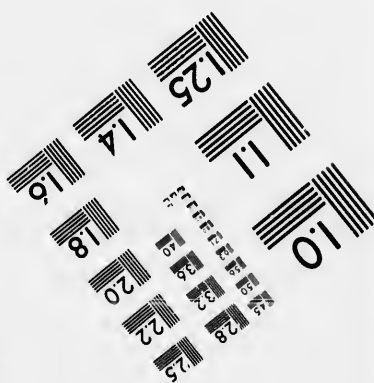
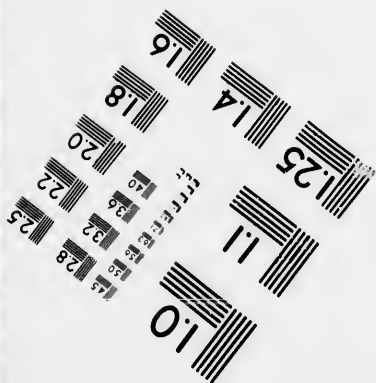
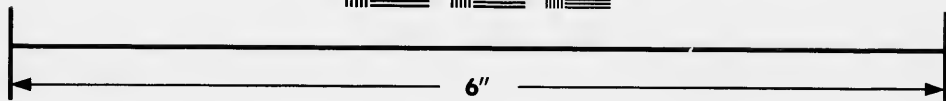
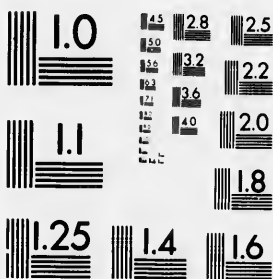


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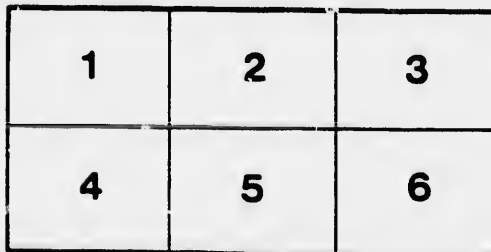
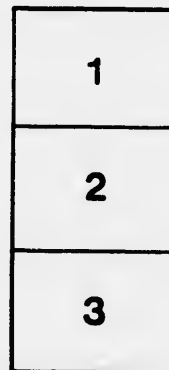
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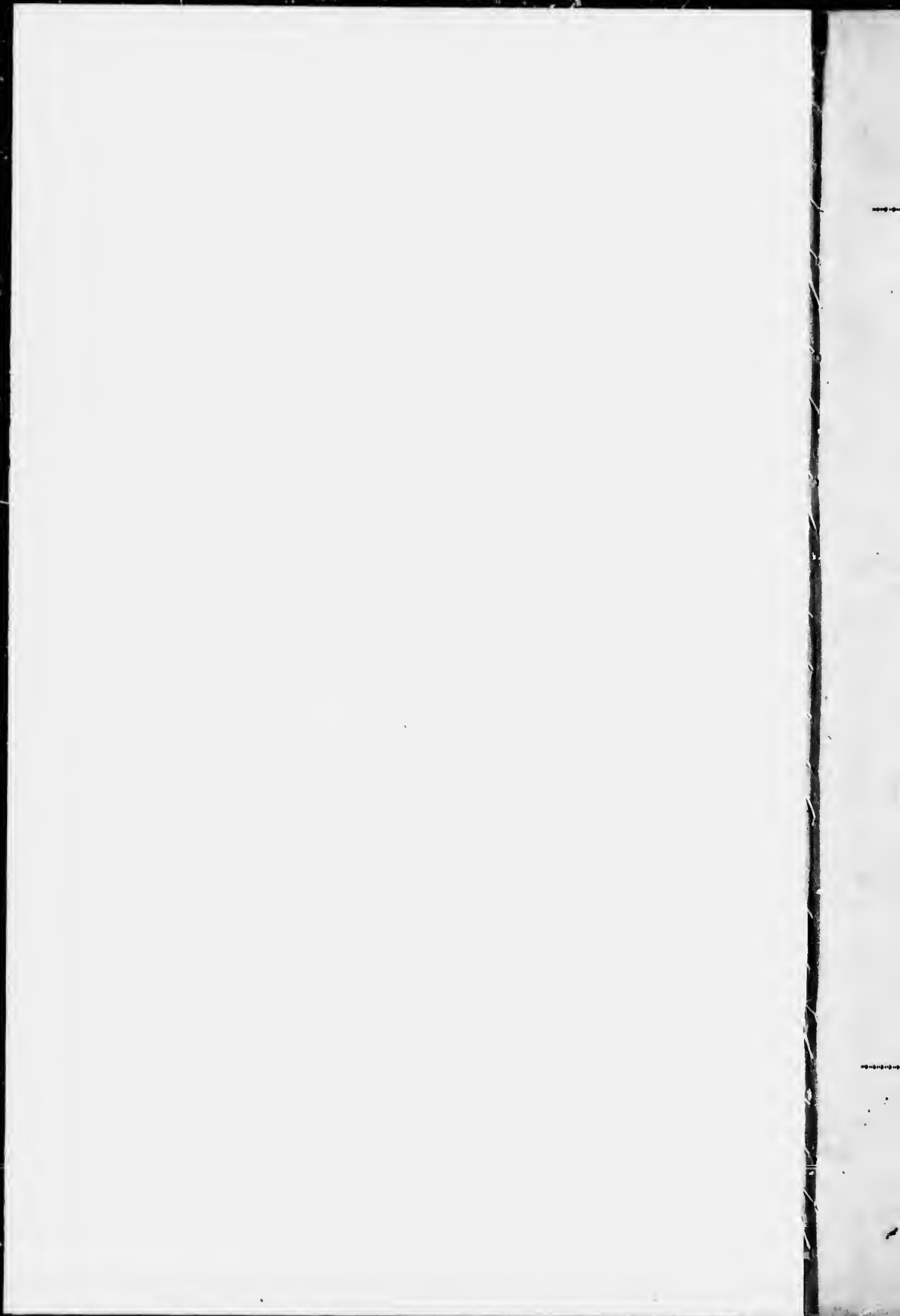
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THE QUESTION

RESPECTING THE RIGHT OF THE

United States of America,

To the ISLANDS in

Passamaquoddy-Bay,

By virtue of the TREATY of 1783,

CONSIDERED

In the Case of the Sloop *Falmouth*,

In the Court of VICE-ADMIRALTY, for

The PROVINCE of

NEW-BRUNSWICK.

In the Year 1805.

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The ADVOCATE-GENERAL, upon the  
relation of GEORGE LEONARD,  
Esq<sup>r</sup>. *Qui tam*, &c. Libellant of  
the Sloop FALMOUTH and Cargo,  
*against*  
EBENEZER LOCK, Claimant there-  
of.

Opening Argument on the part of the PROSECUTOR.

**T**HE Libel in this cause states that Mr. Leonard, Superintendent of Trade and Fisheries in North-America, and a preventive Officer in the service of His Majesty's Customs in New-Brunswick, on the 24th October, 1805, did seize and take at *Snug Cove*, in the Island of Campo-Bello, in the County of Charlotte, in the Province of New-Brunswick, the Sloop Falmouth, of the burthen of ninety-three Tons, under the command of Ebenezer Lock, with her cargo then on board, consisting of Plaster of Paris, and alleges as a cause of forfeiture, that the said Plaster of Paris after the 25th March, 1698, to wit, on the 22d October, 1805, was laden and put on board the said Sloop in Snug Cove aforesaid, the said Sloop being a foreign built vessel, and not owned by any of His Majesty's subjects, nor navigated with a Master and Mariners, or any or either of them, a subject or subjects of His Majesty, but wholly owned and navigated by foreigners and aliens, contrary to the provisions of the Statutes in that case made and provided.

By the Stat. of William 3d, commonly called the Register Act, it is enacted, that "after the 25th March, 1698, no goods or merchandises whatsoever, shall be imported into or exported out of any Colony or Plantation to His Majesty in Asia, Africa or America belonging, or in his possession, or which may hereafter belong unto or be in possession of His Majesty, his heirs or successors, or *shall be laden in or carried from any one port or place in the said Colonies or Plantations, to any other port or place in the same, the Kingdom of England, Dominion of Wales, or Town of Berwick upon Tweed, in any ship or bottom, but what is or shall be of the built of England, or of the built of Ireland, or the said Colonies and Plantations, and wholly owned by the People thereof, or any of them, and navigated with the Masters and three-fourths of the Mariners of the said places only, under pain of forfeiture of ship and goods.*"

7. & 8. W.  
3. c. 22. § 2.

This Act was made in confirmation and in furtherance and explanation of the provisions of the Navigation Act, eminently so called, the Statute 12 Car. 2. c. 18, the great palladium of the maritime strength and resources of the Empire of Great-Britain, as may be seen by a reference to the 11th and 11th Sections of the Statute last mentioned, and to the 13th and 14th Car. 2. c. 11. § 6.

A Claim is interposed by Ebenezer Lock, of Falmouth, in the State of Massachusetts, late Master of the said Sloop Falmouth, in behalf of himself and others, interested in the Sloop and her cargo.

Claim.

The Claimant protesting that Mr. Leonard, the relator, had no right as Superintendent of Trade and Fisheries, to make any seizure for a breach of the laws of trade, and protesting that he never did in fact seize the Sloop and her cargo, but that the Sloop and her cargo were seized and taken possession of on the day stated in the Libel, at Passamaquoddy, within the limits and jurisdiction of the United States of America, or in waters held neutral between Great-Britain and the United States, by one Charles Edward Leonard, the Master of the Schooner commonly called the Cutter, by force and without legal authority, and by him brought to the harbor of Saint John; for answer saith,

1. That on or about the 21st October, he entered the said Sloop at the Custom-House at Passamaquoddy, in the said United States, under the direction of Lewis Frederick Delesdernier, Esq. and afterwards obtained from the said Custom-House a clearance, (commonly called a *foreign clearance*) for the said Sloop in Ballast and Stores; for the purpose of enabling him to go with the said Sloop and anchor in the stream between the Islands of Campo-Bello and Dudley Island, and off *Snug Cove*, in the said Island of Campo-Bello, there in the said stream to lay and to take in a load of Plaster of Paris from on board other vessels there in the said stream also lying, and to carry upon freight, on account of Messrs. Andrews and Campbell, to some part of the said United States.

2. That he accordingly sailed with the said Sloop and anchored her in the stream between the said two Islands, so as to see the house of the said Lewis Frederick Delesdernier, upon the American shore, from the said Sloop when anchored and without the Points or Head-lands forming *Snug Cove* aforesaid, which place he continued to lay at without moving the anchor of the said Sloop, until he had taken on board the said Sloop 120 tons of Plaster from two other vessels, which he believes were British vessels, and until the said Sloop was seized and taken possession of by the said Charles Edward Leonard.



3. That the place where the said Sloop was anchored and where she remained and was seized and taken, is the place where vessels of the United States usually and frequently anchor and receive cargoes of Plaiter, as he the Respondent did in the said Sloop.

4. That it is the place heretofore pointed out and assented to by the Officers of His Majesty's Customs of the Port of Saint John, as the proper place for the vessels of the United States to anchor and take in their cargoes of Plaiter of Paris.

5. That the waters where the said Sloop anchored and was seized, are, as he is informed and believes, either wholly within the limits and boundaries and belong to the United States of America, or otherwise are the waters of the River forming the boundary between His Majesty's dominions and the said United States, and as such neutral and in common for the vessels of both nations.

6. That inasmuch as the principal channel from the Bay of Fundy into the river St. Croix or Scoudiac, commonly so called, is to the Eastward of the said Island of Campo-Bello, and between Deer-Island and Moose-Island, (lying to the Northward thereof) and forasmuch as the Eastern boundary of the said United States is "a line to be drawn along the middle of the river Saint Croix, from its mouth in the Bay of Fundy to its source, &c. and that all Islands within twenty leagues of any part of the shores of the said United States, and lying between parallel due East lines to be drawn from the mouth of the said river St. Croix and the mouth of St. Mary's river, are comprehended within the limits and boundaries of the said United States (except such Islands as at the time of or before the Treaty of Peace of 1783, were within the limits of the Province of Nova-Scotia) he believes that the waters on which the said Sloop was anchored and seized and taken as aforesaid, are wholly within and belong to the United States,"—but if otherwise—

7. He avers that the anchoring, lying and loading with Plaiter of Paris from on board British vessels in the stream, and at the same place where the said Sloop was seized and taken as aforesaid, has been for a long time sanctioned by the concurrent assent of the Officers of His Majesty's Customs at this Port of Saint John, and at the Port of Passamaquoddy, as a practice not prohibited by any of the existing laws of either of the two Countries.

8. He therefore prays that the said Sloop and Cargo may be adjudged to be restored to him with costs and charges.

Replication. To this answer and Claim a general Replication is filed on the part of the Libellant, and

Rejoinder. A Rejoinder on the part of the Claimant, which puts the cause at issue.

SEVERAL witnesses have been examined on both sides, which perhaps was unnecessary, as it is conceived that it would have been perfectly safe on the part of the Prosecutor, to have proceeded to a hearing of the cause upon the Libel and answer, without controverting the facts stated by the Claimant in his defence, as the law arising upon those facts, it is humbly submitted, will not only justify the seizure, but must work a forfeiture and condemnation of the Sloop and her cargo.

With the leave of the Court then, the merits of the cause shall be discussed upon the facts disclosed in the Claim, before the testimony of the witnesses is taken into consideration.

I will take up the grounds of the Claim in the order in which they naturally present themselves.

Defence. I. The Claimant insists that by the Treaty of Peace between His Majesty and the United States of America, concluded in 1783, the waters on which the Sloop was anchored and seized and taken, as stated in the Claim, are wholly within and belong to the United States, for the following reasons:—

1. Because the Eastern boundary of the United States is a line to be drawn along the middle of the river Saint Croix, from its mouth in the Bay of Fundy to its source, &c.

2. Because the principal channel from the Bay of Fundy into the river St. Croix, is to the Eastward of the said Island of Campo-Bello, and between Deer-Island and Moose-Island, lying to the Northward thereof.

3. Because all Islands within 20 leagues of any part of the shores of the United States, and lying between parallel due East lines to be drawn from the mouth of the river Saint Croix and the mouth of Saint Mary's river, are comprehended within the limits and boundaries of the said United States, except such Islands as at the time of or before the Peace of 1783, were within the limits of the Province of Nova-Scotia.

II. The second ground of defence is, that if the waters in question are not wholly within and do not wholly belong to the United States, they are the waters of the River forming the boundary between His Majesty's dominions and the said United States, and as such neutral and in common for the vessels of both nations.

III. That the anchoring, lying and leading with Plaster of Paris from on board British vessels at the place where the Sloop was seized, has been for a long time sanctioned by the concurrent assent of the Officers of His Majesty's Customs at this Port of Saint John, and at the Port of Passamaquoddy, as a practice not prohibited by any of the existing laws of either of the two Countries.

IV. That the Claimant obtained a foreign clearance from the American Custom-House, to enable him to go with his Sloop, and anchor off Sung Cove, without the Points or Headlands forming the Cove, there to take in a cargo of Plaster of Paris from British vessels.

In answer to the first ground of this defence, I shall endeavour to shew to the Court, Reply.

1. That all the Islands in Passamaquoddy Bay, including Moose-Island, Dudley-Island, and Frederick-Island, do, of right, by the Treaty of Peace of 1783, belong to His Majesty.

2. That all the waters surrounding those Islands belong also to Great-Britain.

3. That consequently a right of water-way, passage or navigation only, can be claimed by the United States, from the main channel of the Bay of Fundy, to that moiety of the Saint Croix, the boundary river, which is nearest to the American territory.

I shall then consider the three remaining grounds of the defence set up in the Claim,

1. I shall first endeavour to shew that all the Islands in Passamaquoddy Bay, including Moose-Island and Dudley-Island, do, of right, by the Treaty of 1783, belong to His Majesty.

To this end it will be proper to refer to that part of the 2d article of the Treaty which respects the point in question, after describing the termination of the interior boundary of the United States, to be the middle of St. Mary's river, where it touches the Atlantic Ocean—the words are these—"East by a line to be drawn along the middle of the river Saint Croix, from its mouth in the Bay of Fundy to its source, &c.—comprehending all the 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 Points where the aforesaid boundaries between Nova-Scotia on the one part, and East Florida on the other part, 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."

No doubts have ever arisen what Islands were reserved to His Majesty by the 2d article of the Treaty of Peace; it was obviously and clearly intended by this article—that no part of the Province of Nova-Scotia should be thereby ceded by His Majesty to the United States, and in conformity to this evident intention, all the Islands that then were or theretofore had been within the limits of that Province, are expressly reserved to His Majesty.

SOME doubts however had arisen, what River was truly intended under the name of the river St. Croix mentioned in the Treaty and forming a part of the Western boundary of the Province of Nova-Scotia; and this question was referred under the 5th article of the Treaty of Amity, Commerce and Navigation, between His Majesty and the United States, to the final decision of Commissioners, who were by a declaration under their hands and seals, to decide what River was the river St. Croix, intended by the Treaty of Peace, and in their declaration to give a description of the River, and particularize the latitude and longitude of its mouth and of its source, and both Parties to the Treaty agreed to consider such decision as final and conclusive, so as that the same should never thereafter be called into question, or made the subject of dispute or difference between them.

To determine then what Islands at the time of the Treaty were or theretofore had been within the Province of Nova-Scotia, we must in the first place refer to the original Grant of that Province to Sir WILLIAM ALEXANDER, in the year 1621. It is well known that the decision of the Commissioners under the 5th article of the Treaty of Amity, Commerce and Navigation above mentioned, with regard to the identity of the river St. Croix, was dictated and governed by the boundaries of the Province of Nova-Scotia as originally described in Sir WILLIAM ALEXANDER'S Patent, and that the river St. Croix, mentioned in that Grant as part of the Western boundaries of that Province, was the River decided to be the river St. Croix, truly intended by the Treaty of Peace; by recurring to that Grant we find the Islands originally forming a part of the Province of Nova-Scotia, as far as respects the present question, to be thus described:—"includens et comprehendens intra prædictas maris oras littorales ac earum circumferentias a mari ad mare omnes terras continentes cum fluminibus torrentibus suis, littoribus, INSULAS aut maribus jacentibus prope aut infra sex leucas ad aliquam eorundem partem ex occidentali, boreali aut orientali partibus orarum littoralium et præcinctum earundem." And in conformity to this original Grant of the Province of Nova-Scotia, we find at the time of the Treaty of Peace, the same river St. Croix to be a part of its Western boundary, and the Islands forming a part of it at that time also (as described in the Commissions to the Governors of that Province) to be all Islands within six leagues of any part of the Coast.

It is well known that Moose-Island and Dudley-Island, the latter under the name of St.

St. Croix Island, were granted to FRANCIS BERNARD, and others, by letters patent, under the Great Seal of the Province of Nova-Scotia, bearing date the 30th October, 1765— that they remained under the actual jurisdiction of the Province of Nova-Scotia, until the Treaty of Peace, and afterwards under the actual jurisdiction of this Province, for some time after its erection.

THE State of Massachusetts has, from the time of the Treaty in 1783, been constantly endeavouring to encroach upon His Majesty's Territory in that quarter; in the year 1784 Governor HANCOCK, of that State, remonstrated to Governor PARR, of the Province of Nova-Scotia, against the settlements made at St. Andrews, claiming all the Lands lying Westward of the river Magaguadavic, as being a part of the State of Massachusetts. This claim was referred to the then Secretary of State, Lord SYDNEY, who in his answer to Governor PARR, dated 8th March, 1785, among other things says—"His Majesty feels himself called upon to refuse a compliance with the requisition which has been made for the removal of His Subjects now in possession of Lands on the Western side of the river Magaguadavic, called the Little St. Croix, and between that River and the Great St. Croix or Scoodiac, which latter must be considered as the line of separation, and His Majesty is determined to protect His faithful and loyal Subjects, in the peaceable possession of those Lands."

This decision on the part of His Majesty's Government, and the consequent possession maintained by His Subjects, put a stop to all further complaint with regard to these settlements, and there can be no doubt, if the same conduct had been pursued with regard to the Islands, that Moose-Island, Dudley-Island, and Frederick-Island, would with the other Islands in Passamaquoddy-Bay, have at this day been in the quiet and peaceable possession of His Majesty's Subjects, and the present cause would never have had an existence.

In the month of November, 1784, New-Brunswick was erected into a separate Province.

In the year 1785, this Province was divided into Counties, and the County of Charlotte was bounded and described as follows, viz. "bounded on the South by the Bay of Fundy; on the West by the river Scoodiac or Saint Croix, and the *Western shore of the Bay of Passamaquoddy*, including the Island of Grand Manan; on the East by a due North line from Point Le Proc, in said Bay of Fundy, running into the Country; and on the North by a due West line, commencing in the said North line thirty miles distant from Point Le Proc aforesaid."

Courts of Sessions and Inferior Courts of Common Pleas were thereupon in the same year established in this County, and the Sheriff of the County regularly summoned the Inhabitants of Moose-Island, to serve as Jurymen in those Courts, who attended accordingly.

In this year 1785, Mr. BOWDOIN was elected Governor of the State of Massachusetts— on the 9th of Sept. in that year, he wrote a letter to Governor CARLETON, in which he complained of the Government of New-Brunswick, for "asserting a claim to Moose-Island, Dudley and Frederick-Islands, in advertising and directing the Inhabitants of Moose-Island to attend the Courts at St. Andrews, as Jurymen, which he considered as "an encroachment upon the territorial rights and sovereignty of the Commonwealth of Massachusetts and of the United States."

To this letter Governor CARLETON returned an answer dated the 18th of October, 1785, in which he says,— "Although the Sheriff has acted without any special advice or direction from either of the judicial officers of Government, yet I cannot but think that in considering Moose-Island, together with Dudley and Frederick-Islands, as within the County of Charlotte, he is clearly warranted, not only by the limits of his bailiwick, but by the express terms of the Treaty, which reserve to Great-Britain all such Islands as now are or heretofore have been within the limits of the Province of Nova-Scotia."

The Sheriff continued to summon Jurymen from these Islands, and no further public complaint was made.

In January 1786, the first General Assembly in the Province of New-Brunswick was called. At this Session an Act of Assembly was passed, dividing the several Counties into Towns or Parishes, and the Parish of West-Isles, in the County of Charlotte, is in that Act described as follows:—"The seventh Town or Parish to be called, known and distinguished by the name of West-Isles, to contain Deer-Island, Campo-Bello Island, Grand Manan Island, Moose-Island, Frederick-Island, and Dudley-Island; with all the lesser Islands contiguous to them, not included in the Towns beforementioned."

AFTER the passing of this Act, not only Jurymen continued to be summoned from Moose-Island, which was the only one of the three Islands in question which was inhabited, but Parish officers were several years appointed from this Island indiscriminately with the other Islands forming the Parish of West-Isles.

In the year 1791, a Mr. Cooper, Sheriff of the County of Washington, the next adjoining

joining County in the State of Massachusetts, came to Moose-Island armed, with two men also armed, in order to collect from the Inhabitants a Poll Tax assessed by the Court at Machias, in the said County of Washington. The Inhabitants resisted the payment of the Tax, alleging that they were summoned to discharge the duties of British subjects on one side, and claimed at the same time as American subjects on the other, and refusing to pay any Tax till it should be settled to which Country they belonged. Cooper upon this began to temporize and persuade them that if they would pay the Tax, they would be acknowledged as American subjects, and that the General Court of Massachusetts would in that case be justified in granting them their Lands: And he further pledged himself to them, that if they would pay the Tax so that he could make a regular return thereof to the Court, he would not again enter upon the Island as Sheriff, until he had procured for them a grant of their Lands from the General Court of Massachusetts. The Inhabitants, not having at that time any grants of their Lands under the British Government, yielded to these terms, and some of them paid the Tax, some refused, and some left the Island.— These were facts of public notoriety at the time, and of which abundant testimony may be at any time produced.

GRANTS of Land were made to those who submitted and took the Oath of Allegiance to the States, and the authority of the British Government was never afterwards actually enforced upon either of the Islands in question: Another circumstance tended to confirm the Americans in the possession of these Islands, which was, that some seizures made by Mr. Leonard, the Prosecutor in this cause, of American vessels found trading at Dudley-Island, contrary to the provisions of the same Statute, upon which the present prosecution is founded, were released to the Claimants, by the recommendation of the Officers of the Government of New-Brunswick, though much against Mr. Leonard's wishes and inclination. This took place in the summer of 1786. The release of these seizures was recommended, not from any doubt of His Majesty's right to the Islands, but because the Americans were in the actual possession of some of them, and it was not thought prudent at that time, to adopt any forcible measures to dispossess them, of which nature these seizures were at that time considered to be.

Thus has the possession of those Islands been wrested from His Majesty; and from that time the Claims and encroachments of the American subjects upon His Majesty's territory and rights in that quarter, have been constantly extending and increasing. Had the same measures been pursued with regard to the Islands, which took place respecting the Claim to the territory between the St. Croix and Magaguadavic, in the years 1784 and 1785, little doubt can be entertained, that the very valuable trade and fisheries now carried on by the Americans in that quarter, to the great injury of the commercial and maritime interests of Great-Britain, would have been in a great measure, if not totally prevented.

In the year 1785, there were only 17 heads of families upon Moose-Island, whereas at this day they probably exceed 200, and they are daily and rapidly increasing. This Island contains about 2700 acres of Land.

From the indulgence they experienced and the silence with which their encroachments were submitted to, the Americans at length, in defiance of the Navigation Act, and of all the other important and salutary provisions of the laws of trade in this respect made, came even to the shores of Campo-Bello Island, and took in their cargoes of Plaster of Paris from the wharves there. Mr. Leonard again interfered: and by the seizure two year's ago, of two American vessels employed in this illicit traffic, and their subsequent condemnation in this Court, a stop was put to a practice so highly unjustifiable.

But no sooner is this spirit of encroachment suppressed in one form, than it starts up with new appearances and still more alarming pretensions; of this, stronger evidence cannot be adduced than is exhibited in the Claim now under the consideration of the Court.

The Claimant for the reasons set forth in his Claim, declares upon his Oath that he believes, that "the waters on which the Sloop was anchored and seized, are wholly within and belong to the United States."

Now the waters here spoken of, are the waters between Dudley-Island on one side, and the Island of Campo-Bello on the other, and these waters can by no possibility belong to, or be wholly within the United States, unless the Island of Campo-Bello, either belongs to or lies wholly within the same States; and we accordingly find that one of the reasons or grounds of the Claimant's belief respecting these waters is—"That the principal channel from the Bay of Fundy into the river St. Croix or Scoodiac, is to the Eastward of the said Island of Campo-Bello, and between Deer-Island and Moose-Island, lying to the Northward thereof."

Thus the Americans are not contented with having wrested from Great-Britain, and with now holding in full sovereignty Moose-Island, Dudley-Island, and Frederick-Island, to which they have not, as will presently be more fully shewn, one spark of right; they are not contented with a right of water-way or navigation through the common and nearest channel

channel to their moiety of the St. Croix river, from the main channel or that part of the Bay of Fundy which lies on the outside of the Islands; which common channel, notwithstanding all the bars in it, is sufficient for the passage of the largest ships that trade within the Bay of Fundy, and is the channel usually if not in all instances made use of by American vessels passing to and from the river St. Croix; but, because there is a deeper channel by the East end of Campo-Bello Island, they now affect to claim this channel as the water boundary line between His Majesty's territory and that of the United States;— a prelude, without doubt, to an ultimate claim to the Island of Campo-Bello itself, in full property and sovereignty: Be that however as it may, they now claim the whole of the waters above mentioned as a safe and secure asylum from a violation there, of the Navigation Laws of Great-Britain, the due observance of which is so highly important to her maritime strength and interests: That this is the object of the pretensions set up in this Claim is manifest from that part of it in which the foreign clearance of the Sloop (which I shall hereafter notice) is mentioned; the Claimant declaring that this clearance was obtained to enable him to go and “anchor his Sloop off Snug Cove, there to lie and take on board a cargo of Plaster of Paris from British vessels lying there also”; taking care only to lie “without the Points or Head-lands forming Snug Cove.” Now by a bare inspection of the Map, it will be seen that a line drawn across Snug Cove from one of these Points or Head-lands to the other, will leave nearly the whole of the Stream or waters between Campo-Bello Island and Dudley-Island, on the east side of such line; and (if this Claim should be established) will render them a secure place of rendezvous for carrying on every species of illicit commerce between the two Countries.

The other reason which the Claimant assigns for his belief respecting these waters is, “That the Eastern boundary of the United States is a line to be drawn along the middle of the river Saint Croix, from its mouth in the Bay of Fundy, to its source, &c. and that all Islands within 20 leagues of any part of the shores of the United States, and lying between parallel due East lines to be drawn from the mouth of the said river Saint Croix, and the mouth of Saint Mary's river, are comprehended within the limits and boundaries of the said United States (except such Islands as at the time of or before the Treaty of Peace of 1783,) were within the limits of the Province of Nova-Scotia.”

This reason, given by the Claimant for his belief that the waters between Campo-Bello Island and Dudley-Island, where the Sloop was anchored and seized, “are wholly within and belong to the United States,” must be predicated upon the supposition not only that Moose-Island, Dudley-Island, and Frederick-Island, but Campo-Bello Island also, are wholly within or belonging to the United States.

This brings me to a more particular inquiry, whether any and which of the above mentioned Islands do, by the Treaty of 1783, belong to the United States.

It has been already observed, that upon the slightest perusal of the second article of the Treaty of Peace, it is obvious, “that it was clearly intended by it, that no part of the Province of Nova-Scotia should be thereby ceded by His Majesty to the United States.” The United States are expressly bounded East by the western boundaries of the Province of Nova-Scotia, which excludes them from any part of the Continent which was within that Province; and in still stronger terms they are excluded from all the Islands within the same Province, by the exception of such Islands as at the time of the “Treaty of Peace, or at any time theretofore had been within the limits of the Province of Nova-Scotia.”

It has been also shewn that the Islands in question, and all the Islands in Passamaquoddy-Bay, being within six leagues of the main Land forming the Province of Nova-Scotia, both at its original creation in 1621, and at the time of the Treaty of Peace in 1783, were referred by this Treaty to His Majesty.

I SHALL now examine more particularly the expressions made use of in the Treaty in this regard. This cannot be done more forcibly than by adopting the reasoning made use of by his Grace the Duke of PORTLAND on this subject, in his letter to Lt. Governor CARLETON, being a circular one to the Governors of Nova-Scotia and New-Brunswick, dated 11th April, 1799. His Grace in this letter says, “It is particularly worthy of observation, that in the above mentioned article of the American treaty of 1783, the exception in favour of such Islands as now are or heretofore have been within the limits of the Province of Nova-Scotia, is subsequent to that part of the same article which assigns to America its precise boundaries, comprehending all Islands within 20 leagues of any part of the shores of the United States, &c. &c. consequently the above exception is valid even against the right of America, to all Islands within 20 leagues of any part of the shores of the United States, if any of the Islands so situated are, such Islands as now are or heretofore have been within the limits of the Province of Nova-Scotia.—Indeed it is upon the face of it a general exception in favor of such Islands as now are or heretofore have been within the limits of the Province of Nova-Scotia, which nothing in the preceding part of the article can by any possibility affect.” This letter of His Grace was occasioned by a letter to him from Lord GREXVILLE, then Secretary of State for foreign affairs, communicating an extract of a letter which his Lordship had received from Mr.

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Liston, the American ambassador, "on the subject of a doubt that had been started respecting the boundary of His Majesty's Province of New-Brunswick and the American district of Maine." His Grace in his letter further says, "You will observe that this doubt is shewn to have necessarily arisen out of the determination which has taken place respecting the identity of the river St. Croix, intended by the American Treaty of 1783, and that although it primarily goes only to a presumed right of water-way or navigation to that moiety of the Saint Croix, the boundary river which is nearest to the American territory, yet that it appears to be ultimately intended to deduce therefrom as a further consequence, a right to the Islands in Passamaquoddy-Bay, lying on the American side of such a water-way or navigation."

The extract from Mr. LISTON's dispatch, dated Philadelphia, 31st December, 1798, is as follows:—"Your Lordship will have observed in the Speech of the President of the United States, to the two Houses of Congress, a short statement of a fresh doubt that has been started with regard to the boundary between His Majesty's Province of Nova-Scotia and the American district of Maine. This difficulty was originally suggested by the Agent and the Commissioner of the United States appointed under the fifth article of the Treaty of Amity. I find, that the opinion given on this subject by the 3d Commissioner, Judge BENSON, at the conclusion of a paper which he has drawn up and put into the hands of the President and the Secretary of State, with a view of giving a general idea of the whole transaction, is in the following words:—"There is still a question concerning the boundary of the two nations in that quarter, and originating also in the Treaty of Peace, but which, PARTAKING OF THE NATURE OF AN OMITTED CASE, can be settled only by negotiation and compact. The Treaty supposes the St. Croix to issue IMMEDIATELY into the Bay of Fundy, and of course that there would be an entire SEA-BOARD boundary, if it may be so expressed, between the termination of the Southern and the commencement of the Eastern boundary of the United States; and it is also intended that where the Eastern boundary passed through waters that were navigable, both nations should equally participate in the Navigation. The question then is how the boundary in the intermediate space, between where the mouth of the Saint Croix hath been decided to be and the Bay of Fundy, is to be established most consistent with the Treaty; in answer to which it may be suggested that the boundary should be a line, passing through one of the passages between the Bay of Fundy and the Bay of Passamaquoddy; that the West passage being unfit for the purpose, having a bar across it which is dry at low water, the next to it must be taken and the line may be described—BEGINNING IN THE MIDDLE OF THE CHANNEL OF THE RIVER SAINT CROIX AT ITS MOUTH, THENCE DIRECT TO THE MIDDLE OF THE CHANNEL BETWEEN PLEASANT-POINT AND DEER-ISLAND, THENCE THROUGH THE MIDDLE OF THE CHANNEL BETWEEN DEER-ISLAND ON THE EAST AND NORTH, AND MOOSE-ISLAND AND CAMPO-BELLO-ISLAND ON THE WEST AND SOUTH, AND ROUND THE EASTERN POINT OF CAMPO-BELLO-ISLAND TO THE BAY OF FUNDY."

It may not be improper here to repeat, that no doubt ever was entertained, what Islands by the 3d article of the Treaty of Peace belonged to Great-Britain; nor was this any part of the question referred to the decision of the Commissioners under the 5th article of the Treaty of Amity, Commerce and Navigation, it being easy to establish by authentic and unanswerable documents, what Islands at the time of, and before the Treaty of Peace were within the limits of the Province of Nova-Scotia.

THE DUKE OF PORTLAND therefore was justly alarmed to find the right of water-way or navigation described by Judge BENSON, claimed as a right deducible from the Treaty; apprehending that it was intended to deduce therefrom as a further consequence, a right to the Islands in Passamaquoddy-Bay, lying on the American side of such a water-way or navigation.

It is however to be remarked, that Judge BENSON did not extend his ideas to the pretensions advanced in the Claim now before the Court. He barely intimates that it was intended by the Treaty of Peace, that where the Eastern boundary of the United States passed through waters that were navigable, both nations should equally participate in the navigation; and surely a right of passage or navigation can never be construed into a right to stop and trade in that passage in direct violation of the laws of that nation through whose territory the right of passage is claimed. This would be contrary to every principle of good faith established among nations.

WHATEVER attempt might be made by the State of Massachusetts (which had always discovered the most anxious desire to extend its territory in that quarter) to deduce a right to the Islands on the American side of the passage or water-way, as a consequence of the right of water-way. It is not to be presumed that Judge BENSON had any idea of such consequence, as he well knew the provisions of the Treaty of Peace in this regard; and he also knew from personal acquaintance with the subject, having been upon the spot as a Commissioner, that Campo-Bello Island, by far the most considerable Island on the American side of the water-way described by him, was in fact held in full possession, property and sovereignty, by Great-Britain.

But I apprehend that it may be clearly demonstrated that there is no such omitted

case as Judge BEXSON supposes, and that there is a complete sea-board boundary established by the Treaty of Peace between the termination of what he calls the Southern and the commencement of the Eastern boundary of the United States.

Mr. LISROX's observation to this effect is very pertinent, namely—that with regard to Judge BEXSON's question, "the British Government may be justified in maintaining, that the question is already finally decided; the boundary has been fixed by the Commissioners as far as *the mouth of the St. Croix*, and that River according to the sense of the Treaty of Peace, emptied itself immediately into the Bay of Fundy; for in MERRIMAN'S Map, which was before the Ministers at the time of the Negotiation, and which was "therefore the authority to which it was natural to refer, no such Bay as the Bay of Passamaquoddy is laid down, the whole Arm of the Sea which waters that part of the Coast being comprehended under the *general name of the Bay of Fundy*."

In confirmation of Mr. LISROX's reasoning it may be observed, that the 2d article of the Treaty of Peace describing the boundaries of the United States, and the declaration of the Commissioners under the 5th article of the Treaty of Amity, Commerce and Navigation, explaining and deciding the only doubt that had arisen in the construction of the 2d article of the Treaty of Peace respecting the boundary, must be considered as forming but one act or instrument, and that the declaration of the Commissioners respecting the identity of the River, the local situation and position of its mouth, and of its source, must have the same operation, meaning and construction, as if the contents of that declaration had originally made a part of the description of the boundaries in the 2d article of the Treaty of Peace; otherwise, the declaration instead of explaining and deciding *the intention of the Treaty of Peace* with respect to the doubtful part of the boundary, would operate to the establishment of a new boundary not contemplated by the Treaty of Peace, which was beyond the power of the Commissioners who made that declaration. Accordingly, the fifth article of the Treaty of Amity, Commerce and Navigation, provides that the Commissioners shall by "a declaration under their hands and seals decide what River is the river Saint Croix intended by the Treaty of Peace; that the said declaration shall contain a description of the said River, and shall particularize the latitude and longitude of its mouth and of its source. And both parties agree to consider such decision as final and conclusive, so as that the same shall never thereafter be called in question, or made the subject of dispute or difference between them."

It never has been nor can be contended that the river St. Croix has two mouths; one mouth and one mouth only is spoken of in both Treaties, and in fact it ceases to be or to retain the form of a River at the place or point where its mouth is by the Commissioners declared to be, and it there empties its waters into a Bay which is the common receptacle of the waters of that, with those of the Magaguadavic and several other Rivers emptying into the same Bay.

CONSIDERING then the 2d article of the Treaty of Peace, and the declaration of the Commissioners under the 5th article of the Treaty of Amity, Commerce and Navigation, as forming but one instrument, and the geographical fact, that the river St. Croix has but one mouth, we may reason conclusively as follows.

THE mouth of the River is in the Treaty of Peace *expressed*, and must therefore *be intended* by it, to be, *in the Bay of Fundy*.—The Commissioners under the fifth article of the Treaty of Amity, Commerce and Navigation, are required by a declaration under their hands and seals to decide what River is the river St. Croix, *intended by the Treaty of Peace*, to describe the River, and to particularize the latitude and longitude of its mouth, which must therefore be its mouth, *expressed and intended* in the Treaty, namely, *its mouth in the Bay of Fundy*. The mouth of the River is in this declaration *described* to be at *Joe's Point*, and its latitude and longitude are accordingly particularized in the declaration; therefore the mouth of the River thus *described and particularized*, and the waters into which it empties itself at *Joe's Point*, must be *in the Bay of Fundy*, or a part or section thereof. Hence it follows that the Bay above mentioned, sometimes called *Passamaquoddy*, but now known by the name of *St. Andrews Bay*, into which the river St. Croix empties itself at *Joe's Point*, must have been contemplated by the framers of the Treaty of Peace, as being in or a part or section of the Bay of Fundy, and must have been so intended by the Treaty. The description of the boundary in the Treaty of Peace, is upon this supposition perfectly clear and complete, but on any other supposition it is palpably inconsistent with geographical facts that cannot be disputed.

THERE is then no such chasm in the boundary of the United States as Judge BEXSON supposes; *The main land* of the United States on the sea-board is by the Treaty of Peace of necessity bounded by the shores of the United States from the mouth of Saint Mary's river to the mouth of the river Saint Croix, "comprehending all Islands within twenty leagues of any part of those shores, except the Islands that then were or theretofore had been within the limits of the Province of Nova-Scotia," all the Islands in this supposed chasm or *space* alluded to by Judge BEXSON being within the limits of the Province of Nova-Scotia and consequently referred by the Treaty and still belonging to Great-

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Great-Britain, the United States are of necessary consequence bounded in that quarter by the western shore of the Bay of Passamaquoddy being that part or section of the Bay of Fundy into which the waters of the river Saint Croix at its mouth empty themselves and consequently where in the terms of the Treaty of Peace the boundaries on that part "between Nova-Scotia and the United States touch the Bay of Fundy."

In conformity to this evidently just and only fair and consistent construction of the Treaty of Peace, the County of Charlotte, (as has been already observed,) was constituted by Letters Patent under the Great Seal of this Province in the year 1785, and confirmed by an Act of Assembly in 1786, under the following boundaries, to wit, "On the South by the Bay of Fundy, on the West by the river Scodiac or St. Croix, and the western shore of the Bay of Passamaquoddy, including the Island of Grand Manan, &c." And I beg leave in this place humbly to insist, that this and every other Court established in the Province, must be governed in their decisions by the existing laws of the Country.

By the Treaty of Peace the mouth and source of the river St. Croix were points of equal importance with the identity of the River itself, as upon the situation of the former depended the commencement of the Eastern and the termination of what is called the Southern boundary of the United States, which united in one and the same point, and upon that of the latter, the interior boundary line from it, due North, through an immense tract of Country to the Highlands mentioned in the Treaty, these three important particulars were accordingly ascertained by the Commissioners under the fifth article of the Treaty of Amity, Commerce and Navigation, by giving in their declaration a full description of the River and of its source and particularizing the latitude and longitude of its mouth; the obligation to ascertain the latitude and longitude of its source having been dispensed with by an explanatory article agreed upon between the two nations for that purpose.

Now, therefore to contend that the mouth of the river St. Croix, described and particularized in the declaration of the Commissioners, is not its mouth intended and expressed in the Treaty of Peace, would be in effect, to render the declaration altogether nugatory, as either of the parties, if dissatisfied, might with equal propriety call in question the decision with respect to the identity of the River itself and respecting its source, and if the mouth of the River particularized in the declaration of the Commissioners, be its mouth contemplated and intended by the Treaty of Peace, it must, as has been already observed, be its mouth in the Bay of Fundy, and Passamaquoddy-Bay must be considered, as it in fact is, a section of the Bay of Fundy.

If then the question with regard to the Islands depends at all upon the situation of the mouth of the River, the declaration of the Commissioners is "final and conclusive, and cannot now be called into question by either party or made a subject of farther dispute."

BUT to consider the question in another point of view, the Treaty of Peace contemplated the mouth of the river St. Croix as being in the Bay of Fundy, possibly from the circumstance mentioned by Mr. LISTON that in MITCHELL'S Map which was before, and principally consulted by, the Ministers of the respective powers, at the time of the negotiation of the Treaty of Peace, "no such Bay as the Bay of Passamaquoddy is laid down, "the whole Arm of the Sea which waters that part of the Coast, being comprehended under the general name of the Bay of Fundy," and the mouth of the river St. Croix appearing by that Map to be in the Bay of Fundy. But still, if the mouth of the River, upon investigation, should prove not to be in the Bay of Fundy, it is evident that by the Treaty of Peace was intended the mouth of that river Saint Croix, which formed a part of the western boundary of the Province of Nova-Scotia, wherever the local situation of that mouth might be ascertained to be; for it cannot be contended that if the mouth of that River St. Croix which formed a part of the western boundary of the Province of Nova-Scotia, should in fact be found not to be in the Bay of Fundy, that any other River which did not form a part of such western boundary was to be adopted, it being evident, as has been already shewn, that the United States were to be bounded East, upon the western boundary of the Province of Nova-Scotia, and that the river Saint Croix formed a part of such western boundary. Wherever, then, the mouth of the river Saint Croix, forming a part of such western boundary, should be found to be, whether in the Bay of Fundy or in the Bay of Passamaquoddy, it must of necessity form the commencement of the Eastern and the termination of what is called the Southern boundary of the United States, or the object of the Treaty in this respect, would be entirely defeated; and this will fairly account for the provision in the Treaty of Amity, Commerce and Navigation, that the local situation of the mouth of the river Saint Croix should be ascertained by particularizing its latitude and longitude: thus in either case, and in every point of view, there is no chasm in the boundary of the United States; and it is not probable that any such question as the present would ever have arisen, but from the anxiety of the State of Massachusetts to retain and to extend their possessions of the British Islands in the Bay of Passamaquoddy.

THE describing of the mouth of the river St. Croix in the Treaty of Peace, as being in the Bay of Fundy, when in fact it is found to be in a small intervening Bay, communicating



nicating immediately with the Bay of Fundy, but bearing a distinct name, which distinctly name, it must be presumed, was not known to the framers of the Treaty, will not, I humbly contend, admit of any such question, as Judge BENSON supposes, "*partaking of the nature of an omitted case*," to be settled "by farther negotiation and compact." In this manner, to make new questions in cases of this kind, would tend not only to destroy the intention of Treaties, and their object in putting an end to controversies between nations, but would be inconsistent with the rules laid down and established, and by which nations ought to be governed in the interpretation of them, and consequently would be a violation of the faith of Treaties.

"In concessions, conventions, and treaties, in all contracts, as well as in the laws," Vattel, b. 2. says Vattel, "it is impossible to foresee and point out all the particular cases that may arise; we decree, we ordain, we agree upon *certain things*, and express them in *general terms*, and though all the expressions in a Treaty should be perfectly clear, plain and determinate, the true interpretation would still consist in making in all the particular cases that present themselves a *just application* of what has been decreed in a *general manner*. It is therefore necessary to establish rules founded on reason and authorized by the law of nature capable of diffusing light over what is obscure, of determining what is uncertain, and of frustrating the views of him who acts with duplicity, in forming the contract."

"Unless certain rules be admitted for determining the sense in which the expressions are to be taken, Treaties will be only empty words, nothing can be agreed upon with security; and it will be almost ridiculous to place any dependance upon the effect of conventions: the faith of Treaties is no less violated *by a refusal to admit an evidently fair interpretation* than by an open infraction."

He then proceeds to lay down, among others, the following rules.—"Every Treaty must be interpreted according to fixed rules, calculated to determine its meaning, as *naturally understood by the parties concerned, at the time when the Treaty was drawn up and accepted.*"

"To each term we should affix that meaning, which the party whose words we interpret, *probably had in contemplation.*"—"A Treaty ought to be interpreted in such manner as that it may have its effect and not prove nugatory."

"In *imforeseen* cases we should rather be guided by the *intention* of the author of a Treaty than by his *words*, and interpret the instrument, conformably to what *he would have done*, if he had foreseen the circumstances which *are at present known.*"

To apply these principles.—It was the object and design of the Treaty of 1783 to give a complete and entire boundary to the United States, and that the Eastern should commence at the termination of what is called the Southern boundary. It was intended to give to the Bay in which the mouth of the river Saint Croix was situated, the name by which it was known, and it was under this impression, called the Bay of Fundy. It was intended that the mouth of the river Saint Croix, forming a part of the Western boundary of the Province of Nova-Scotia, wherever that mouth might be, should be the Eastern boundary of the United States: It was intended that all the Islands which at or before the time of the Treaty, were or had been within the limits of the Province of Nova-Scotia, should be reserved to His Majesty and continue to belong to Great-Britain; and in no other sense could the Treaty have been accepted by His Majesty consistently with any rational interpretation of it.—To deny either of these positions would be in effect to charge the framers of the Treaty with absurd or wicked and fraudulent designs.

It turns out upon examination that the waters into which the river St. Croix issues at its mouth, and which communicate immediately with the Bay of Fundy, form a small Bay known by the name of Passamaquoddy. Can it be contended that this Bay of Passamaquoddy is not to be considered, so far as respects the present question, as being, what it in fact is, a part or section of the Bay of Fundy, without a manifest violation of the faith of Treaties and an evident infraction of the rights secured by the Treaty? Let candor, justice and good faith, dictate the answer to this question.

In case the reasoning of his Grace the Duke of PORTLAND, should not be considered, as it appears to me to be, conclusive, with respect to His Majesty's right to the Islands in question, I come now to consider in what manner the right to these Islands may be affected or determined by the situation of the mouth of the river St. Croix, as particularized in the declaration of the Commissioners under the fifth article of the Treaty of Amity, Commerce and Navigation.—If the clause reserving these Islands to His Majesty must be affected or governed by the preceding part of the article His Majesty's right to all the Islands in Passamaquoddy-Bay may, I humbly conceive, be demonstrated under that part of the final declaration of the Commissioners which decides the mouth of the river Saint Croix to be at *Joes Point*, the northernmost Point of Saint Andrews Harbour. After that part of the 2d Article of the Treaty of Peace, which assigns to the United States their precise boundaries, the words descriptive of the Islands granted to them, follow thus:—

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"comprehending all Islands within 20 leagues of any part of the shores of the United States, and lying between lines to be drawn due East from the Points 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;" then the reservation follows in these words, "excepting such Islands as now are or heretofore have been within the limits of the said Province of Nova-Scotia," the operation of the exception, if affected by any preceding part of the article, can be affected by the words of the cession only, and the Islands comprehended in the exception must be a part of those included in the cession, agreeably to the maxim, *exceptio probat regulam*. The words forming the second part of the description of the Islands ceded by the Treaty, must be intended to have some meaning, in ascertaining which, the conjunction *and* connecting the two parts of the description must be construed either in a copulative or disjunctive sense; if in the latter, the exception which follows in favor of His Majesty, will apply *distinctly* to each of the descriptions and all the Islands in that part of the Bay of Fundy called Passamaquoddy-Bay, being within 20 leagues of the shore of the United States, and therefore within the first description, will belong to His Majesty by virtue of the exception, be the mouth of the river St. Croix (the situation of which must determine whether or not they are within the second description) where it may. But if this connecting term is construed in a copulative sense, and all the words therefore as forming but one description, it will be necessary that all the Islands in this section of the Bay of Fundy be found within the second as well as the first part of the description before the exception can apply to save and reserve them to Great-Britain; on the present occasion I will interpret this conjunction in a copulative sense, because this is the sense most unfavorable to His Majesty, so far as respects the Islands in question, in which the words can be construed, and because, if it is taken in a disjunctive sense, the description in the latter part of the sentence will be altogether unlimited, as the East lines mentioned in it may be indefinitely extended, involving the most absurd consequences.

ADOPTING this construction it will be necessary to draw the East lines mentioned in this part of the description, in order to ascertain the Islands lying between them, and consequently included both in the grant or cession and the exception.

LET a line then be extended *due East* from the middle of Saint Mary's river, where it touches the Atlantic Ocean till it becomes, and is thence farther continued 20 leagues, parallel with a *due East* line extended the same number of leagues from the middle of the mouth of the river St. Croix at *Joe's Point*, where it touches that part of the waters of the Bay of Fundy, it will be found, that all the Islands in Passamaquoddy-Bay, are not only within twenty leagues of the shores of the United States, but are also included *and lying* between these *due East* parallel lines, and consequently that such of these Islands as at the time of the Treaty were or theretofore had been within the limits of the Province of Nova-Scotia are reserved to His Majesty by virtue of the express exception in his favor; but if the mouth of the river St. Croix should for the sake of the argument, be considered as being at the western passage, where the waters in that passage intermix with the waters in the main channel of the Bay of Fundy, and the *due East* line in this behalf mentioned in the Treaty, should be extended from this point or passage, it would be found that none of the Islands in Passamaquoddy-Bay would be within the description of the Islands ceded by the Treaty, nor consequently within the exception, and that the exception would in this case reserve the Island of Grand Manan only to His Majesty from the operation of the general words of the cession, and the Islands in Passamaquoddy-Bay not being within the cession or exception, the right to them would be ascertained by the middle line of the waters from this point or passage Northerly to the middle of the river St. Croix to its real and only mouth at *Joe's Point*, and consequently Moose-Island, Dudley-Island and Frederick-Island, the Islands in question, taken possession by the Subjects of the United States since the Treaty of Peace being on the western side of this middle line, would belong to the United States.

Of such importance, in this view of the question, is the actual situation of the mouth of the river Saint Croix.

I shall now consider the first point of my argument as established, namely, "That all the Islands in Passamaquoddy-Bay, including Moose-Island, Dudley-Island, and Frederick-Island, do of right, by the Treaty of Peace of 1783, belong to His Majesty."

2. The second point is, that all the waters surrounding those Islands belong also to Great-Britain.

THE manner in which the first point has been investigated, and the various grounds upon which it has been established, preclude the necessity of a separate discussion of the second, the latter resulting as a necessary consequence of the former.

It was evidently intended by the Treaty of Peace, as has been repeatedly observed, that no part of the Province of Nova-Scotia should be thereby ceded to the United States, and it having been established that the *Islands* and *waters* in question, were at the time of the Treaty, and always theretofore had been within the limits of the Province of Nova-Scotia,

Scotia, from the first establishment of that Province in the year 1621, they must consequently still belong to His Majesty, in full property and sovereignty.

As the whole Territory of the United States as well as the Province of Nova-Scotia before the Treaty of Peace belonged to Great-Britain, it will be sufficient, in addition to what has been already said, to observe, that the Islands and waters in question never did before that Treaty belong to nor were in possession of the adjoining Province now State of Massachusetts, and it has been shewn that these waters were not ceded to the United States by that Treaty, but on the contrary, that the United States are by the Treaty bounded, in that quarter, upon the *western shore of the Bay of Passamaquoddy*; indeed no waters whatever are *expressly* included in the cession, from the mouth of Saint Mary's river, to the mouth of the river Saint Croix, and in the interpretation of Treaties, says Vattel,—  
 Vattel, b. 2. c. 17. § 305. “the Proprietor cannot be deprived of his right, except so far *precisely*, as he relinquishes it on his part; and in case of doubt the presumption is in favor of the Possessor.” And again, “The cession of a right or of a Province, in order to obtain Peace, is interpreted in its most confined sense.” And it is remarkable that he gives the following instance in illustration of his doctrine. “If it were true,” says he, “that the limits of Acadia were always uncertain, and that the French were the lawful possessors of it, that nation would have had a *right on their side* in maintaining that their cession of Acadia to the English by the Treaty of Utrecht, did not extend beyond the *narrowest limits* of that Province.”

Vattel, b. 2. c. 17. § 305. § 308.

3. I come now to the third point of my argument, which may be considered also as a necessary consequence of the points already discussed, namely, “that a right of water-way, passage or navigation only, can be claimed by the United States, from the main channel of the Bay of Fundy to their moiety of the river St. Croix.”

THE question stated by Judge BENSON as remaining to be settled by negotiation and compact, I conceive, can merely respect such a right of water-way or navigation to that moiety of the Saint Croix, the boundary river, which is nearest to the American territory, as this water-way must necessarily pass between the Islands in Passamaquoddy-Bay, all of which have been shewn to belong to His Majesty; indeed the question evidently arises from an implied concession on his part, that all these Islands do belong to Great-Britain, because if Moose-Island, Dudley-Island, and Frederick-Island, the Islands in question, had been supposed by him to belong to the United States, no question could have been made, but that they would have had an entire sea-board boundary, and an indisputable right of water-way through the western passage by these Islands, and along the western shore of Passamaquoddy-Bay to their moiety of the river St. Croix, which is indeed the passage that they uniformly make use of; for although there is a bar across some part of it, which is dry at low-water, there is sufficient depth of water, when the tide is in, at least for any vessels they employ in this Navigation.

THAT such a right of water-way only, was in the contemplation of Judge BENSON, appears from the whole of his language upon the subject: He contends, that the Treaty of Peace “intended that where the Eastern boundary passed through waters that were navigable, both nations should equally participate in the *Navigation*”; and to secure such a right of Navigation to the United States, he proposes—“that the boundary should be a line passing through one of the passages between the Bay of Fundy and the Bay of Passamaquoddy; that the West passage being unfit for the purpose, having a bar across it, which is dry at low-water, the next to it *must be taken*, and that the following line should be adopted, viz. beginning in the middle of the channel of the river St. Croix at its mouth, thence direct to the middle of the channel between Pleasant Point and Deer-Island, thence through the middle of the channel between Deer-Island on the East and North, and Moose-Island and Campo-Bello Island on the West and South, and round the Eastern point of Campo-Bello Island to the Bay of Fundy.”

Now it is hardly to be presumed that for the purpose of securing the proposed right of Navigation, which was the only object in view, it could have been intended by Judge BENSON that the property and sovereignty not only of Moose-Island, Dudley-Island, and Frederick-Island, which, though at that time in the possession of Subjects of the United States, did of right by the Treaty of Peace belong to Great-Britain, but also of the large and very valuable Island of Campo-Bello in the possession of His Majesty as well as of right belonging to him, *must* of necessity be ceded to the United States in order to fulfil the intention of the Treaty of Peace, contrary to the intention of that Treaty so clearly *expressed* in it, with regard to the Islands; and if he did not mean to divest His Majesty of his right to these Islands, he could only mean by farther negotiation and compact, to secure the right of water-way, passage or navigation abovementioned.

But if the foregoing reasoning is correct, there is no such chasm in the boundary of the United States as Judge BENSON suggests, and which is the sole foundation of the supposed necessity of farther negotiation between the two Nations, and, it remains only to inquire what right the United States have by the law of nations to a water-way or passage through the waters in question.

Grotius treating of Rivers says—“Though in case of any doubt, the jurisdictions on each side reach to the middle of the River, yet it may be, and in some places it has actu-

Grotius, b. 2. c. 3. § 18.

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"ally happened, that the River wholly belongs to one party, either because the other na-  
tion has not got possession of the other bank till later, and when their neighbours were  
"already in complete possession of the whole River, or else, because matters were so stipu-  
"lated by some Treaty." GROTIUS does not proceed expressly to state what the law is in  
the latter case, but it is a fair and necessary inference, that in such case the nation to  
whom the whole River belongs must retain its jurisdiction over the whole.

Puffendorf is more explicit.—"The Gulphs and Channels or arms of the Sea, are," Puff. b. 4.  
says he, "according to the regular course, supposed to belong to the People with whose c. 5. § 8.  
lands they are encompassed; but in case different nations border on the same channel,  
"the sovereignty of each shall be conceived to reach into the middle of the water, from e-  
"very part of their respective shore, unless either all the estates have agreed, by covenant,  
"to use the whole water promiscuously among themselves, and to exercise a general un-  
"divided sovereignty over it, against foreigners, or else if one particular people has ob-  
"tained a dominion over the whole by pact, or the tacit confession of the rest, or by the right  
"of conquest, or because they fixed their station near it, and immediately took it into full  
"possession, exercising acts of sovereignty over the people of the opposite shore. In  
"which latter case nevertheless, the other neighbouring States their fellow borderers, shall  
"be supposed to be lords of each of their particular ports, and of so much of the sea, as  
"the convenient access to the shore requires."

In the present case it has been shewn that the Islands in question and the whole of the  
waters between them, formed a part of the Province of Nova-Scotia, before and at the  
time of the Treaty of Peace.

It has been shewn that by that Treaty it was not intended that any part of the Province  
of Nova-Scotia should be thereby ceded to the United States, and consequently the Uni-  
ted States can by the law of nations claim only to be lords of their particular ports on  
their shores, and such a right only in those waters, as the convenient access to their shores  
requires. This inference is further confirmed by the rules laid down by Vattel in the  
interpretation of Treaties that have been already cited, "that the Proprietor cannot be  
"deprived of his right, except so far, precisely, as he relinquishes it on his part," and that  
"the cession of a right or of a Province to obtain peace is to be interpreted in its most  
"confined sense."

The right of passage or water-way which may in the present instance be claimed by  
the United States, is founded upon the same reason with that of the maxim in our mun-  
icipal law, "Quando aliquid cui conceditur; conceditur et id, per quod pervenitur ad illud;"  
and can be extended no farther.

The same reasoning upon which the right in the present instance is founded, will also  
confine that right to a water-way through the western passage, as being competent to the  
enjoyment of every privilege and advantage that the United States are intitled to, as be-  
ing the only passage they have been accustomed to use, and as being least liable to ob-  
jection on account of carrying on any clandestine trade with the neighboring part of His  
Majesty's dominions.

BUT to go farther. It is laid down by MARTENS in his Compendium of the Law of Nations, b.  
a work of acknowledged authority, that "a Nation is fully authorized, to pre- 4. c. 3. § 4.  
"scribe the manner in which the commerce with its dominions shall be carried on;" and  
in a note upon this passage he says, "The famous Navigation Act," (for a breach of the  
provisions of which the present prosecution is instituted) "passed under CROMWELL and  
"confirmed by CHARLES the 2d, contained nothing contrary to the law of nations, not-  
"withstanding it was very embarrassing to other Countries."

SIR WILLIAM SCOTT in pronouncing sentence, in the High Court of Admiralty of Eng-  
land, in a case of appeal from a condemnation on the Revenue laws in the Vice-Admiralty 1 Rob. ad.  
Court of Jamaica, speaking of the same Act with others on the same subject says, "The Rep. 220.  
"Revenue and Navigation Laws are certainly to be construed and applied with great ex- The Betty  
"actness, they are framed for the security of great national interests, and the effect of Cathcart,  
"such laws, founded on great purposes of public policy, must not be weakened by a mi- Gillespie,  
"nute tenderness to particular hardships." Maffler.

CAN it for a moment be contended or imagined, that under cover of a right of passage  
or navigation, which is all that the United States can pretend to in the waters in question,  
they can have any such right as is contended for in the claim which has been interposed  
in the present cause, to go with their vessels and anchor them in these waters, and there,  
in open defiance and violation of all these laws, to take their cargoes on board from  
British vessels? On the other hand, is it not a manifest violation of the faith of Treaties,  
and a most unwarrantable invasion of His Majesty's rights, for the subjects of the United  
States to be guilty of such practices under so frivolous a pretext? All the rules laid  
down by the most approved writers upon the law of nations, reprobate the principles upon  
which such conduct is attempted to be justified. As well might the American vessels, or  
the vessels of any other power in Amity with Great-Britain, because they have a right of  
navigation in the British Channel, claim also a right to lie at anchor off Torbay, or Wey-  
mouth,

mouth, or any other British port in the channel, and there take on board from British vessels cargoes of articles prohibited to be exported from Great-Britain, or carry on any other species of illicit and clandestine trade, as the Claimant in the present instance be justified in the conduct which he avows in his answer to the information.

If we look into the articles of the Treaty of Amity, Commerce and Navigation, between His Majesty and the United States, we shall find that provision is made for every species of Commerce that may be lawfully carried on by either nation within the Territories of the other.

By the eleventh article it is provided, "that there shall be a reciprocal and entirely perfect liberty of Navigation and Commerce between their respective people, in the manner, under the limitations and on the conditions specified in the subsequent articles." In the 12th article the trade between the United States and the *British West-Indies* is permitted under certain limitations; in the 13th article their trade with the Territories of Great-Britain in the *East-Indies* is also permitted under certain conditions and limitations; in the 14th article it is provided "that there shall be, between all the dominions of His Majesty in *Europe* and the Territories of the United States, a reciprocal and perfect liberty of Commerce and Navigation;" but no provision is made in any of the articles for carrying on any trade between the United States and His Majesty's Sea-ports in His North-American Colonies.

Would it not be sufficient that this trade is entirely left out in the enumeration of the places in which the Treaty provides for the liberty of Navigation and Commerce between the two Nations, in order to determine that no such trade can be justified under the Treaty? The maxims, "*expressum facit cessare tacitum*," and "*expressio unius est exclusio alterius*," are as just and as applicable in the interpretation of public Treaties, as of the municipal law, and it is to be observed here that the right of passage or navigation now under discussion, in the waters in question, does not respect any right of Navigation between the Territories of the two Nations, but only a right of passage or Navigation between different parts of the Territory of the United States, through a part of the British territory, and even this merely that the moiety of the river St. Croix, ceded to them by the Treaty, may not prove a useless acquisition, for want of a convenient communication with or access to it by water.

But the inference I am now contending for does not arise merely from the omission above mentioned in the enumeration of the places in which the Treaty provides for the liberty of Navigation and Commerce between the two Nations; so important an object was it to prevent an infringement of the Navigation Act under any pretence, in His Majesty's Colonies upon the Continent, that in the 3d article of the Treaty which provides for the communication by Land, and "the inland navigation between the territories and countries of the two parties on the *Continent of America*," and gives liberty "to navigate all the Lakes, Rivers and Waters thereof, and freely to carry on trade and commerce with each other;" an express clause is added, "that this article does not extend to the admission of vessels of the *United States into the Sea-ports, Harbours, Bays or Creeks* of His Majesty's said Territories or into any parts of the Rivers in His Majesty's said Territories below the highest port of entry from the Sea." Thus careful was the Treaty to prevent and prohibit the infraction of the Navigation Act, and that illicit trade which is now claimed as a right on the part of the United States.

By the Treaty of Peace no provision whatever was made for the carrying on of any Commerce between His Majesty's territories and those of the United States, and in the instructions to Mr. LEONARD accompanying His Majesty's Commission to him as Superintendent of the trade and fisheries carried on, on the coasts of His Majesty's North-American Colonies, originally given in the year 1788, and confirmed in the year 1797, three years after the Treaty of Amity, Commerce and Navigation, he is directed, "upon no account to permit any commerce or traffic of any nature or kind to be carried on between the Subjects of His Majesty and the Citizens of the United States, who may come within the limits of his district, in contradiction to the laws and regulations which have been established."—Such is the opinion of His Majesty's Government respecting the right claimed in the present instance, on the part of the United States, to contravene and violate the laws and regulations referred to in these instructions. But by way of protestation it is said in this claim that Mr. LEONARD as Superintendent of trade and fisheries had no right to make any seizure for a breach of the laws of trade; this is an assertion that may be well doubted, but it is unnecessary to go into this discussion, at present, as the difficulty is obviated by his having a Commission from the Customs, authorizing him to make seizures in such cases; and as his appointment was made for the sole purpose of attending to the due execution of the Treaties between the two Countries, his having such Commission to confirm his authority to make seizures, forms another ground of argument in favor of the legality of the present seizure, and of the liability of the Sloop and Cargo to confiscation.

From the foregoing Premises, it is presumed, that an inference may be safely drawn, that a right of water-way, passage or navigation only, can be claimed by the United States, from

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from the main channel of the Bay of Fundy, through the waters in question to that moiety of the river St. Croix which is nearest to the American territory, and further that such right of navigation is so far from authorizing the carrying on of any commerce or traffic of any nature or kind, between the subjects of His Majesty and the Citizens of the United States in those waters, that any such commerce or traffic, is, not only prohibited under the penalty of forfeiture of the vessel and cargo by the navigation laws of Great-Britain, but is contrary to the express provision of the Treaties existing between the two Countries.

II. This brings me to the second ground of defence set up in the Claim, namely, that if the waters in question, are not *wholly within*, and do not *wholly* belong to the United States, *they are the waters of the River forming the boundary between His Majesty's dominions, and the said United States, and as such neutral and in common* for the vessels of both nations. In other words, if the United States cannot succeed in their claim to Campo-Bello Island, they are determined to insist upon their right to the three other Islands of which they have taken possession.

The foregoing arguments accompanied by a bare inspection of the Maps before the Court, destroy the idea that the waters in question are the waters of the river St. Croix, which is the River forming the boundary here alluded to; and it has also been proved that they are neither *neutral* nor *common* for the purpose of any *traffic or commerce*, forbidden by the laws of either Country, but merely for the purpose of a *water-way, passage or navigation*, between the different parts of the Territories of the respective nations.

But we will suppose for the sake of the argument, that the waters in question were the waters of the boundary river; even in that case they could be only *neutral or common* for the purposes of passage and navigation, and not for the purpose of carrying on an illicit and clandestine trade between the subjects of the two Countries, and the waters being *in common*, must be considered wholly as the waters of either nation, for the purpose of authorizing a seizure in any part of them of the vessels of either, transgressing the laws of the other country; this is the only interpretation of the Treaties between the two countries that is consistent with the express intention of the Treaties, with good faith or common sense.

The provision that is made in the 3d article of the Treaty of Amity, Commerce and Navigation, respecting the river Mississippi, fully confirms this interpretation. This River, according to the Treaty of Peace, was to be *entirely open to both parties*, as the waters in question in the present cause are claimed to be, but this *common right of navigation* gave to neither party a right to trade in any place in this *common River*, belonging to the other, accordingly it is *expressly* provided in the 3d article above mentioned, "that all the ports and places on its Eastern side, to whichever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the *ports or places of His Majesty in Great-Britain.*"

But to narrow the cause to the precise circumstances of the present case, as set forth in the Claim.

We have seen that, by the law of nations, as laid down by GROTIUS and PUFFENDORF, in case different nations border on the same channel, the sovereignty of each shall be conceived to reach into the *middle* or *TIDE WATER*, from every part of their respective shore; unless either has obtained a dominion over the whole; and to the same effect MARTENS says, "Every nation has a right to property and dominion *as far as the middle* of all the Martens, b. 4. c. 4. § 3.  
"Lakes and Rivers that are situated on its frontiers, at least till the contrary has been proved, or till another division has been agreed upon."

It must be recollected that I am now arguing upon the supposition that the waters in question were the waters of the boundary river, the St. Croix, as contended for in the claim; and I will suppose further for the sake of the argument, that Moose-Island, Frederick-Island, and Dudley-Island, belong to the United States. Admitting then farther the absurd idea that the subjects of either nation have a right to carry on any trade prohibited by the laws of the other in these waters, such right must be confined to that part of the waters or River lying on their side of the middle of the waters, because at the middle of the waters the sovereignty, property and dominion of the two nations respectively terminate.

Now it is not pretended in the present case, that either at the time the Sloop came to an anchor, or when her cargo was laden on board, or when she was taken, she was on the American side of such middle of the waters between Campo-Bello Island and Dudley-Island. The claim barely states, that "the Sloop came to an anchor between the said two Islands, so as to see the house of the American Custom-House officer, Lewis Frederick Delefeldnier, upon the American shore from the said Sloop when anchored, and without the Points or Head-lands forming Snugg Cove." It is not pretended that this house cannot be seen from the waters on the British side of the middle line, nor can it be presumed, as the house is stated to be upon the American shore; and by a bare inspection



of the Map or Chart, which is admitted to give a correct description of the places in question, it will be seen that the Sloop might lie *without the Points* *Head-lands forming Snug Cove*, and yet be nearer by seven eighth parts of the distance to Campo-Bello, than to Dudley-Island. So that had this cause been brought on to a hearing upon the Libel and answer, a condemnation must inevitably have taken place upon the Claimant's own shewing, if he could not make out, that this illicit trade may with impunity be carried on by American subjects within the British territory, and if such trade might be so carried on within the British territory at the place where the Sloop was anchored, it certainly would have been equally justifiable to have taken in the cargo from the wharves or shores of Campo-Bello Island.

The Claimant aware of this difficulty, resorts to his next ground of defence, which is,

III. "That the anchoring, lying and loading with *Plaster of Paris* from on board *British vessels*, at the place where the Sloop was seized, has been for a long time sanctioned by the concurrent assent of the Officers of His Majesty's Customs at this Port of Saint John, and at the Port of Passamaquoddy, as a practice not prohibited by any of the existing laws of either of the two Countries." In another part of the claim, he avers "that this is the place heretofore pointed out and assented to by the Officers of His Majesty's Customs of the Port of Saint John, as the proper place for the vessels of the United States to anchor and take in their cargoes of *Plaster of Paris*."

How far this ground of defence is substantiated by the witnesses in point of fact, will be seen when their depositions come under the consideration of the Court; for the present purpose, the facts here stated shall be taken for granted.

The loading of the Sloop with *Plaster of Paris* from on board British vessels in the present instance, as stated in the claim, was, or was not, a violation of the British Laws of Trade.—If it was not a violation of these laws, no sanction of the Custom-House Officers was wanting to justify it.—If it was a violation of these laws, no permission, acquiescence, connivance or sanction on their part, could authorize it, or can save the Sloop and her cargo from the penalty of those laws.

This part of the defence therefore, be it true or false, can be of no avail to the Claimant.

This Court must decide agreeably to the law, and will, I have no doubt, be of the same opinion with the present eminently learned Judge of the High Court of Admiralty of England, "that the Revenue and Navigation Laws are to be construed and applied with great exactness, that they are framed for the security of great national interests, and that the effect of such laws, founded on great purposes of public policy, must not be weakened by a minute tenderness to particular hardships."

A similar defence with the present was set up before him, on the part of the Claimants in the case of the *Hoop*, Cornelis, master. In pronouncing judgment Sir WILLIAM SCOTT says—"This is the case of a Ship, laden with Flax, Madder, Geneva and Cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive French cruisers; and as the claim discloses (of which I see no reason to doubt the truth) the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this Country, and being brought under an assurance from the Commissioners of the Customs in Scotland, that they might be lawfully imported, without any licence, by virtue of the Statute 35 Geo. 3. c. 15 § 80.

"It is said that these circumstances compose a case intitled to great indulgence, and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me, though it leads to consequences that I may privately regret, when I look to the particular intention of the parties."—"The intention of the parties might be perfectly innocent, but there is still the fact against them of that actual contravention of the law, which no innocence of intention can do away."

"I may feel greatly for the individuals, who I have reason to presume, acted ignorantly under advice that they thought safe; but the Court has no power to depart from the law which has been laid down, and I am under the necessity of rejecting the Claims."

I come now to the last ground of defence stated in the claim.

IV. "That the Claimant obtained a foreign clearance from the American Custom-House, to enable him to go with his Sloop, and anchor off *Snug Cove*, without the Points or *Head-lands forming the Cove*, there to take in a cargo of *Plaster of Paris* from *British vessels*."

The foreign Clearance here referred to is as follows.

"UNITED STATES of AMERICA."

"District and Port of } STATE of MASSACHUSETTS.  
"PASSAMAQUODDY." }



"THESE are to certify all whom it does concern, that EBENEZER LOCK, Master of the Sloop FALMOUTH, burthen Ninety-three Tons or thereabouts, mounting no Guns, United States built, navigated with four Men, and bound for St. Andrews, having on board as follows, viz. BALLAST and VESSEL'S STORES. Hath here entered and cleared his said Vessel according to Law.

(Signed)

"LEWIS FRED. DELESDEBNIER,  
"Collector."

"GIVEN under my hand and seal of office, this twenty-second day of October, in the year of our LORD, Eighteen hundred and Five, and in the 30th of the Independence of the United States of America."

The first observation that occurs upon the face of this pretended foreign clearance is, that the vessel is cleared out for St. Andrews, a *British port or place* in the Province of New-Brunswick, into which it must have been well known to this American Collector, that this vessel could not be permitted to enter, and for which he must also have known, that he ought not upon any pretence to have cleared out an American vessel.

In the next place it appears from the Claimant's own account of the transaction, that this clearance was not obtained to enable the Sloop to go to Saint Andrews, and that she was not bound for St. Andrews, but that it was obtained to enable him to go with his Sloop and anchor off *Sntag Cove, without the Points or Head-lands forming the Cove*, there to take in a cargo of Plaitter of Paris from *British vessels*.

Now, if this cargo was to be taken on board from *British vessels* lying within any port or place in the *United States*, no such *foreign clearance* was necessary; and if it was to be taken on board from *British vessels* lying within the *British territory*, the clearance was manifestly given, in open violation of the *British Navigation Laws*, and of the express provisions of the third article of the Treaty of Amity, Commerce and Navigation, between the two Nations.—In whichever light then this clearance is viewed, it must be pronounced false or fraudulent.

AGAIN, this Cargo could not have been taken on board this Sloop within the United States, without having been regularly imported there, and if so imported in a *British vessel*, such vessel must have been entered at the American Custom-House, and have paid the *Tonnage duty* and the *Light duty*, imposed by the Laws of the United States upon all foreign vessels, amounting together to one dollar per Ton; this clearance then was evidently intended to prevent the payment of these duties by taking the cargo on board within the *British territory*, and was therefore doubly fraudulent on the one hand by depriving the United States of these duties, and on the other by procuring an open and intended violation and infringement of the *British Laws* and the Treaties subsisting between His Majesty and the United States.

AGAIN, this clearance was obtained for the express purpose of enabling this vessel to take on board the cargo in question.

This clearance was obtained for the express purpose of enabling this vessel to take on board the cargo in question, *within the British territory*.

The Cargo, by the Claimant's express averment, was taken on board in consequence and by virtue of this clearance.

The Cargo then by the Claimant's own shewing, was knowingly laden on board the Sloop, within the *British territory*; and being so laden is liable to forfeiture and condemnation in this Court.

It is perhaps difficult to conceive a more bare-faced attempt to violate the existing laws of both nations, or a more bare-faced avowal of so flagrant an intention than is exhibited on the part of the Claimant in the present cause.

AND the principal ground of justification seems to be that such a practice has been "for a long time sanctioned by the Custom-House officers of both nations;" if this be the case, it is high time to put a stop to a practice so dishonorable to both Countries, so extensively injurious to His Majesty's interests and the Commerce and Navigation of Great-Britain.

The consequences of supporting the Claim in the present cause would be truly alarming; this would be in effect to exercise an act of the highest dominion and sovereignty, by making the Ports on the British and American side of these waters to be *free Ports* reciprocally,



reciprocally, and to annihilate in these waters the provisions of the laws of trade and navigation of both nations.

If this Sloop could lawfully take in the present cargo from British vessels, at the place where it was laden on board, it must have been equally lawful for these British vessels to receive from the Sloop in the same place a cargo of East-India or any other goods prohibited to be imported either from the United States, or in foreign vessels, into this Province.

AGAIN, if the conduct of the Claimant in this instance can be justified, it must be equally lawful for a British vessel to lie at anchor off Moose-Island or Dudley-Island, at any place on the American side of the middle of these waters, and there discharge her cargo, of whatever articles it may consist, into American vessels, without entering at the American Custom-House, or paying the tonnage, light or any other duty, or being subject to any penalty of the laws of the United States, on any account whatever.

INDEED there is no end to the absurd consequences that would necessarily result from an establishment of the defence set up by the Claimant, and it must be evident that the only rule that can be laid down consistently with the laws of, and the treaties between, the two nations, is, that there can be no trade lawfully carried on in these waters between the vessels of His Majesty's subjects and of the subjects of the United States, which it would not be lawful for the former to carry on in the ports and harbours of the United States, and for the latter, in the ports and harbours of His Majesty's dominions.

THIS would leave the right of Navigation free, and the waters entirely open to both parties, for every lawful purpose; it would not interrupt any communication between the vessels of the same nation in any part of these waters, and would effectually prevent the violation of the laws of either; consequently, in whatever part of these waters either a British or American vessel should be found, the one directly or indirectly transgressing the laws of the nation of the other, it must be lawful for the proper officer of the nation whose laws are transgressed, to see those laws enforced by such seizures and prosecutions as are directed for that purpose.

EVEN the above rule is laid down, under a supposition, for the sake of the argument, that Moose-Island, Dudley-Island, and Frederick-Island, belong to the United States, considering their possession as equivalent to a title in the present discussion.

WELL might His Grace the Duke of PORTLAND predict that, although the doubt started on the part of the United States "primarily went only to a presumed right of water-way or navigation to their moiety of the St. Croix, yet that it was ultimately intended to deduce therefrom as a further consequence, a right to the Islands in Passamaquoddy-Bay, lying on the American side of such water-way or navigation," among which Islands, Campo-Bello as we have seen, was included.

THIS prediction we now see amply verified, in the course of six years from the date of his letter, and if such claims are submitted to, the tacit acquiescence of Great-Britain in these assumptions, will soon come to be looked upon as an absolute acknowledgment of the title, and we know not what farther pretensions may be advanced and persisted in, in the same manner.

ALTHOUGH, if the foregoing reasoning be correct, it is totally immaterial in what particular part of the waters in question, the Sloop now under prosecution was lying, at the time her cargo was laden on board, whether on the British or American side of the supposed line agreed upon by the Custom-House Officers of the two nations, I will nevertheless, proceed to examine the evidence upon this point; premising that the testimony taken on the part of the prosecution, has been principally with a view to shew the importance of the trade thus (as we contend) illegally carried on, and the extent of the mischiefs and inconveniences resulting to the British trade and commerce, from the practices avowed and justified in the Claim now before the Court.

So alarming indeed have been the effects of these injurious practices, that they have claimed the serious attention of the House of Assembly of the Province, who, in their Session in February, 1803, passed the following Resolution:—

"RESOLVED, that an humble Address be presented to His Excellency the Lieutenant-Governor, requesting that he will be pleased to state to His Majesty's Ministers the necessity of an Act of the British Parliament, compelling Masters of Vessels lading Plaster of Paris or Grind-stones at the mines of *Nova-Scotia*, *New-Brunswick* and in the *Gulph of Saint Lawrence*, to give bond to the Officers of His Majesty's Customs in the different Ports where the same shall be laden on board, not to land or unload the same in any Port or Harbor in the American States to the Northward and Eastward of *Portland*, in the State of *Massachusetts*, or in any British Port, but for the purpose of being re-shipped on board British vessels, who shall give bond as beforementioned, not to land the same in any Port or Harbour of the United States of America, to the Northward and Eastward of *Portland*, in the State of *Massachusetts*."

In answer to which Address, His Excellency was pleased to say, "that representations would be made to His Majesty's Ministers accordingly."

[The testimony in the cause was very voluminous and principally tended to shew on the part of the Claimant an agreement made about six years ago between Mr. Dunn the acting British Custom-House officer at St. Andrews, and Mr. Desjardins the American Custom-House officer at Passamaquoddy, that British and American vessels lying in any part of the waters outside of the points or head-lands which form the harbours either on the British or American shores, that is, of *Dudley* and *Moose* Islands on the American side, and of *Campo-Bello* Island on the British side, should be considered as lying in waters wholly neutral, free or common for both nations, and might land or unlade their cargoes without interruption or seizure by the officers of either Government, which agreement was fully proved by the Custom-House officers on both sides, and the practice agreeably to such agreement was also proved by them and many other witnesses.

Upon the cross-examination of the Claimant's witnesses, it appeared that it was a common practice till within the last two or three years for American vessels to take their cargoes on board from the shores and wharves of *Campo-Bello* Island, but that such practice was not known or assented to by the British Custom-House officers; that this practice was interrupted and put a stop to by the frequent visits of the Union Cutter under the direction of Mr. Leonard, the Prosecutor in the cause. It appeared farther in evidence, that for several years past it has been and still is customary to permit the loading of American vessels, lying close off any of the Coves or Harbours on the British side, by taking in their cargoes with boats, gondolas and small craft from the wharves and shores on *Campo-Bello* Island, provided only that such American vessels do not lie within a line drawn across the Points forming such Coves or Harbours. To this point one of the Claimant's witnesses deposed, "that he had seen as he supposed, near an hundred vessels of the United States taking in Plaster from British vessels in *Snug Cove*, three, four and five years ago, but that such practice has not been so frequent of late, for fear of the Union Cutter. Four or five others of the Claimant's witnesses also testified "that this practice was discontinued by reason of the Union Cutter coming often in the way."

When regard to the Sloop *Falmouth*, it appeared in evidence, that the said Sloop upon her arrival from her last voyage from Portland in the State of Massachusetts, anchored at the place where her cargo was taken on board, off *Snug Cove*, but on the outside of a line drawn across the mouth of the Cove from one to the other of the points or head-lands forming the said Cove; and that she was much nearer to *Campo-Bello* Island than to *Dudley*-Island. The American Custom-House officer, one of the Claimant's witnesses, who was on board her, upon his cross-examination says, that she was lying "without a line drawn across *Snug Cove*, and in the neutral waters described in the agreement." It also appeared that the Sloop never altered her situation in any respect, nor took up her anchors from the time of her first arrival there till she was taken possession of by the Cutter; that upon such her arrival she entered at the American Custom-House in that neighbourhood, and took out the foreign clearance, before recited, for Saint Andrews; that the two British vessels from which the cargo of the Sloop was laden on board, arrived from the Province of Nova-Scotia, and came to anchor in the same waters near to the place where the said Sloop came to an anchor; that these British vessels entered at the British Custom-House kept at *Campo-Bello*; and that the Sloop and British vessels being along side of each other in these waters, the Sloop received the cargo in question from these British vessels; that the Sloop was taken possession of by Mr. Charles E. Leonard, commanding the Union Cutter, as a Deputy to Mr. Leonard the Prosecutor, in his office of Superintendent of Trade and Fisheries, and brought to the harbour of Saint John, where she was formally seized by the Prosecutor, and libelled in this Court.

It also appeared that this was the usual mode of carrying on the trade, and was strictly in conformity with the agreement of the Custom-House officers before mentioned; and that the British and American vessels under this agreement were permitted to interchange their cargoes in these waters in the manner before mentioned, without molestation or seizure by the Custom-House officers of either Government.

The distance between *Dudley* Island and the nearest head-land of *Campo-Bello* Island appeared by a Map admitted in evidence by both parties as correct, to be upwards of three quarters of a mile, and between *Moose*-Island and *Campo-Bello* Island nearly two miles.

When regard to the foreign clearance, Mr. Desjardins, one of the Claimant's witnesses, testified as follows, "that the Claimant applied for and obtained a foreign clearance for the Sloop for *St. Andrews*, in Ballast and Stores.—That it was not intended nor necessary to proceed to *St. Andrews* in consequence of such clearance, it being customary to grant such clearances to American vessels taking Plaster, to entitle them to a re-entry in the Ports of the United-States;—That by such clearance the American vessel is enabled to receive Plaster from a British vessel without obliging such British vessel to enter at the American Custom-House.—That all British vessels entering at the American Custom-House are subject to a duty of one dollar per Ton.—That the American vessels after obtaining these foreign clearances, without any removal or altering their situations in any respect, proceed to take their cargoes on board from British vessels and thence proceed to any part of the United-States."

From the testimony of the British Custom-House officers it appeared, "that the British vessels in which the Plaster of Paris is imported from the upper parts of the Bay of Fundy, into that part of the British territory bordering upon the United States, regularly enter and clear at the British Custom-House."

When regard to the western passage into Passamaquoddy-Bay, so frequently alluded to, John Mills, a witness produced on the part of the Prosecutor, deposed, "that he is a Branch Pilot for the Port of Saint John and in the Bay of Fundy, and has been so employed nearly since the first erection of this Province of New-Brunswick, and that he is well acquainted with the western passage into Passamaquoddy-Bay, otherwise called St. Andrews Bay, by West Quaddy head so called, and that the said western passage is the passage generally and almost in all instances, made use of by American vessels trading and navigating to and from Moose-Island, the river Cobscook and the river Scodiac—that the said western passage is much more convenient than the eastern passage for American vessels trading and navigating to and from the places above mentioned, because the said western passage is a much shorter route to the said places than the eastern passage, and also because the American Custom-House is situated on the said passage nearly about the centre of the narrow part of it, and the said Custom-House is very difficult of access to all vessels coming through the eastern passage aforesaid, and it is the opinion of this deponent, that the said American Custom-House is thus situated as aforesaid for the convenience of the American vessels coming through the western passage aforesaid, and that he has very seldom known such American vessels to make use of any other than the western passage aforesaid—that it sometimes happens, when such vessels are bound into the places above mentioned, and have the wind from the Northwest, that they will come through the eastern passage aforesaid, as such Northwest wind is directly a head for them in coming through the said western passage.

"That there are shoal grounds consisting of muscle banks extending nearly across the said western passage, but that such shoal grounds do not impede the navigation of vessels in the said passage when the tide is in; that he the deponent as a Branch Pilot as aforesaid, once piloted a ship of about three hundred tons burthen, and drawing as much as fifteen feet of water, as nearly as this deponent can recollect, through the said western passage at high water, and with the wind from the Northwest, such wind being directly fair for vessels going down through the said passage—that he this deponent has been informed by Pilots at St. Andrews, and believes, that they the said Pilots have frequently piloted ships of three and four hundred tons burthen, through the said western passage without danger or difficulty, when the tide was in and the wind fair—that he the deponent does not consider the said western passage as safe and convenient for ships or vessels of any considerable burthen, unless the tide is in and the wind fair—that at half tide with a fair wind, the said western passage is safe and convenient for vessels from seventy to one hundred tons burthen, and that in the channel of the said western passage at high water, there is upwards of twenty feet depth of water—and this deponent further saith, that he has known American vessels frequently to anchor in West Quaddy Bay, so called, and there to wait until the tide should make, and there should be a sufficient depth of water to carry them through the said western passage."

Mr. Mills, upon his cross-examination on the part of the Claimant, says, "that the course of the principal channel from that part of the river St. Croix, (otherwise called the Scodiac) between Joe's Point near St. Andrews and the opposite shore to the first waters, which are called the Bay of Fundy, is as follows, viz. from Joe's Point aforesaid to Clam Cove head, so called, the Northwestern extremity of Deer-Island, so called, thence between Deer-Island aforesaid, and Moose-Island, so called, thence leaving Marvel-Island, so called, on the larboard hand, between Wind-mill Point, so called, the Northwestern Point of Harbor De Lute, so called, and a small Island called Pope's Folly, thence between Casco Bay Island, so called, and Campo-Bello Island, so called, thence between Head Harbour, so called, the eastern extremity of Campo-Bello Island aforesaid and Spruce-Island, so called, into the Bay of Fundy."

This passage or channel last above described by Mr. Mills, is the same which he calls the eastern passage in his deposition upon the direct interrogatories, and is the same that is described by Judge Benson, and recited in the former part of this argument.

The whole of the testimony in the cause was discussed very much at large, when the argument was concluded with the following animadversions upon the foreign clearance, and the observations subsequent thereto.]

The minutes of that part of this argument, which precedes the introduction of the testimony, were made before I had looked into any part of the testimony, and so extravagant at that time appeared to me, *such a right* as now appears to have been in the contemplation of the Claimant, that barely shewing it to be a *necessary consequence* of the doctrine which I then supposed would be the utmost that would be contended for in the Claimant's defence, was in my mind an irresistible proof of the absurdity of that doctrine; but to my surprize, I now find, that the Claimant's defence rests, in the broad assertion of *that right* as legally vested in him, not only by usage and custom, but even independently of such usage.

Thus

This makes it necessary for me to inquire farther into the *legality* of the right thus claimed, and to shew the absurdities necessarily resulting from such claim.

Mr. Delesdernier testifies, "that with a view to the *ease* and *accommodation* of persons concerned in *navigation*, he about six years ago entered into a *tacit* agreement, "with the Officers of the British Customs at Passamaquoddy, for a *neutral line* or rather *limits*, between which vessels of both nations might *safely* lie at anchor and *receive or discharge* their cargoes, which line or limits were understood to lie between *the head-lands of Campo-Bello* on the one side, and the *head-lands of Dudley* and *Moose Islands* on the other side." He afterwards says, "that in *consequence of these arrangements*, he has considered that such British vessels are in *neutral waters*, and not *subject to tonnage or other duty*." So that, had it not been for this *tacit* agreement these British vessels would have been subject to the tonnage and light duty, amounting together, as he testifies, to one dollar per ton. This is certainly a very extraordinary power to be assumed by a Custom-House officer, to dispense with the Laws of his Country.

It seems that the *tacit* agreement, arrangement, or accommodation treaty, which Mr. Delesdernier here speaks of, in *consequence of which*, he was no longer to consider British vessels in these *neutral waters*, as being subject to the American duty of one dollar per ton, could not be carried into effect without the contrivance of the foreign clearance, by which the British vessel was to be discharged from the payment of this duty.

The British vessel, if considered as being in *American waters*, must enter at the American Custom-House, and pay the duty, otherwise such vessel could not be permitted to discharge her cargo into an American vessel in these waters.

If considered as being in *British waters*, such vessel could not be permitted by the British Custom-House to discharge her cargo into an American vessel at all.

To get over this difficulty, the American vessel arriving in these waters, is, in the first instance considered by the American Custom-House as being *wholly American*, and is accordingly required to enter at the American Custom-House, in the same manner as the British vessel arriving in the same waters is in the first instance considered by the British Custom-House as being in waters wholly British, and accordingly required to enter at the British Custom-House.

The next step is for the American vessel without discharging any part of her cargo, (if she happen to have a cargo on board to give in exchange for the British Plaster) and without any alteration in her situation, after having entered from her last voyage at the American Custom-House, to apply for and obtain as a matter of course from the same Custom-House, a foreign clearance for *Saint Andrews*, for the same vessel.

The American vessel and the British vessel, which under this *accommodation* treaty are respectively to *lade, unlade and exchange* their cargoes in these waters, which at this period of the process are *instantaneously neutralized*, are at length brought into contact with each other.

The operation of the foreign clearance is now wonderful, without any removal or alteration of the situation of either of the vessels in any respect, from the time of their first arrival in these waters and entry at the Custom-Houses of their respective nations; on a sudden, these waters to the American vessel become *foreign and British*; this vessel is under *clearance for St. Andrews*, but not *bound or intended for St. Andrews*, which is confessedly on all hands a British Port in the Province of New-Brunswick; but she cannot *re-enter* at any Port in the United States, without evidence that the cargo of Plaster, being an article of foreign growth, which she is to take on board from the British vessel, was actually laden on board in a foreign Port, as it would be otherwise liable to seizure for non-payment of the tonnage and light duty. This *foreign clearance* then, to the American vessel, transforms these waters from American or neutral, to British, while the same waters to the British vessel remain neutral, and farther becomes legal and satisfactory evidence at any Port of the United States, to which the American vessel carries the Plaster, that it was actually taken on board at St. Andrews in the British Province of New-Brunswick, and in the last stage of its potent influence, intitles this American vessel to a re-entry in such Port.

FARTHER, this foreign clearance thus made complete and legal evidence in any Port of the United States to which the cargo shall be carried, that such cargo was actually laden on board the Sloop in a British Province, is applied for and obtained by the Claimant for the avowed purpose of depriving the American Revenue of the tonnage and light duty.

Most righteously then shall the same clearance be considered in this Court as complete and legal evidence of the *same fact*, for the purpose of preventing a violation of the British Laws with impunity.

This consideration destroys every idea of hardship, and all pretensions to indulgence on the part of the Claimant in the present cause, for a more gross abuse of public documents

ments cannot well be conceived, than is exhibited in the instance of this foreign clearance.

It may not be improper here to remark the absurdity of the application of the epithet *neutral* to these or any other waters in a similar situation; so far from being *neutral*, or belonging to *neither* power, by the Claimant's own shewing, they must be considered for the accomplishment of his purposes as wholly and altogether *British*. But although what is contended for on the part of the Claimant, would not render these waters *neutral*, it would nevertheless operate to the extent of making them to be *free ports* in the territories of both nations, in which the operation of all the Laws of both Countries would be completely annihilated; which is a state that it has hitherto required the act of the Supreme Legislature of a nation to create within its dominions.

BEFORE I quit this part of the argument, I must again bring to the recollection of the Court, that my whole reasoning upon the testimony in the cause has been predicated upon a supposition, for the sake of the argument, that the *possession* of Moose, Dudley, and Frederick Islands, the three Islands in question, by the subjects of the United States, is equivalent to a *title* in the present discussion.

BUT when it is taken into consideration that these Islands do *of right* belong to Great-Britain in full property, and that the possession of them has been wrongfully taken and withheld by the subjects of the United States, the argument becomes infinitely stronger respecting the waters in question; for it would be an extravagant position, that a *wrongful possession de facto* of these Islands, should give a *constructive possession de jure* to the whole or to any part of these waters.

It remains now in some way to account for the agreement made by the Custom-House officers of the two Governments, and the foreign clearance, which have been disclosed in the testimony in this cause, in doing which we must retrace the Plaster trade to its origin, and consider its magnitude and importance at the present day.

It is well known that the mines or quarries of Plaster of Paris in the upper parts of the Bay of Fundy within the British Provinces of Nova-Scotia and New-Brunswick, are inexhaustible.

It is equally well known that it is now become almost an indispensable article in agriculture in all the United States to the Westward and Southward of Connecticut; barren and exhausted soils by the aid of this Plaster, as a manure, become fertile and productive, and are so permanently improved by it, that many of the land-holders there have been known to say that, rather than be without it, they would give for it twenty dollars, and some go so far as to say fifty dollars per ton.

FROM the first settlement of this Province the British vessels here have been employed in carrying this article to that part of the United States, where it has been in so great demand: for several years it commanded a very considerable price; ten or twelve years ago, it brought from ten to twelve dollars per ton in New-York and Philadelphia; and if British subjects in British vessels were, as they ought to be, the sole carriers of it to the places of its consumption, it would without doubt, prove a source of wealth to these Provinces, of encouragement to their settlement, and to their commercial and maritime concerns, and consequently become important to the interests of the British empire.

It is ascertained that in the year 1791, the Plaster trade had not commenced at Passamaquoddy; even so lately as in the year 1794, only about 100 tons of this article were imported from the upper parts of the Bay of Fundy to Campo-Bello; in the year 1795 about 250 tons: from that time to this it has been gradually increasing, and the average is now, from the best information that can be had upon the subject, very little, if at all, short of 14,000 tons per annum.

It appears from the testimony of the Clerk of the British Custom House at Passamaquoddy, "that during the present year there have been imported into Passamaquoddy from Nova-Scotia about 10,000 tons in 50 vessels by a computation from the Custom-House books in his possession," and we know that there was a considerable suspension of this trade in the course of the summer, occasioned by a fear of impressment from His Majesty's Sloop of War, the *Buffy*, which was for some time stationary there.

FROM a correct account kept in the year 1802, it appears that from the 20th March, to the 20th of December in that year, there were 13,155 tons thus imported, and that there were several other vessels so importing it in that year not included in that account; from whence there is good reason to believe that the annual average does not fall much short of 14,000 tons.

A respectable witness on the part of the Claimant, states, "that he thinks the *great demand* has been the cause why the Plaster is not now landed at Campo-Bello, as the "British vessels have now the opportunity of loading the American vessels in the stream;" so that it appears on all hands that this is a very increasing trade.

WE know that many British vessels from this Port of Saint John are constantly employed



employed in carrying great quantities of Plaster to the places of its consumption in the United States, probably not less annually, at a very moderate computation, than 10,000 tons; but the owners of these vessels complain, that unless the traffic in this article be extensively carried on in the manner above described at Passamaquoddy, is put a stop to, they must dispose of their vessels and quit the trade; and the reasons are, that the American vessels are navigated at so much less expence than the British; and that the small British coasting vessels employed in carrying the Plaster to Passamaquoddy, are suffered in the manner that has been stated by Mr. Delefeldner, to discharge their cargoes into American vessels, without paying the tonnage and light duty, which all the British vessels carrying the Plaster to any other part of the United States are subject to, amounting to one dollar per ton; and lastly, that the American vessels are suffered in the same place in the waters in question, to land their cargoes on board from British vessels, giving contraband articles in exchange, in open violation of the Navigation act and the other British laws of trade.

If this practice be authorized by the Government of the United States, and the foreign clearance in question be dictated by that Government, it is only to be accounted for upon one principle, namely, that of procuring a foreign article of indispensable use in that country at a reduced price, and securing to its subjects the carrying trade in this instance, objects in comparison with which the tonnage and light duty are a trifling sacrifice.

BEFORE the Plaster trade in question commenced at Passamaquoddy, when its utility was not generally known in the United States, and the demand for it was comparatively small, this article was sold by the British vessels carrying it to New-York and Philadelphia, from 10 to 12 dollars per ton; it is now sold from  $6\frac{1}{2}$  to  $7\frac{1}{2}$  dollars per ton in those places, which makes a difference in the price of the article of 4 dollars per ton at the American market, besides yielding to American vessels the carriage of two-thirds of the quantity consumed.

If we suppose then 25,000 tons of this article in the whole to be annually imported into the United States, directly or indirectly from these Provinces, which is a very moderate estimate and probably much less than the quantity really so imported, there is a loss of 100,000 dollars per annum in the price of the article, exclusively of the other considerations above alluded to.

THERE is no doubt entertained by those who are most conversant and best acquainted with the subject, that instead of 25,000, the quantity of Plaster annually imported into the United States from the British Provinces, is very little if at all short of 50,000 tons, and that His Majesty's subjects in these Provinces suffer a direct loss, in the price of the article only, of 200,000 dollars annually by this illicit traffic.

ONE circumstance within the knowledge of every one conversant in this trade is, that if it happen in the spring of the year, that there is no Plaster at Campo-Bello, in readiness for the American vessels, it immediately commands an extra price of three dollars per ton by the British vessels first carrying it to New-York and Philadelphia at such seasons; and even in the short interruption of this trade during the last summer, occasioned by His Majesty's sloop of war the *Bully*, being at Passamaquoddy, which deterred the British coasters from carrying the Plaster during that time, from the fear of having their hands impressed; the British vessels carrying it to the States, at once obtained an advance of one dollar per ton in the price; from which we may fairly conclude, if a stop were altogether put to this illegal trade, and the carriage of this article confined, as it ought to be, to British vessels, that not only a standing advance would be obtained in the price, of from 4 to 5 dollars per ton, but that a considerable proportion of it would be paid for in Cash, and thereby the continual drain of *specie* from the Province prevented, the inconveniences of which have of late been so sensibly felt.

BUT these are by no means the greatest inconveniences resulting from this trade; by the mode of carrying it on, if it be legal, as contended for by the Claimant, a door is opened for the admission into these Provinces, through this channel, of foreign brandies, spirits, teas, and every other article of prohibited commerce, to the ruin of the fair British merchant and trader.

How easy is it, I speak not without information on the subject, for any one concerned in this trade residing upon the Island of Campo-Bello, or any neighbouring part of the British territory, having once purchased a few chests of Tea and a few casks of Spirits, that have been legally imported into these Provinces with their appropriate marks upon them, to have them filled and replenished with the same commodities from these American vessels for years together, without a possibility of detection?

How many other ways are there of distributing these and other prohibited articles to all the Inhabitants of these Provinces upon the Bay of Fundy, the legality of such an interchange of cargoes between British and American vessels, as is now insisted upon, being once admitted?

THE Plaster trade may be said to be yet in its infancy, and the demand for it daily increasing. This article seems to be, among others, one of those bounteous gifts of Heaven

ven to this country, calculated to encourage its settlement, promote its interests and increase its consequence, if the advantages to be derived from it are duly attended to and secured.—The existing laws, I humbly conceive, are sufficient for the purpose, if properly enforced; but should I be mistaken in this, I hope that the discussion of this cause will give rise to other regulations from competent authority, which will enable us fully to avail ourselves of a source of prosperity, which promises ere long to be incalculable in its extent and beneficial consequences.

I mean not however to urge these as considerations to the Court, in pronouncing its decree in this cause, if the law be not with me;—but if I am warranted in the principles I have endeavored to establish, and the deductions I have drawn from those principles, it is just and fair to enforce my argument, by stating the mischiefs and inconveniences that would result from the establishment of the claim now before the Court.

WELL might this trade be thought an object of sufficient magnitude to merit the attention of the General Assembly of the Province; the same view of the subject and the same reasons which I here humbly submit to the consideration of the Court, induced them to apply for the most effectual means of annihilating this trade by an act of Parliament, to prevent the landing of Plaster of Paris exported from these Provinces, in any part of the United States, to the Northward and Eastward of Portland, in the State of Massachusetts, though it is much to be doubted whether any place to be named for this purpose to the Northward and Eastward of Connecticut river, would prove an effectual remedy for the evils complained of.

I come now to the point of the cause from which I set out, namely, the charge in the libel, that the Cargo of the sloop Falmouth, now under prosecution, was *laden* on board the said Sloop *in the County of Charlotte*, in the Province of New-Brunswick, and within the jurisdiction of this honorable Court on the 22d October last, the same Sloop being a foreign built vessel, not owned by His Majesty's subjects nor navigated according to Law.

THAT the Sloop is not British, but foreign built, and owned and navigated by foreigners, is admitted on all hands.

THE only remaining question then is, whether this cargo was laden on board the Sloop within this Province.

I might possibly be justified in insisting that the Claimant can no longer be permitted to controvert this fact, having submitted to the jurisdiction of the Court; and that he should have availed himself of this ground of defence by a plea in abatement to its jurisdiction; for this Court can have no jurisdiction of this cause unless the offence charged has been committed within the limits of this Province; but waving this, I will briefly recapitulate the evidence there is in the cause of this fact.—It has then been shewn,

1. That all the Islands between which the waters flow, in which the Sloop was laden, belong to Great-Britain as a part of the ancient Province of Nova-Scotia, and as such expressly reserved by the Treaty of 1783.
2. That the King's charter, erecting and establishing the County of Charlotte, and the act of the General Assembly of the Province for dividing this County into Towns and Parishes, have confirmed this fact by expressly including all these Islands within this County, and within the Parish of West Isles in the same County.
3. That if the right to these Islands can be in any manner affected by the declaration of the Commissioners under the 5th article of the Treaty of Amity, Commerce and Navigation, respecting the mouth of the river St. Croix, (which I have endeavored to shew it cannot be) this declaration confirms and establishes this right in Great-Britain.
4. That not only all these Islands belong to Great-Britain, but that of necessary consequence the waters in question flowing between them also belong to Great-Britain.
5. That admitting for the sake of the argument, the possession which has been taken by the subjects of the United States of three of these Islands, to wit, Moose Island, Dudley Island, and Frederick Island, to be equivalent to a title to these Islands in the United States, nevertheless, by the established principles of the law of nations, even in that case they can claim no right to any part of these waters beyond the middle line between Dudley Island and Moose Island, in their possession on the one side, and Campo-Bello Island in the possession of Great-Britain, on the other.
6. That even this claim by the same principles can extend to a right of water-way or navigation only, and not to a right of carrying on trade with British subjects and their vessels in those waters.
7. That admitting even that the United States have a right to trade in this manner as well as to navigate on their side of such middle line, it is proved by all the testimony in the cause, that the Sloop in question was clearly on the British side of such middle line, and therefore without the protection of the law.

PRESUMING then that the Court will be of opinion that the cargo of the Sloop FALMOUTH was laden on board, *within the limits of this Province*.

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No doubt can remain, that this is an offence not only against the laws upon which the prosecution is more immediately founded, but against various other British acts of trade, and against the express provisions of the third article of the Treaty of Amity, Commerce and Navigation, between Great-Britain and the United States.

To make a question whether this Court will on the one hand consider itself as bound by these laws, or on the other by its decree sanction and legalize the custom and agreement relied upon by the Claimant, and indeed his only ground of defence, by which not only these laws, but the laws of the United States are set at defiance, would be an insult which decency forbids me to offer.

[*The Counsel for the Claimant having been fully heard, and the cause closed on the part of the prosecution, His Worship WILLIAM BOTSFORD, Esq. Judge of the Court, pronounced his decree as follows.*]

THIS is the case of the Sloop FALMOUTH, an American and foreign vessel, owned and navigated by Citizens of the United States of America, seized by GEORGE LEONARD, Esq. Superintendent of trade and fisheries in North-America, and a preventive officer in the service of His Majesty's Customs, for taking in a load of Plaster of Paris at Snug Cove, in the County of Charlotte and Province of New-Brunswick, contrary to the provisions and meaning of the Statute of 7 & 8 W. 3. c. 22. and by him libelled in this Court.

A claim has been put in by EBENEZER LOCK, the late master, in behalf of himself and others, protesting against the right of Mr. LEONARD to make the seizure, and alledging that the said vessel was laden, either within the territories of the United States, or in waters held neutral between Great-Britain and the United States.

THE objection to Mr. LEONARD's right to make the seizure having been overruled by the Court, the merits of the cause have been very elaborately and ably discussed both on the part of the Libellant and Claimant.

It now devolves on me to give my opinion; in doing which, I cannot but acknowledge, that I feel a painful solicitude. This is a cause, that has arisen from the contentious situation of the waters that divide this Province from the United States, and involves a territorial claim, of course important; a cause of some expectation, and in its consequences highly interesting. Whatever may be the peculiar hardships that will attend the decision of the cause, however innocent may have been the intentions of the Claimant, they cannot have any influence with the Court; for to inclinations and feelings the Court has no power to give way. If I err in my opinion, I have the consolation, that my intentions are just; and that the sentence of this Court is not final, as an appeal lies to another tribunal, where the error can and will be rectified.

It is admitted that the Sloop is an American vessel, owned and navigated by citizens of the United States; of course a foreign vessel owned and navigated by foreigners. The question then arises, can such foreign vessel enter any of the ports or harbours of this Province, being one of His Majesty's British North American Colonies, and carry on commerce in the same? It is acknowledged that every nation has a right to make whatever commercial regulations it may think proper, and in the exercise of this right Great-Britain has thought fit to assume to herself the monopoly of the trade of her Colonies; for this express purpose several Statutes have been passed, in which the legislature seems to have had this object constantly in view. By the Statute of 12 Car. 2. c. 18. otherwise called the Navigation Act, the palladium of British commerce, which, to use the words of Adam Smith in his inquiry into the cause of the wealth of nations, "is perhaps the wisest of all the commercial regulations of England," all ships of which the owners, masters, and three fourths of the mariners are not British subjects, are prohibited upon pain of forfeiting ship and cargo, from trading to the British settlements and plantations in Asia, Africa, or America. By this Act England first established the monopoly of her Colonial trade, since which farther provisions have been made by the Statutes of 15 Car. 2. c. 7. and 7 & 8 W. 3. c. 22. By these Statutes therefore all foreign vessels are prohibited from trading within this province of New-Brunswick, being one of His Majesty's provinces in British North-America.

The United States then having no right by virtue of these Statutes to trade with this Province; it will next be inquired, whether they can derive such right from any treaty or convention with Great-Britain. Vattel says, "a nation not having naturally a perfect right to carry on a commerce with another, may procure it by an agreement or treaty." This right is then acquired only by treaties and relates to that branch of the law of nations termed conventional; the treaty that gives the right of commerce, is the measure and rule of that right." By the Treaty of Peace the United States most certainly were not allowed to carry on any trade with the British Colonies; and although by the Treaty of Amity, Commerce, and Navigation, between His Majesty and the United States regulations were made for governing the Trade between the United States and His Majesty's dominions in Europe, and the British possessions in the East and West-Indies, and also, "the inland navigation between the territories and countries of the two parties on the continent of America;" yet no provision was made by which the citizens of the United States

Vattel, b. c. 8. §93.

States



States are permitted to trade with this Province, or their vessels admitted into the Harbours, bays or creeks of His Majesty's North American territories, or into any of the rivers below the highest port of entry from the sea. It is evident therefore, that they have not naturally a right to the trade now in question; and that they do not derive such right by Treaty or compact, provided the same has been carried on within the limits of this Province. This therefore leads me to inquire into the boundary line between this Province and the United States, the great point in the cause. If the uniform principle, that has governed the Parent state has been to exclude all foreigners from her Colonies, in order that she might assume the monopoly of the Colonial trade; is it to be presumed, that she would allow the limits of this Province to remain so indefinite and undetermined, as to admit foreign vessels within its ports, and permit them to carry on a Commerce in direct violation of the Navigation Act, and the other laws of trade?

Whatever may be my private opinion with regard to the exclusive right of Great-Britain to the Islands lying in Passamaquoddy-Bay, so called, and now in the possession of the United States, it cannot have any weight in this cause. I must be governed by the facts which exist. By referring to the Charts, which by consent have been used in explanation of the arguments in the cause, I find, after leaving the mouth of the Scodiac, or Saint Croix at Joe's point, as determined by the Commissioners under the fifth article of the Treaty of Amity, Commerce and Navigation, a passage through which the main waters of the river are said to flow, and by which they are discharged into the Bay of Fundy. This passage or channel is formed on the Eastern side, by Deer, Marvel, and Campo-Bello Islands, and on the Western side by Moose, Dudley, and Frederick Islands, and in some places by the Continent. This Province claims and exercises jurisdiction over the Islands forming the Eastern side of the channel; which Islands are in the possession of His Majesty's subjects, inhabitants of the Province of New-Brunswick. The citizens of the United States are in possession of Moose-Island, Dudley-Island, and Frederick-Island, over which the United States claim and exercise undisturbed jurisdiction. I know of no public act of our Government from which I can infer its denial of the jurisdiction exercised by the United States over the Islands on the Western side of the channel, or a disavowal of the right claimed by them to the same; I am therefore to consider this passage or channel as common, and dividing this Province from the United States. The question then, to whom does this channel or passage belong? must be referred to the general Law of Nations, and for its decision we must have recourse to the principles laid down by the most able and distinguished writers on the subject.

"EVERY nation," says Martens, "has a right to property and dominion as far as the middle of all the lakes and rivers, that are situated on its frontiers, at least till the contrary has been proved, or till another decision has been agreed upon."

PUFFENDORFF says, that "the gulphs and channels, or arms of the sea are, according to the regular course, supposed to belong to the people with whose lands they are encompassed; but in case different nations border on the same channel the sovereignty of each shall be conceived to reach into the middle of the water from every part of the respective shore, unless either all the estates have agreed by covenant to use the whole water promiscuously among themselves, and to exercise a general undivided sovereignty over it against foreigners, or else if one particular people has obtained a dominion over the whole by pact or the tacit confession of the rest, or by the right of conquest, or because they fixed their station near it, and immediately took it in full possession, exercising acts of sovereignty over the people of the opposite shore; in which latter case nevertheless, the other neighbouring States, their fellow borderers, shall be supposed to be lords each of their particular ports, and of so much of the sea, as the convenient access to the shore requires."

GROTIUS says, "though, in case of any doubt, the jurisdiction on each side reach to the middle of the river, yet it may be and in some places it has actually happened that the River wholly belongs to one party, either because the other nation has not got possession of the other bank till later, and when their neighbours were already in complete possession of the whole river, or else because matters were so stipulated by Treaty."

VATTTEL says "that of two nations inhabiting the opposite banks of the river, if neither party can prove that they themselves or those whose rights they inherit were the first settlers in those tracts, it is to be supposed that both nations came there at the same time, since neither of them can give any reason for claiming the preference; and in this case, the dominion of each will extend to the middle of the river."

From these writers we derive this general rule of the law of nations, that when two neighboring nations inhabit the opposite banks of a river, the dominion of each will extend to the middle of the stream. There are some exceptions to this general rule: but do these exceptions prevent its application to the passage, which is part of the boundary line between this Province and the United States? certainly not in favour of the American government. The inhabitants of these States, when they formed a part of the British empire, had a right in common with His Majesty's subjects, to navigate the waters now under consideration; but this power did not give them an exclusive possession, nor

Martens, b. 4. c. 4. § 3.

Puffendorff, b. 4. c. 5. § 8.

Grotius, b. 2. c. 3. § 18.

Vattel, b. 1. c. 2. § 266.

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mitted into the sea—into any of the rivers, that they have not derive such right in the limits of this Province between this Province and the Colonies, in or to be presumed, that undetermined, as to Commerce in direct

right of Great-Britain the possession of the Channel governed by the facts used in explanation of the Scoundiac, or the fifth article of the main waters of the Bay of Fundy, and Campo-Bello, and in some places over the Islands of His Majesty's Colonies of the United States, over which of no public act is exercised by the disavowal of the passage or channel as a question then, to general Law of Nations by the most a-

tion as far as the least till the con-

sea are, according to the sovereignty of the part of the river the whole undivided people has obtained or by the right of it in full possession; in which cases, shall be supposed, as the conve-

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the river, if neither were there at the same time; and in this

s, that when two of each will extend the boundary of the American part of the British waters the possession, nor did

did they thereby acquire dominion over the whole. The mother country in acknowledging the independence of her revolted colonies, had a right to prescribe their limits; in doing which, she was bound to consult the interest and preservation of that part of her empire, which continued in its allegiance. The Province of Nova-Scotia adhered to the cause of the mother country; the western limits therefore of that Province, it is presumed, were by the Treaty of Peace, made the eastern boundary of the United States; and the exception in the Treaty of such Islands, as before or at the time of the Treaty of Peace, were within the limits of the Province of Nova-Scotia, strengthens this presumption. By these limits therefore, must the United States be governed. That they considered Deer, Marvel, and Campo-Bello Islands as once forming a part of the Province of Nova-Scotia, and that they do now consider them as being within the jurisdiction of this Province of New-Brunswick, is evident, from their allowing His Majesty's subjects to remain in the undisturbed possession of them. To place this question, therefore, on the broadest ground, and in the most favorable point of view for the citizens of the United States, I will consider them, the moment their independence was acknowledged by the mother country, in the character of a sovereign people, and in the possession of the western side of the channel now in dispute; that His Majesty's subjects were in the possession of the eastern side; and that neither possessed an exclusive right to the waters of the same. The application of the general rule of the law of nations to this case then, will lead me to conclude, that the boundary line between this Province and the United States, is a line to be drawn through the middle of the channel that divides them, and to which the jurisdiction of each will extend. I am strongly confirmed in this conclusion by that part of the description of the boundary of the United States, in the second article of the Treaty of Peace, which says "East by a line to be drawn along the middle of the river Saint Croix," &c. The Commissioners, who made the Treaty, appear to have adopted the same rule, that governs the decision of this Court.

It has been urged that the west passage lying between Campo-Bello and Dudley and Frederick Islands, is unfit for the navigation of vessels of any burthen, as a bar extends across it in one place, over which at low water, there are about four feet of water only; and as the principal channel from the Bay of Fundy into the river Saint Croix lies to the eastward of Campo-Bello, it has from thence been inferred, that the waters to the westward of such channel, or lying between Campo-Bello and Dudley and Frederick Islands, are wholly within and belong to the United States; or that they are the waters of the river forming the boundary between His Majesty's dominions and the United States, and as such neutral as they are termed, and common to both nations. It appears in evidence, that the west passage is a considerable channel at high water, at which time there are twenty feet of water on the bar; that a ship of 300 tons burthen has passed through it; and that it is the passage principally made use of by the American vessels. But allowing, that the passage to the eastward of Campo-Bello is the principal channel into the Saint Croix, and more fit for navigation than the West passage, and that Great-Britain should admit the American vessels to the free navigation of it; would such admission convey the dominion of the passage to the United States, and with it, a right to the whole of the West passage, and the waters lying between Campo-Bello and Dudley and Frederick Islands? With equal propriety it might be said, that Denmark cedes the dominion of the Sound, by permitting the vessels of other nations to pass through it; or that Turkey yields the sovereignty of the Dardanelles, when she allows the ships of Great-Britain or Russia to pass the same. The West passage is one of the channels into the St. Croix, and is a part of the boundary between this Province and the United States, to the middle of which I conceive that the jurisdiction of each must extend; of course the waters cannot be common for any other purposes, than those of navigation.

I come now to the evidence adduced in this cause, which was very voluminous; and I shall only touch upon those points, which appear the most material.—It appears that about six years ago an agreement was made between the deputy of the Custom-House officers for this port of Saint John, and the American Collector, that the waters between Campo-Bello Island and Dudley Island, or in other words, those waters that lie within two lines commencing at the American Custom-House, (which is situated on the American side of the West passage) the one ranging from thence with the heads or points of land that form Snug Cove on the Campo-Bello shore, the other with the outmost heads or points of land on the American shore, should be considered neutral as they are termed, or common to the vessels of both nations, in which they might load or unload their cargoes, and that this agreement was assented to by the Officers of His Majesty's Customs for this Port, by virtue of which agreement the American vessels have been accustomed to anchor off Snug Cove, and take in their cargoes from British vessels lying in the stream. That previously to the American vessels taking in their cargoes, they obtain a foreign clearance for St. Andrews, a place within the jurisdiction of this Province, from the American Custom-House; and that the British vessels, which arrive at Campo-Bello from the upper parts of the Bay of Fundy, laden with Plaster, report at the British Custom-House kept at Snug Cove by the Clerk of the deputy Collector.

As to the situation of the Sloop at the time she was seized, it appears by the Mate and

two of the hands of the Cutter, who were present at the time, that she was lying at anchor within a line drawn from Friar's head and the South-west head, the two heads or points of land which form Snug Cove, of course within the cove. Some remarks have been made as to the credit of these witnesses; I cannot but observe that their testimony stands fair before the Court, and is corroborated by one of the witnesses produced on the part of the Claimant, who says, that sometimes the Sloop swang within the British lines, at other times within the American bounds; one of the hands belonging to the Sloop also says, that she was lying rather within the British line when she was seized. It might not have been the intention of the Claimant to have anchored his vessel within Snug Cove; I do not think that it was, but the place where the vessel came to, and from which she was not moved until after she was seized, was so near the line extending from Friar's head to the South-west head, that I have no doubt with the scope of cable some of the witnesses say the vessel had out, she sometimes tended with the wind or tide over the neutral line as it is termed, and within the outermost heads of Snug Cove. This is not material, the question is, was she on the British side of the line running through the middle of the stream? When the witnesses of the Claimant speak of the place where the Sloop came to anchor and was seized, they mention uniformly her situation as relative to Campo-Bello Island; that she was at the mouth—off the chops—and was lying off of Snug Cove. She is invariably mentioned as being nearer to Campo-Bello than to Dudley Island; some say one third nearer, others about one hundred rods from the shore of Snug Cove. By the Charts before the Court it appears that the distance from Campo-Bello Island to Dudley Island, is about three quarters of a mile; and from the whole of the testimony it evidently appears, that the Sloop took in her cargo, and was lying when seized near the Campo-Bello shore, and within the British waters. I cannot but observe here, that the line which was at first established by the British Custom-House officers for this Port, and the American Collector, as the limit of the neutral or common waters on the Campo-Bello side, has by some of the witnesses, been considered as the boundary of the British and American waters, and that those to the Westward of this line belong to the United States; such has been the effect of the American vessels being allowed to take in their cargoes in the waters near the Campo-Bello shore.—I shall now consider a paper which was found on board the Sloop, termed a foreign clearance, and obtained as is stated in the claim for the purpose of enabling the said Sloop to proceed off Snug Cove, there to anchor in the stream, and take in her cargo from vessels also lying there. This clearance expressly mentions the Sloop FALMOUTH, as "bound for St. Andrews," a place evidently within the jurisdiction of this Province, and where she could not be permitted to enter. It has been argued that this paper was obtained to enable the vessel to a re-entry in the Ports of the United States, as *Plaster of Paris* is an article of foreign growth; and that all the American vessels, which take their lading out of British vessels, lying in these neutral waters, obtain such foreign clearances. These vessels at the time of their lading, must either be within the American territories or without, if they are within, the effect of their clearances is to defraud their own Government, by depriving it of the tonnage duty, which the British vessels would be obliged to pay, before they could be allowed to unlade their *Plaster*; for if it was duly imported, it would not be necessary to procure the foreign clearance to entitle them to a re-entry in the Ports of the United States; if without the limits of the United States, they must be within the British waters. I cannot suppose that the American Collector would be guilty of a fraud against the Revenue of his Country; and am therefore to conclude that by this foreign clearance, obtained from the American Custom-House, in which the destination of the vessel is mentioned, she was considered as being bound into waters foreign to the United States. By viewing the clearance in this light it is a confirmation of the testimony in the cause, and carries with it a conviction, that the Sloop when seized was within the British waters, and that the foreign clearance was obtained to enable her to go there. As to the agreement between the Custom-House officers for this Port of Saint John, and the American Collector, by which the waters between Campo-Bello Island and Dudley Island were considered free and common for the vessels of both nations to lade and unlade in, I am clear that no such agreement can be binding on this Court.—When the Officers of His Majesty's Customs assented to this, they considered the boundary line between this Province and the United States as undetermined; and I have no doubt they were actuated by the most honorable motives, and supposed themselves as acting within the strictest line of their duty.—It has been contended that this is a case of extreme hardship, that the intentions of the Claimant were innocent, that he was pursuing a course of trade, that had for some years past received the sanction of the British Custom-House officers, and that a great many American vessels had been allowed to take in their cargoes at the place where this vessel was seized.—But are the circumstances of this case so peculiarly hard as to authorize the Court to depart from the law, when those in the case of the *Hoop, Cornelis, Master*, 1 Rob. 196, would not. In that case the parties acted under the advice of the Commissioners of the Customs at Glasgow, who previously to their giving such advice had consulted their own law advisers; in giving the sentence of the Court, Sir WILLIAM SCOTT says, "It appears that these parties had before applied to the Council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information; instead of doing so they consulted the Commissioners of the Custom-

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"toms, very proper judges to ascertain what goods might be imported under the Revenue laws; but this is a matter of general law, on which they are not the persons best qualified to give information or advice. The intention of the parties might be perfectly innocent; but there is still the fact against them of that actual contravention of the law, which no innocence of intention can do away. I may feel greatly for the individuals who I have reason to presume, acted ignorantly under advice that they thought safe; but the Court has no power to depart from the law which has been laid down." The British Custom-House officers in affixing to the line of the neutral or common waters on the Campo-Bello side, exceeded their authority as Officers of the Customs, by determining a matter of general law.

THERE is another principle of law, which I think applicable to the present case, recognised by Lord MANSFIELD, in the case of *Berens v. Rucker*. 1 Black. 313, in which he says, "The first question is, whether this was a just capture. Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust, the pretence was that part of this cargo was put on board off St. Eustatius out of Barks supposed to come from the French Islands, and not loaded immediately from the shore; this is now a settled point by the lords of appeal to be the same thing, as if they had been landed on the Dutch shore, and then put on board afterwards." It is admitted that the Sloop FALMOUTH took in her cargo off Snug Cove out of two British vessels lying in the stream. These vessels it appears came from the upper parts of the Bay of Fundy, laden with Plaster, arrived at Campo-Bello, and of course must be presumed to have entered at the Custom-House at Snug Cove. As these vessels were lying on the Campo-Bello side, they must have been within the British waters, and agreeably to the law as settled by the lords of appeal, the taking on board her cargo out of the vessels lying in the stream, amounts to the same thing as if it had been taken on board from the shore, and is a direct violation of the Navigation Act.

I am therefore of opinion, that the Sloop FALMOUTH was laden within the British waters in contravention of the Navigation Act, and the Statute of 7 & 8. W. 3. c. 23, and therefore decree the vessel and cargo to be forfeited;—but considering the particular circumstances of the present case, I shall dismiss the claim without costs.



she was lying at the two heads or some remarks have at their testimony produced on the British lines, going to the Sloop seized. It might vessel within Snug Cove, and from which loading from Friar's cable some of the tide over the neutral. This is not mar-rough the middle where the Sloop relative to Campo-off of Snug Cove. Idley Island; some Snug Cove. By po-Bello Island to of the testimony it n seized near the ve here, that the for this Port, and s on the Campo-ary of the British ng to the United d to take in their er a paper which ned as is stated in ug Cove, there to e. This clearance a place evidently ermitted to enter. a re-entry in the owth; and that all y in these neutral eir lading, must e the effect of their the tonnage duty, allowed to unlade y to procure the United States; if h waters. I can-against the Reve-ign clearance, ob-vessel is mention-States. By view-e cause, and carries waters, and that the greement between can Collector, by onsidered free and ear that no such a-jectly's Customs af-ce and the United e most honorable heir duty.—It has ns of the Claimant years past receiv-ny American ves-essel was seized.— the Court to de- asler, 1 Rob. 196, mmissioners of the onsulted their own s, "It appears that nd had always ob-gain to the same sioners of the Cuf- "toms,

