is anything ambiguous in the terms in which they are expressed, they shall be explained by the *common* use of those terms in the country

in which the contracts were made.—Cf. Pothier, *Obligations*, No. 94, “Ce qui peut paraître ambigu dans un contrat, s’interprète par ce qui est d’usage dans le pays.”

In the second place it is an admitted principle, that for the meaning of the *technical* language of jurisprudence, we are to look to the laws and jurisprudence of the country, if the words have acquired a plain and positive meaning. (“*The Huntress*,” Davies’ *Admiralty* [American] *Reports*, p. 100. *Flint v. Flemyng*, 1 Barnwall and Adolphus, 48.)

In the third place, as Treaties are contracts belonging to the Law of Nations, and the Law of Nations is the common property of all nations, and, as such, a part and parcel of the law of every country (*De Lovio v. Boit*, 2 Gallison’s *Admiralty* [American] *Reports*, p. 398. *Buvot v. Burbot*, cited by Lord Mansfield in *Triquet and others v. Peach*, 3 Burrows, p. 1481); if we have recourse to the usage of nations, or to the decisions of courts in which the Law of Nations is administered, for the definition of terms which occur in such contracts and which have received a *plain and positive meaning*, we are not going beyond the law of either of the countries which are parties to the Treaty.

The interpretation contended for by the United States’ Government requires that we should, in effect, admit the words “of the shore” into the Article itself, as understood although not expressed, either before the words “of any of the coasts, bays, creeks, or harbours,” &c., as necessary to make those words operative, or as authorized by usage; or before the words “bays, creeks, or harbours,” as demanded by the context, and indispensable to prevent a conflict with other provisions of the Treaty.

Such an interpretation, however, is, in the first place, not required to make the words “of any of the coasts” operative. Assuming that we should be justified in applying to the language of the Treaty the decisions of the Admiralty Courts of the United States, where any words have received a judicial interpretation, the Treaty being a contract according to the Law of Nations, and the Admiralty Courts in the United States being tribunals which administer that law, we find that the term “coast” has received a judicial interpretation expressly with reference to territorial jurisdiction; and that, according to that interpretation, the word “coasts” signifies “the parts of the land bordering on the sea, and extending to low-water mark;” in other words, “the shores at low-water.”

This question was formally taken into consideration in the year 1804, in the case of the “*Africaine*,” a French corvette, captured by a British privateer off the bar of Charleston, and on the outside of the Rattlesnake shoal, which is four miles at least from land. (*Bee’s Admiralty Reports*, p. 205.) On this occasion, the Commercial Agent of the French Republic claimed the corvette to be restored as captured within the jurisdiction of the United States; and it was contended in argument, in support of the claim, that the term “coasts” included also the shoals to a given distance; and that all geographers and surveyors of sea-coasts understood by the term “coasts” the shoals along the land. Mr. Justice Bee, however, who sat in the Court of Admiralty in Charleston, overruled this argument; and after observing that the interpretation of coasts in the large sense of the word might possibly be correct in a *maritime* point of view, decided that the term “coasts,” in reference to *territorial jurisdiction*, is equivalent to shores, and must be construed to mean “the land bordering on and washed by the sea extending to low-water mark.”

That the words “shores” and “coasts” are equivalent terms, according to the *common* sense of those terms in the jurisprudence of the United States, may be gathered from the language of various Acts of Congress. For instance, the Revenue Act of 1799 (*Laws of the United States*, vol. iii, p. 136) assigns districts to the collectors of revenue, whose authority to visit vessels is extended expressly to a distance of four leagues from the coast; and the districts of these collectors in the case of the Atlantic States are expressly recited as comprehending “all the waters, shores, bays, harbours, creeks, and inlets” within the respective States. This Act of Congress has also received a judicial interpretation, according to which the authority of revenue officers to visit vessels is held to extend over the high seas to a distance of four leagues from the shore of the main land. Again, the Judiciary Act of June 1794 uses the words “coasts” and “shores” not as alternative, but as equivalent terms, according to judicial decisions on this very point, when it speaks of the “territorial jurisdiction of the United States extending a marine league from the ‘coasts’ or ‘shores’ thereof.”

It would thus appear that it is not necessary to understand the word “shore” before “coasts” in order that the latter word should be fully intelligible. It remains to consider whether such an understanding would be authorized by usage on the principle laid down by Pothier: “L’usage est d’une si grande autorité pour l’interprétation des Conventions, qu’on sous-entend dans un contrat les clauses qu’y sont d’usage, quoiqu’elles ne sont pas exprimées.” (*Obligations*, No. 95.)

No such usage, however, of nations prevails, applicable to the term “coasts.” Islands, indeed, which are adjacent to the land, have been pronounced by Lord Stowell to be natural appendages of the coast on which they border, and to be comprised within the bounds of territory. (“*The Anna*,” 5 Robinson’s *Reports*, p. 385.) The assertion, therefore, of an usage to understand the word “shore” before “coasts” in Treaties, would tend to limit the bounds of territorial jurisdiction allowed by Lord Stowell in the case just cited, in which a question was involved to which the United States’ Government was a party, and in favour of whose claim, on the ground of violated territory, Lord Stowell pronounced.

It remains next to consider what is the true construction of the expressions within three marine miles of any of the “bays, creeks, or harbours.” That the words “bays,” “creeks,” and “harbours,” have all and each a distinct sense separate from and supplemental to the word “coasts,” to which effect must be given, where there are reciprocal rights and obligations growing out of the Treaty in which these words have been introduced, is consonant with the rules for interpreting contracts, which have been dictated by right reason, and are sanctioned by judicial decisions. Mr. Justice Story may be cited as an authority of the highest eminence, who has recognized and applied this principle in construing a statute of the United States. “The other words,” he says, “descriptive of place in the present statute (Statute 1825, cap. 276, s. 22), which declare that ‘if any person or persons on the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the Admiralty jurisdiction of

the United States, and out of the jurisdiction of any particular State, &c., give great additional weight to the suggestion that the 'high seas' meant the open, unenclosed ocean, or that portion of the sea which is without the *fauces terræ* on the sea-coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories; for if the 'high seas' meant to include other waters, why should the supplemental words, 'arm of the sea, river, creek, bay,' &c., have been used?" (United States v. Grush, 5 Mason's Admiralty Reports, p. 298.)

This view of Mr. Justice Story is in accordance with Pothier's rule, "Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui dans lequel elle peut avoir quelque effet, que dans celui dans lequel elle n'en pourrait avoir aucun." (*Obligation*, No. 92.)

The word "bay" itself has also received a *plain and positive meaning* in a judicial decision of a most important case before the Supreme Court of the United States, upon the construction of the 8th section of the Act of 1790, cap. 9:—A murder had been committed on board the United States' ship of war "Independence," lying in Massachusetts Bay, and the question was whether any Court of the State of Massachusetts, or only the Circuit Court of the United States, as a Court of Admiralty and Maritime Jurisdiction, had jurisdiction over a murder committed in such a bay. Chief Justice Marshall in delivering the opinion of the Court defined "bays" to be "*inclosed parts of the sea.*" (United States v. Beran, 3, Wheaton's Reports, p. 387.)

Again, Mr. Justice Story, in a question of indictment for assault with intent to kill, under the Crimes Statute of 1825, cap. 276, sec. 22, which declares, "that if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the Admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel, shall commit an assault," &c., decided, that the place where the murder was committed (the vessel lying at such time between certain islands in the mouth of the Boston river) was an arm of the sea.

"An arm of the sea," he further said, "may include various descriptions of waters, where the tide ebbs and flows. It may be a river, harbour, creek, basin, or bay." (United States v. Grush, 5 Mason, 299.)

It would thus appear that the word "bay" has received a positive definition as a term of jurisprudence, which is in accordance with the common use of the term in text-books on the Law of Nations, which invariably speak of "bays" as "*portions of sea enclosed within indents of coasts, and not as indents of coast.*"

Assuming, therefore, as established beyond reasonable doubt, that the word "bay" signifies an arm or elbow of the sea enclosed within headlands or peaks, and not an indent of the coast, we may consider what is the true intention of the expression "within three marine miles of a bay." Are such miles to be measured from the outer edge or chord of the bay, or from the inner edge or arc of the bay? In the first place it may be observed, that the inner edge or arc of a bay touches the coast, and if the distance is to be measured from the shore of the bay, the word "bay" itself has virtually no distinct signification from "coast," and has no supplemental force; *primâ facie*, therefore, this interpretation does not recommend itself on the grounds already stated.

Again: the interpretation which is given to the measure of distance from bays, must be given to the measure of distance from creeks and harbours, both of which, by the Municipal Law of the United States, equally as of Great Britain, are *infra corpus comitatûs*, and their waters are subject to the provisions of the Municipal Law precisely as the shores of the land itself. But it may assist in determining this question to keep in mind the rule that in contracts, "on doit interpréter une clause par les autres clauses contenues dans l'acte, soit qu'elles précèdent, ou qu'elles suivent." (Pothier, *Obligations*, No. 96.) In other words, a subsequent clause may serve to interpret a former clause, if the latter be at all ambiguous. Accordingly we find the renunciation of the liberty to fish within three marine miles of any of the bays, creeks, or harbours of His Britannic Majesty's dominions, followed by the *proviso* that American fishermen shall be permitted to *enter* such bays and harbours for certain specified purposes other than taking fish. In other words they may prosecute their voyage for other purposes than fishing *within the entrance* of any bay or harbour, but may not take fish within three marine miles of any bay or harbour, *i.e.*, within three marine miles of the *entrance* of any bay or harbour. If this interpretation be not adopted, the *proviso* would be absurd; for if American fishermen are *implicitly* permitted to fish within three marine miles of the *shore* of any bay or harbour, they are permitted to *enter* such bay or harbour, if the breadth of the mouth be more than six miles, and the distance of the head of the bay or harbour from the entrance be more than three miles, for another purpose than for the purpose of shelter, or of repairing damages, or of purchasing wood, or of obtaining water. But the Convention expressly says, "*for no other purpose whatever.*" If, therefore, they cannot *enter* any bay or harbour for the purpose of prosecuting their occupation of fishing, it cannot be intended that they should be allowed to fish within three marine miles of the *shore* of any bay or harbour, as the two provisions would be inconsistent. Accordingly, as the question resolves itself into the alternative interpretation of *shore* or *entrance*, it follows that the correct interpretation, which makes the language of the entire Article consistent with itself, is within three marine miles of the *entrance* of any bay, such entrance or mouth being, in fact, *part of the bay itself*, and the bay being approachable by fishing-vessels only in the direction of the mouth or entrance.

That a bay of sea-water wider than six miles at its mouth may be within the body of a county, is laid down by Lord Hale in his Treatise *De Jure Maris et Brachiorum ejusdem* (Hargrave's Tracts, chap. 4): "An arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." This doctrine has been expressly adopted by Mr. Justice Story in *De Lovio v. Boit* (2 Gallison's Reports, p. 426, 2nd Ed.), in which, to use the language of Mr. Wheaton's argument in *United States v. Berans* (3 Wheaton's Reports, p. 358), "all the learning on the civil and criminal jurisdiction of the Admiralty is collected together." There is, consequently, no doubt that the jurisdiction of the Municipal Law over bays is not limited to bays which are less than six miles in breadth or three miles in depth, since the general rule is, as was observed by the same eminent judge in *United States v. Grush* (5 Mason,

p. 300): "That such parts of rivers, arms, and creeks of sea, are deemed to be within the bodies of countries, where persons can see from one side to the other."

That the jurisprudence of the United States has recognized the principle of Courts of Municipal Law exercising jurisdiction over bays at a distance more than three miles from the shore, is shown by the decision of the Supreme Court in the case of *Church v. Hubbard* (2 Cranch's Reports, p. 187). In this case an American brigantine, the "Aurora," when at anchor in the bay of Pará on the coast of Brazil, and four or five leagues from Cape Paxos, was seized and condemned by the Portuguese authorities for a breach of the laws of Portugal on a matter of illicit trade. Chief Justice Marshall, in delivering the opinion of the Court, said, "Nothing is to be drawn from the laws or usages of nations which proves that the seizure of the 'Aurora' by the Portuguese Government was an act of lawless violence."

The same principle was also involved in the opinion of the Attorney-General of the United States upon the seizure of the British vessel "Grange" by a French frigate, within the Bay of Delaware, and which was accordingly restored to the owners. In his report to the United States' Government (14 May, 1793), the Attorney-General observed, "that the 'Grange' was arrested in the Delaware, *within the capes*, before she had reached the sea," that is, in that part of the waters of the Delaware which is called *the Bay of Delaware*, and which *extends to a distance of sixty miles within the capes*. It is worthy of remark that the Bay of Delaware is not within the body of a county, its northern headland, Cape May, belonging to the State of New Jersey in property and jurisdiction, and its southern headland, Cape Henlopen, being part of the State of Delaware; yet the whole bay was held to be American territory.

The same principle was also involved in the judgment of the Supreme Court of the United States in the case of *Martin and others v. Waddell* (16 Peter's Reports, 367), in which it was agreed on all sides that the prerogative of the Crown prior to the American Revolution, extended over all bays and arms of the sea, from the River St. Croix to the Delaware Bay.

Again, in the Report of the Committee of Congress (November 17, 1807) on the affair of the Little Belt, it was maintained that the British Squadron had anchored *within the capes of Chesapeake Bay and within the acknowledged jurisdiction of the United States*, whilst it seems that the alleged violation of territory had taken place at a distance of three leagues from Cape Henry, the southern headland of the Bay of Chesapeake.

This assertion of jurisdiction was in accordance with the instructions sent May 17, 1806, from Mr. Madison to Messrs. Monroe and Pinckney, according to which it was to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory; and that no belligerent right should be exercised within the chambers formed by headlands, or anywhere at sea, within the distance of four leagues, or *from a right line from one headland to another*.

What those claims were as maintained by Great Britain, may be gathered from the doctrine laid down by Sir Leoline Jenkins in his Report to His Majesty in Council, December 5, 1665, (*Life of Sir Leoline Jenkins*, vol. ii, p. 726) in the case of an Ostend vessel having been captured by a Portuguese privateer about four leagues west of Dover, and two Dutch leagues from the English shore, in which case a question arose whether the vessel had been taken within one of the King of England's chambers, *i.e.*, within the line (a straight one having been drawn) from the South Foreland to Dungeness Point, on which supposition she would have been under the protection and safeguard of the English Crown.

The same eminent Judge, in another Report to the King in Council (vol. ii, p. 732), speaks of one of those recesses commonly called "your Majesty's Chambers," being bounded by a straight line drawn from Dunmore, in the Isle of Wight, to Portland (according to the account given of it to the Admiralty in 1664). He says, "It grows very narrow westward, and is scarce in any place four leagues broad, I mean from any point of this imaginary line to the opposite English shore."

And in a third Report, October 11, 1675 (vol. ii, page 780), he gives his opinion that a Hamburg vessel captured by a French privateer should be set free, upon a full and clear proof that she was within one of "your Majesty's Chambers at the time of seizure, which the Hamburger in his first memorial sets forth as being eight leagues at sea over against Harwich."

This doctrine is fully in accordance with the text-books. Thus Azuni writes in his *Droit Maritime de l'Europe*, chap. ii, art. 3, § 3: "Les obligations relatives aux ports sont également applicables aux baies et aux golfes, attendu qu'ils font aussipartie de la souveraineté du Gouvernement dans la domination et le territoire duquel ils sont placés, et qui les tient également sous sa sauvegarde: en conséquence, l'asile accordé dans une baie ou dans un golfe n'est pas moins inviolable que celui d'un port, et tout attentat commis dans l'un comme dans l'autre, doit être regardé comme une violation manifeste du droit des gens."—Valin. *Comment, à l'Ordonnance de France*, tit. "Des Rades," art. i, may be cited in confirmation of this doctrine.

Mr. Wheaton, in the last edition of his *Elements of International Law*, part ii, chap. iv, § 6, writes: "The maritime jurisdiction of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State."

It has been urged, however, on the American side, that supposing the English interpretation as to the measuring the distance of three marine miles from the entrance of bays to be correct, the Bay of Fundy is not a bay from which American fishermen are prohibited—

First, because the Bay of Fundy is not a bay which a vessel would enter for the purpose of taking shelter.

Secondly, because it is not a bay of her Majesty's dominions, as it is bounded in part by the State of Maine.

With regard to the first objection, it is not deserving of any serious attention, for although the Bay of Fundy may not be a bay to which vessels would at all times readily have recourse for the purpose of shelter, owing to the great rise and fall of the tide (60 feet), yet occasions might arise when it would be necessary for a fishing-vessel to enter the bay in pursuit of shelter, which if not found in

the bay itself might readily be obtained on the eastern side of it, in the basin of Annapolis, described by Sir John Hervey as a noble estuary, and on the Western side in the Harbour of St. John's. But there are other purposes specified in the Convention, for which it might be convenient for an American fishing-vessel to enter the Bay of Fundy.

This objection may be dismissed as unimportant.

The second objection, indeed, that the Bay of Fundy is not a bay of Her Majesty's dominions, goes to the root of the controversy, and demands more attentive consideration. For the purpose, however, of appreciating the weight of this objection, it will be indispensable to bear in mind that the Convention of London, concluded on the 20th October, 1818, arose out of difficulties relative to the claims of the United States to take and dry fish on certain coasts, bays, harbours, and creeks within His Britannic Majesty's dominions in America, and that those claims had been based on the Treaty of Paris of 3rd September, 1783, which Treaty in respect of the boundary line between the United States and the Province of Nova Scotia had been a subject of subsequent controversy, which has been finally arranged by various Conventions pursuant to the provisions of the Treaty of Ghent (24th December, 1814).

The Convention of London being thus supplemental to the Treaty of Paris, both Treaties must be looked at together, in order to arrive at a correct solution of the question of territorial dominion.

By Article II of the Treaty of 1783, the easterly boundary of the United States was defined to be "a line drawn along the middle of the River St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to certain highlands (in the north-west angle of Nova Scotia) which divide the rivers that fall into the Atlantic Ocean from those which fall into the River St. Lawrence; comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the point where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean: excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia."

From the provisions of this Article we gather that the mouth of the St. Croix River was considered to be in the Bay of Fundy, and that certain islands which formed part of the Province of Nova Scotia were to the south of a line drawn due east from the point where the boundaries between Nova Scotia on the one hand, and East Florida on the other, respectively touched the Bay of Fundy and the Atlantic Ocean.

What the limits of the province of Nova Scotia were, before the province of New Brunswick was carved out of it in 1784, may be ascertained from the description of its boundaries in the Royal Commission issued to Sir Montague Wilmot, as Captain-General and Governor-in-chief of the province of Nova Scotia, bearing date November 21, 1763, when it became necessary to define the respective limits of the British provinces of Quebec and Nova Scotia upon the cession of Canada, and the renunciation of Acadia and Nova Scotia by Louis XV under the Treaty of Paris (February 10, 1763).

"To the northward our said province shall be bounded by the southern boundary of our province of Quebec," (which had been previously settled by a royal proclamation of the date of October 7, 1763), "as far as the western extremity of the Baie des Chaleurs; to the eastward by the said bay and the Gulf of St. Lawrence; and to the westward, although our said province hath anciently extended, and does of right extend, so far as the River Pentaget or Penobscot, it shall be bounded by a line drawn from Cape Sable, *across the entrance of the Bay of Fundy* to the mouth of the River St. Croix, by the said river to its source, and by a line drawn due north from thence to the southern boundary of our province of Quebec."

It further appears, from Article IV of the Treaty of Ghent, that the United States claimed the several islands in the Bay of Passamaquoddy, which they alleged to be part of the Bay of Fundy, and the Island of Grand Menan, in the Bay of Fundy, as comprehended within their boundaries, under the Treaty of 1783,—which islands, on the other hand, were claimed as belonging to His Britannic Majesty, as having been at the time of, and previous to, the aforesaid Treaty of 1783, within the Province of Nova Scotia; and it was agreed that the question between the two countries should be determined by two Commissioners respectively appointed by the two countries, whose award, if they should agree, was to be conclusive.

Accordingly, two Commissioners were appointed, who decided, on November 24, 1817 ("Hertslet's Treaties," vol. iii, p. 487), that Moose Island, Dudley Island, and Frederick Island, in the Bay of Passamaquoddy, and the Island of Grand Menan, in the Bay of Fundy, do each of them belong to His Britannic Majesty,—in other words, were, in the language of the Treaty of 1783, within the limits of the Province of Nova Scotia.

On referring to the map, it will be seen that the effect of this decision is to recognize the Island of Campo Bello as British territory, and as part of the old Province of Nova Scotia, which decision is in perfect harmony with the language of the Royal Commission of 1763; and if they be construed together it will be found:—1. That the territory of the Province of Nova Scotia, 1783, was bounded by a line drawn from Campo Bello to Cape Sable; 2. That the mouth of the St. Croix River, which is the point from which, on the one hand, under the Treaty of 1783, the boundary line between the United States and the Province of Nova Scotia was to be drawn westwardly; and to which, on the other hand, under the Royal Commission of 1763, a line was to be drawn from Cape Sable across the entrance of the Bay of Fundy, as constituting the water boundary of the Province of Nova Scotia, is identified with the mouth of the channel which separates the Island of Campo Bello from the American mainland.

Such is the necessary conclusion from the award of the Commissioners in 1817, inasmuch as the expressions "boundaries between Nova Scotia, on the one hand, and East Florida, on the other," in the Treaty of 1783, mean the boundaries between Nova Scotia and the United States, on the one hand, and East Florida and the United States, on the other; the former of which boundaries expressly

commences at the mouth of the River St. Croix, in the Bay of Fundy, and is to be drawn westward along the middle of that river.

An apparent objection may be taken to this view, on the ground that the mouth of the St. Croix, intended by the Treaty as the point of departure for the boundary westward, ought, with more propriety, be fixed at the point where that river meets the waters of the Bay of Fundy, in that part of it distinguished as Passamaquoddy Bay, opposite to the low headland upon which the town of St. Andrew stands, in Charlotte County, New Brunswick.

If this, however, were to be conceded, it would not affect the substantial question of territorial jurisdiction or dominion; for the Island of Campo Bello, Deer Island, and Marvel Island, which, with other small islands, form almost a continuous chain on the north-east side of the deep-water channel, are all British territory, and, with the adjoining waters, are within a county of New Brunswick. The water limits, therefore, of His Britannic Majesty's territory are co-extensive with the waters on the north-east side of the line drawn in continuation of the mid-channel between Campo Bello and the American mainland, to the mid-channel of the St. Croix River, between St. Andrew's and the shore of the United States, along which river it is to be prolonged to its source.

This view is perfectly in accordance with the decision of the Circuit Court of the United States in the case of the schooner "Fame," reported in 3 Mason's "American Reports," p. 147. (October 1822.) This was a question of an English schooner seized for a violation of the United States' Coasting Act of 1793, c. 8, and the Revenue Act of 1799, c. 128; and it appeared in evidence, that the acts of illicit trade were committed on the American side of the stream, and about one-third way over from the American side between Moose Island and Campo Bello Island. If the middle of the stream constituted by the Law of Nations the true boundary line, then it was admitted by the parties that the illicit acts were done within the American waters.

Mr. Justice Story held that, by the Law of Nations, when no exclusive and prior occupancy has existed, "each of the nations inhabiting the opposite banks of a river or bay, has a right to go to the middle of the stream, calculated from low-water mark as the limit of its territorial boundary. This doctrine has been affirmed by the Supreme Court in the case of *Handly's Lessee v Anthony* (5 Wheaton, 374). But although the territorial line of a nation, *for purposes of absolute jurisdiction*, may not extend beyond the middle of the stream, yet, consistently with this doctrine, the right to the *use* of the whole river or bay *for the purpose of navigation, trade, and passage*, may be common to both nations. Such a right does not destroy the territorial jurisdiction to the middle of the stream; but it is in the nature of an *easement*, as it is called at the common law, or a *servitude*, as it is called in the civil law. It is like the right of a highway, or a private way, over the land of another. This right of passage and navigation must exist, as a common right, in all those cases where such passage or navigation is ordinarily used by both nations, and is indispensable for their common convenience and access to their own shores. A river or bay may be so narrow or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all times. If in such a case no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of passage and navigation in both.

"There is no pretence to say that Great Britain had, as to us, acquired previously to the Revolution any exclusive right to the waters of Passamaquoddy Bay. These waters were common to all the subjects of the Realm, and just as much a part of our right and inheritance as of any other of the British dominions. The American colonies used them on all occasions, and the province of Massachusetts, which was contiguous to the bay, and perpetually used the waters for the *purpose of navigation and trade, and passage*, might just as well be deemed the proprietor as the Province of New Brunswick or as the Realm of England. In truth, the Law of Nations must, under such circumstances, be presumed to prevail, and annex the bay to the middle of the stream to the territories of the adjacent provinces; and as there was at all times a common right of passage and navigation exercised over the whole bay, and it was necessary for the convenience of all parties, the whole waters must be deemed common for these purposes. When the separation took place by the American Revolution and the Treaty of Peace, if nothing was stipulated on either side, the *status ante bellum* prevailed, and there was a continuance of the old rights and privileges.

"The Treaty of Peace of 1783 contains nothing definite on this subject. It fixes generally the eastern boundary line of the United States on the Bay of Fundy, of which Passamaquoddy Bay is part, but it is silent as to the exact line and the use of the waters. No subsequent Treaty has changed, or in any shape regulated, the general rights growing out of the Law of Nations on this subject, and, therefore, as I conceive, they remain in full force.

"In the negotiations which have taken place between the Governments of Great Britain and the United States as to this boundary, and which ended in Conventions which, though not ratified, are not understood to have involved any real difference of opinion on this particular point, the view taken by both Governments seems entirely in harmony with that of this Court. The Conventions of 1803 and 1807 take the middle of the channel between the islands belonging to the respective nations to be the true and proper line. (6 *Wait's State Papers*, 387 to 394; 10 *Wait's Confidential State Papers*, p. 470.) This is the same rule which results in the general Law of Nations.

"Upon the whole my opinion is, that the 'Fame,' being within the jurisdictional waters of the United States, and on this side of the middle of the channel, when she committed the illicit acts for which condemnation is sought, is brought within the forfeiture."

On the principle upheld by the above judgment the general rights, growing out of the Law of Nations, remain in full force in favour of Great Britain equally as of the United States. The right of fishery within its own territorial limits is one of the general rights of an independent State.

"*Quoique la pêche,*" writes Azuni, "*soit considérée comme un des effets de l'empire maritime, cependant le prince ou la Puissance propriétaire de la mer territoriale a coutume de ne se réserver à elle seule que la grande pêche qu'on est en usage d'exécuter en des temps marqués ou en des lieux*

déterminés, ou enfin sur une certaine espèce de poissons ; mais elle ne défend pas elle qui se fait pour l'usage et les besoins des peuples. Elle la permet même aux nations voisines quoique non sujettes, lorsque de leur côté elles laissent chez elles la même liberté."—*Droit Maritime de l'Europe*, ch. iii, art. viii, § 6.

Numerous authorities might be quoted in support of this general right, which is a *proprietary right* totally different in character from a *servitude*, and rests on the principle "quicquam est in territorio, etiam est de territorio." "C'est pour cette raison que non seulement la terre réellement habitée, mais aussi les districts non cultivés et les mers enclavées dans les frontières de l'Etat, font partie de son territoire, et que tout ce que ce territoire renferme de produit de la nature ou de l'industrie humaine appartient à l'Etat." (Kluber, *Droit des Gens*, part ii, tit. ii, § 128.) Mr. Wheaton confirms this view in these words: "The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State." (*Elements of International Law*, part ii, ch. iv, § 8.)

Such being the invariable doctrine of the text-books, we find it confirmed by the circumstance that the liberty of fishing within the waters of an independent State has always been a matter of Treaty-privilege, and has been a subject of international negotiation and convention from the earliest times. Upon the principle then of the general rights growing out of the Law of Nations, British subjects are entitled to an exclusive fishery on the north-east side of the boundary-line.

With regard to the limits of the old province of Nova Scotia, that the water-line drawn from Campo Bello to Cape Sable, across the entrance of the Bay of Fundy, and resting in its course upon the Island of Grand Menan, is not unreasonable in its extension of dominion and jurisdiction, must be admitted on the part of the United States, which claims exclusive maritime jurisdiction over the waters on these coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of Delaware, and from the South Cape of Florida to the Mississippi. (*Kent's Commentaries of American Law*, vol. i, p. 30.)

It being thus established that the waters of the Bay of Fundy, on the north-east side of the boundary line, are in the dominions of His Britannic Majesty, it hardly seems open to question that the American fishermen are prohibited from fishing within them, unless privileged so to do by Treaty. This boundary line being the boundary line of the old province of Nova Scotia, was described "*ante litem motam*" in the Royal Commission of 1763, as drawn across the *entrance* of the Bay of Fundy. It would thus appear that the known limit of the Bay of Fundy was identical with the water-boundary of the province of Nova Scotia ; as the mouth or entrance of a bay is one of the limits of a bay. If indeed any portion of the sea beyond the water-boundary of the province of Nova Scotia has been ever regarded as part of the Bay of Fundy, from that part indeed American fishermen would not be excluded under the Convention of 1818, as it is not any longer within His Britannic Majesty's dominions. In determining this controversy it becomes important to take care that the term "Bay of Fundy" is not used equivocally, otherwise a verbal ambiguity may create difficulties, which do not arise on the face of the Convention itself of 1818.

By the first Article of that Convention, after reciting that differences had arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it was agreed that the inhabitants of the United States should enjoy for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish on certain specified coasts, bays, harbours, and creeks (not within the province of Quebec), and to dry and cure fish in certain specified uninhabited bays, harbours, and creeks. The United States then proceeded to renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits ; provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purposes of shelter, or of repairing damages therein, of purchasing wood or of obtaining water, *and for no other purpose whatever*.

On the face of this Convention no difficulty ought to arise, in either case, whether the Bay of Fundy be strictly coterminous with the territorial waters of the province of Quebec, or the appellation has been extended by some geographers to waters beyond these, so as to allow the term to be used by different parties in somewhat different senses. One thing is clear, that the Bay of Fundy is not specified in the Treaty as one of the bays in which the American fishermen are to have the liberty to take, or dry, and cure fish.

The United States has thus no Treaty-privilege to fish in British waters within the province of Quebec.

They can only have the general rights of fishery growing out of the Law of Nations, and such rights do not extend within British waters. No subsequent Treaty has changed or varied those rights. The renunciation was introduced to prevent any ambiguity, because the privilege of taking fish in certain of the coasts, bays, and creeks of His Britannic Majesty's dominions in America was granted to citizens of the United States by the Convention of 1818 ; but this privilege was not identical with the privilege under Article III of the Treaty of 1783. The latter privilege, which the citizens of the United States had enjoyed since the Treaty of 1783, until hostilities broke out between the United States and Great Britain, was a privilege to take and cure fish on all the coasts, bays, and creeks of His Britannic Majesty's dominions in America, just as the subjects of Great Britain, under Article VIII of that Treaty, had enjoyed the privilege of navigating the River Mississippi from its source to the ocean in common with the citizens of the United States.

The latter privilege in behalf of British subjects to navigate the waters of the Mississippi in common with the citizens of the United States ceased with the occurrence of war between the two countries, and was not re-established in any form by any subsequent Treaty.

The fishery privilege in behalf of American citizens ceased in like manner at the same time ; but

it was re-established in a limited form by the Convention of 1818; and that it might not be confounded with the former privilege, an express renunciation of the special portion of the former privilege which had not been re-established, was inserted after the grant, so that the exclusive rights of British subjects to take fish in the waters of His Britannic Majesty's dominions in America *not included in the above-mentioned limits* might henceforth rest not merely on the general law of nations, but be protected from any question by this special Treaty-arrangement.

The ambiguity in the privilege granted by the Convention of 1818; which is assumed to exist by the construction contended for on the part of the United States, disappears with the application of the general principles of the Law of Nations (1) that the right of fishery is *not a servitude* which may be enjoyed by one nation without any prejudice to the territorial jurisdiction of the other nation, within whose territory the fishery exists, and (2) consequently no foreign subjects or citizens may fish within the waters of an independent State without the consent of the Sovereign of that State. The territorial jurisdiction of an independent State over waters of the open sea extends, by the comity of nations, to the distance of three marine miles seaward from the territory itself; and as all creeks, bays, and harbours of His Majesty's dominions are portions of Her Majesty's territory, citizens of the United States are, by the same comity of nations, excluded from fishing within three marine miles seaward from the mouth or entrance of all such bays, creeks, or harbours, as the open sea commences at such mouth or entrance. This absolute rule of the law of nations rests on a basis independent of the renunciation contained in the Convention. It never can be contended, with any show of reason, that the effect of that renunciation has been to limit the absolute rights of the British Crown growing out of the general Law of Nations on the subject of fisheries, more especially as by the subsequent words of the Treaty American citizens are expressly prohibited from *entering* any such bays, creeks, or harbours for any such purpose as that of fishing.

In the case where a province of the United States approaches a province of the British Crown nearer than six marine miles, a different principle under the same general law of nations prevails, which annexes to the territory of either nation the waters as far as the middle of the passage between the two provinces.

The renunciation of the Convention of 1818 has accordingly left untouched the rights of citizens of the United States to fish within their own waters, when the channel between the two provinces is less than six marine miles; but in cases where the channel exceeds that width, it has established, by express words beyond a doubt, that they are not to take or cure fish within three marine miles of the entirety of any of the bays, creeks, or harbours of His Britannic Majesty's dominions in America, except those specifically mentioned in the Convention.

Upon the above considerations, I beg to report to your Lordship my decided opinion, that the Government of the United States is not justified in contending that the United States fishermen are permitted by the first Article of the Convention of 1818 to fish in the bays, creeks, or harbours of Her Britannic Majesty's dominions, provided that they do not approach within three marine miles of the *shore* of any such bay, creek, or harbour, and that on the contrary the Government of Great Britain is justified in maintaining that the United States' fishermen are by that Article prohibited from fishing within three marine miles of the *entrance* of any of the bays, creeks, or harbours of Her Britannic Majesty's dominions in America, with the exception of those bays, creeks, or harbours previously specified in the earlier part of the same article.

I have, &c.,
(Signed) TRAVERS TWISS,

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LETTER from the SECRETARY of STATE for the COLONIES to the LORDS of the ADMIRALTY.

My Lords,

Downing Street, April 12, 1866.

THE determination of the Reciprocity Treaty contracted in 1854 between Great Britain and the United States revives the 1st Article of a Convention of the 20th of October, 1818, with various Imperial and Colonial Acts enumerated in the margin, of which the operation had been suspended during the continuance of the Treaty by the Imperial Act 18 and 19 Vict., cap. 3, sec. 1, or otherwise.

The precise provisions of that Article will be seen by reference to the Convention. Its general result is as follows:—

1. American fishermen may fish, "in common with the subjects of Her Britannic Majesty," in certain specified parts of Newfoundland and Labrador, and on the shores of the Magdalen Islands, with liberty to dry and cure fish on the shores of certain of the unsettled—or with the consent of the inhabitants of the settled bays, harbours, and creeks of Newfoundland and Labrador.

2. Except within the above limits American fishermen are not to take, dry, or cure fish on or within three miles of the coasts, bays, creeks, and harbours of British North America. But they may enter such bays and harbours for certain specified purposes under such restrictions as may be necessary to prevent abuse by fishing or otherwise.

I. With regard to Newfoundland and Labrador, the Convention does but continue with certain geographical limits, and subject to the qualification in respect to the curing of fish, the privileges which have hitherto been exercised under the Reciprocity Treaty. It does not, therefore, call for much observation. It is only requisite to say that although the privilege of drying and curing fish on the Magdalen Islands is not expressly given to American fishermen, Her Majesty's Government have no

desire at present to exclude them from it, nor to impose any narrow construction on the word "unsettled." A bay containing a few isolated houses is not to be considered as "settled" for the purpose of this clause of the Convention.

On the other hand, naval officers should be aware that Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty, are also bound, in common with those subjects, to obey the law of the country, including such Colonial laws as have been passed to insure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.

The enforcement of the Colonial laws must be left, as far as the exercise of rights on shore is concerned, to the Colonial authorities, by whom Her Majesty's Government desire they shall be enforced with great forbearance, especially during the present season. In all cases they must be enforced with much forbearance and consideration, and they must not be enforced at all by Imperial officers if they appear calculated to place the Americans at a disadvantage in comparison with British fishermen in the waters which, by the Treaty of 1818, are opened to vessels of the United States. On the contrary, their unequal operation should, in this case be reported to their Lordships, a copy of the report being at the same time sent to the Governor of the Colony.

II. Fuller explanation is necessary respecting that part of the Convention by which the United States renounce the right of fishing, except within the permitted limits—"on or within three miles of any of the coasts, bays, creeks, or harbours" of British North America, and are forbidden to enter such bays or harbours, except for certain defined purposes.

The Act of Parliament (59 Geo. III, cap. 38), already mentioned, subjects to forfeiture any foreign vessel which is found fishing, or having fished, or preparing to fish, within the prohibited limits, and authorizes the enforcement of this forfeiture by the like means and in the same Courts as may be resorted to under any Act of Parliament in the case of any offence against the laws relating to Customs, or the laws of trade and navigation.

The statutory mode of enforcing the law against Customs offences committed in the Colonies will be found in the Act 16 and 17 Vict., cap. 107, and particularly in the 2nd, 183rd, 186th, and 223rd clauses. But as it would probably be held under this Act that a vessel could only be seized safely by a naval officer "duly employed for the prevention of smuggling" (section 223), it will be probably more convenient for naval officers to take advantage of the procedure authorized by the 103rd clause of the Merchant Shipping Act, which is a law relating to "trade and navigation."

Under that clause* any commissioned officer on full pay in the military or naval service of Her Majesty may seize any ship subject to forfeiture, and bring her for adjudication before any Court having Admiralty jurisdiction in Her Majesty's dominions.

It will probably be advisable, as a general rule, that officers of the navy should proceed against vessels engaged in unlawful fishing under the Act of Geo. III and the Merchant Shipping Act, which extend to all the closed waters of British North America, and do not require the officer's authority to be fortified by any Colonial commission or appointment. But more extended powers are conferred by the above-mentioned local Acts of Nova Scotia, New Brunswick, and Prince Edward Island, on persons commissioned by the Lieutenant-Governors of these Colonies, and any officer who is permanently charged with the protection of the fisheries in the waters of any of these Colonies may find it useful to obtain such a commission.

It will invest him with a special authority in the waters of the Colony to which it relates, to bring into port any foreign vessel which continues within these waters for twenty-four hours after notice to quit them, and, in case she shall have been engaged in fishing, to prosecute her to condemnation. It will also enable him to prosecute the forfeiture of the vessel, if it shall be found to have prohibited goods on board. But this power it would be undesirable to exercise, as Her Majesty's Government do not at present desire officers of the navy to concern themselves with the prevention of smuggling.

These being the powers legally exercisable by officers of Her Majesty's Navy, it follows to consider within what limits and under what conditions they should be exercised.

Her Majesty's Government are clearly of opinion, that by the Convention of 1813, the United States have renounced the right of fishing, not only within three miles of the Colonial shores, but within three miles of a line drawn across the mouth of any British bay or creek. But the question what is a British bay or creek is one which has been the occasion of difficulty in former times.

It is, therefore, at present, the wish of Her Majesty's Government neither to concede, nor, for the present, to enforce, any rights in this respect which are in their nature open to any serious question. Even before the conclusion of the Reciprocity Treaty, Her Majesty's Government had consented to forego the exercise of its strict right to exclude American fishermen from the Bay of Fundy; and they are of opinion that during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with either by notice or otherwise, unless they are found within three miles of the shore or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839.† American vessels found within these limits, should be warned that by engaging or preparing to engage in fishing they will be liable to forfeiture, and should receive the notice to depart which is contemplated by the laws of Nova Scotia, New Brunswick, and Prince Edward Island, if within the waters of one of these Colonies under circumstances of suspicion. But they should not be carried into port except after wilful and persevering neglect of the warnings which they may have received; and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offence of fishing has been committed within three miles of land.

* 17 and 18 Vict., cap. 104, sec. 103.

† Hertslet, vol. v, p. 89; Convention of August 2, 1839, Articles IX and X.

Her Majesty's Government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And, in particular, they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's Government are advised they might be lawfully excluded), unless it shall appear that this permission is used to the injury of Colonial fishermen, or for other improper objects.

I have it in command to make this communication to your Lordships as conveying the decision of Her Majesty's Government on this subject.

I have, &c.
(Signed) EDWARD CARDWELL.