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Misc Reports

Canada.

Dept. of Marine & Fisheries

1877

MEMORANDUM

ON POINTS OF LAW

CONNECTED WITH THE FISHERIES.

Confidential.

MEMORANDUM

ON

POINTS OF LAW CONNECTED WITH THE FISHERIES.

INTRODUCTION.

Before the outbreak of the War of Independence, (in 1775), the fisheries on the coast of British North America were the common property of all British subjects. It has been stated that the acquisition of these fisheries was largely achieved by the enterprise and valor of the people of the New England Colonies. As regards the fisheries on the coasts of what are now the Atlantic Provinces of Canada, viz., Quebec, New Brunswick, Nova Scotia, (including Cape Breton), Prince Edward Island and the islands in the Gulf of St. Lawrence, these became the property of Great Britain, not by discovery, or by conquest, but by transfer from France, under the Treaty of Paris, 1763, which terminated the French dominion on the continent of America.

When peace was concluded between England and the United States at the close of the War of Independence, the thirteen colonies, which had become the United States, obtained the recognition of their independence by the Treaty of 3rd September 1783, and the fisheries on the coast of the remainder of British North America naturally become one of the subjects of discussion by the Plenipotentiaries.

The people of the New England States were unwilling to be confined to their own coast. Their fishing industry had become one of great importance. But, as to their right, it seems clear that when the thirteen colonies proclaimed their independence they ceased to be entitled to the right of fishing on the British American coasts—that right being incidental to the condition of British subjects. As was said by de Vergennes: "To claim the privileges of subjects after renouncing allegiance was unprecedented." (*De Circourt, Vol. 3, De Flasson; "Hist. de la Diplomatie Française."*)

By every principle of international law and of right it would seem that the fisheries on the coasts of Quebec, New Brunswick, Nova Scotia, Cape Breton, Prince Edward Island and the Islands of the Gulf of the St. Lawrence remained, as they always had been, since the Treaty of Paris of 1763, the property of the British Crown, and there was no reason or right to expect that the enjoyment of them should be continued to the people of the United States any more than to the people of any other Foreign State.

Count de Vergennes, although he had been a partizan of the United States in the revolution, said, in a letter to M. de la Luzerne, the French Minister at Philadelphia, dated Versailles, September 25th, 1777:

"It is essential to remark that the fisheries belong, and have always belonged, to the Crown of Great Britain, and that it was as subjects of the Crown the Americans enjoyed them—consequently, from the moment when they shook off the English yoke and declared themselves independent, they broke the community which existed between them and the metropolis; and voluntarily relinquished all the advantages which they derived from that community, just as they despoiled England of all the advantages she derived from their union with her." * * *

"It should therefore, be well established that from the moment when the colonies published their Declaration of Independence they have ceased to own a share in the fisheries, because they have forfeited by their own act the qualification which entitled them to such a share; that consequently they can offer to the court of London neither title nor actual possession; from this comes another result, viz., that the Americans having no right to the fishing we can give them no guarantee on that head." (*III de Circourt*, pp. 276, 277).

Lord Bathurst's language to Mr. Adams was: "when the Americans by their separation from Great Britain became released from the duties, they became excluded also from the privileges of British subjects."

So late as February 5th, 1887, Mr. Manning, Secretary to the Treasury, said, in reference even to the right to enter the bays and harbors of Canada for shelter and to make repairs, to purchase wood and to obtain water: "As colonists we had those rights, but as colonists we lost them by just rebellion." *49th Congress, 2nd Session, No.* 4087.

The fisheries on the banks of Newfoundland and elsewhere in the open sea, were the common property of all, and were so treated by those who negotiated the Treaty by which independence was recognized. The Treaty of 1783 treats that as a "right," as contradistinguished from a "liberty." Notwithstanding that no such right could be claimed on behalf of the United States in respect of the coast fisheries, Article III of the Treaty conceded the "liberty" of taking fish there as previously.

The whole article is as follows:—

"It is agreed that the people of the United States shall continue to enjoy unmolested the *right* to take fish of every kind on the Grand Bank and all the other banks of Newfoundland, also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish.

"And also that the inhabitants of the United States shall have *liberty* to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have *liberty* to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the land."

It may be important to bear in mind the principle on which the people of the United States ceased to have a right to the enjoyment of the coast fisheries and also the fact that that enjoyment was, in 1783, conceded to them as a liberty; for it is frequently claimed, on the part of the United States, that this article of the Treaty was simply a recognition of a pre-existing right, and one which the people of the States retained when they passed from their former colonial condition; Mr. John Quincy Adams maintained that the Treaty was simply a *partition*

of the former British possessions in North America, and that, in the partition, the rights of fishing on the coasts of the remaining Provinces, fell to the lot of the United States.

In accordance with a universally recognized principle the exclusive right of fishing within three marine miles of the coasts at least follows the ownership of the coasts—the United States did not own the coasts on which Article III of the Treaty of 1783 gave them the liberty to fish. Moreover, it seems inconsistent with the "partition" theory that the liberty, which was conceded by the Treaty, was to be exercised jointly with the enjoyment of the fisheries by the subjects of Britain. The concession then of 1783 may be regarded as a treaty concession, and not as the acknowledgment of a pre-existing right.

The reason for this concession may perhaps be found in the condition of Europe at that period, and in the fact that the coasts of the Atlantic Provinces were very sparsely settled. It was probably induced also, to a large extent, by the concessions on the part of the American plenipotentiaries, in reference to the navigation of the Mississippi and the American lakes by British vessels.

Speaking on the subject in 1814, Mr. Canning brought to the notice of the British Parliament, the necessity for revising the provisions of Article 3 of the Treaty of 1783. He said:—"In our Treaty of 1783 we gave away more than we ought, and we never hear of that Treaty but as a trophy of victory on the one hand, or a monument of degradation and shame on the other. We ought to refer any question with America to the state in which we now stand rather than that in which we once stood."

But even the very liberal provisions of the Treaty of 1783 did not continue to the people of the United States all the privileges, with regard to the fisheries, which, as British subjects, they had previously enjoyed. They were not to be allowed to land, to dry and cure their fish on any part of Newfoundland, and only on the unsettled parts of Nova Scotia, the Magdalen Islands and Labrador, so long as the same should remain unsettled. They retained no right to land on the shores of Cape Breton, or on Prince Edward Island.

The War of 1812 produced the next change. According to a principle of international law, which will be discussed hereafter at greater length, it was claimed, on the part of Great Britain, that the fishery provisions of the Treaty of 1783 were terminated by that war. When peace was concluded, in 1814, the liberty of the people of the United States to fish on the British North American coasts, and the right to use parts of the shores of British America for purposes connected with the fisheries became again the subject of controversy. The British Commissioners stated at the first meeting, which took place on the 8th August, 1814: "That the British Government did not intend to grant to the United States gratuitously the privileges formerly granted to them by Treaty of fishing within the limits of British territory or of using the shores of the British territories for purposes connected with the fisheries."

The ground was firmly taken by them that the fishery provisions of 1783 had been terminated by the war, and must thereafter be abandoned by the United States, unless again conceded by the new Treaty about to be made. The Commissioners on the part of the United States denied that these provisions had ceased to operate; they insisted on the "partition" theory above-mentioned, and claimed that the Treaty of 1783 was not a new grant, either as to the "right" conceded, or the "liberty" conferred, but a recognition of an ancient and inherent right.

Agreement on this subject was found to be unattainable, and the matter was left undecided, but with each party adhering to its contention. Mr. Adams said, with regard to the British Commissioners: "Their efforts to obtain our acquiescence in their pretensions that the fishing liberties had been forfeited by the war were unwearied. They presented it to us in every form that ingenuity could devise. It was the first stumbling-block and the last obstacle to the conclusion of the Treaty."

On the 24th of December, 1814, the Treaty of Ghent was concluded, without alluding to the fisheries. From this time forward, Great Britain treated Article III of the Treaty of 1783 as no longer in force. On the 17th June, 1815, Lord Bathurst instructed the Governor of Newfoundland thus: "On the declaration of war by the American Government and the consequent abrogation of the then existing Treaties, the United States forfeited, with respect to the fisheries, those privileges which are purely conventional, and as they have not been renewed by stipulation in the present Treaty, the subjects of the United States can have no pretence to any right to fish within British jurisdiction, or to use the British territory for purposes connected with the fisheries."

A long correspondence ensued between Mr. John Quincy Adams and Lord Bathurst which resulted in the British Government adhering to its position.

In 1815 the Commander of His Majesty's ship "Jasseur," in the month of June, sent eight captured fishing vessels of the United States into Halifax as prizes. (*Sabine*, 393.) He also warned another American fisherman to keep a distance of sixty miles from the coast. His extreme view in this latter respect was disavowed.

In 1817 instructions were issued by the British Government to seize foreign vessels fishing or at anchor in any of the harbors or creeks in Her Majesty's North American possessions or within the maritime jurisdiction and send them to Halifax for adjudication. Under these instructions twenty American fishing vessels were seized in June, 1817, by Capt. Chambers, of H.M.S. "Dee."

In 1818, while negotiations were going forward for the treaty which was concluded in that year, two fishing vessels, the "Nabby" and "Washington," were seized and condemned for entering British American waters.

In May, 1818, the United States empowered Plenipotentiaries "to agree, treat, consult and negotiate of and concerning the general com-

merce between the United States and Great Britain and its dominions or dependencies and such other matters and subjects interesting to the two nations as may be given to them in charge, and to conclude and sign the treaty or treaties, convention or conventions touching the premises."

At the third conference the following proposal in reference to the fisheries emanated from the American Plenipotentiaries:—

"ARTICLE A.

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America: It is agreed between the high contracting parties that the inhabitants of the said United States shall continue to enjoy unmolested, forever, the liberty to take fish, of every kind, on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, and the western and northern coast of Newfoundland, from the said Cape Ray to Quirpon Island, on the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence, northwardly, indefinitely, along the coast; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, of the Magdalen islands, and of Labrador, as hereabove described; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground; and the United States hereby renounce any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, and harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits: Provided, however, That the American fishermen shall be admitted to enter such bays and harbors for the purpose only of obtaining shelter, wood, water, and bait, but under such restrictions as may be necessary to prevent their drying or curing fish therein, or in any other manner abusing the privilege hereby reserved to them."

At the fifth conference the British Plenipotentiaries presented a counter project, as follows:—

"ARTICLE A.

"It is agreed that the inhabitants of the United States shall have liberty to take fish, of every kind, on that part of the western coast of Newfoundland which extends from Cape Ray to the Quirpon Islands, and on that part of the southern and eastern coasts of Labrador which extends from Mount Joli to Huntingdon Island; and it is further agreed that the fishermen of the United States shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of the said south and east coasts of Labrador, so long as the same shall remain unsettled; but as soon as the same, or any part of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

"And it is further agreed that nothing contained in this article shall be construed to give to the inhabitants of the United States any liberty to take fish within the rivers of His Britannic Majesty's territories, as above described, and it is agreed, on the part of the United States, that the fishermen of the United States resorting to the mouths of such rivers shall not obstruct the navigation thereof, nor wilfully injure nor destroy the fish within the same, either by setting nets across the mouths of such rivers, or by any other means whatever.

"His Britannic Majesty further agrees that the vessels of the United States, *bona fide* engaged in such fishery, shall have liberty to enter the bays and harbors of any of His Britannic Majesty's dominions in North America, for the purpose of shelter, or of repairing damages therein, and of purchasing wood and obtaining water, and for no other purpose; and all vessels so resorting to the said bays and harbors shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein.

"It is further well understood that the liberty of taking, drying and curing fish, granted in the preceding part of this article, shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects, residing within the limits hereinbefore assigned for the use of the fishermen of the United States, for any of the purposes aforesaid.

"And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States, engaged in the said fishery, to have on board any goods, wares, or merchandise, whatever, except such as may be necessary for the prosecution of the fishery, or the support of the fishermen whilst engaged therein, or in the prosecution of their voyages to and from the said fishing grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated, together with her cargo."

The following is the reply of the American Plenipotentiaries:—

"The American Plenipotentiaries are not authorized by their instructions to assent to any article on that subject which shall not secure to the inhabitants of the United States the liberty of taking fish of every kind on the southern coast of Newfoundland, from Cape Ray to the Rameau Islands, and on the coasts, bays, harbors and creeks from Mount Joli on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, and also the liberty of drying and curing fish in any of the unsettled bays, harbors and creeks of Labrador, and of the southern coast of Newfoundland, as above described, with the proviso respecting such of the said bays, harbors and creeks as may be settled.

"The liberty of taking fish within rivers is not asked. A positive clause to except them is unnecessary, unless it is intended to comprehend under that name waters which might otherwise be considered as bays or creeks. Whatever extent of fishing ground may be secured to American fishermen, the American plenipotentiaries are not prepared to accept it on a tenure, or on conditions, different from those on which the whole has heretofore been held. Their instructions did not anticipate that any new terms or restrictions would be annexed, as none were suggested in the proposals made by Mr. Bagot to the American Government. The clauses forbidding the spreading of nets, and making vessels liable to confiscation in case any articles not wanted for carrying on the fishery should be found on board are of that description, and would expose the fishermen to endless vexations."

The British Plenipotentiaries finally proposed the following article:—

"*Whereas*, Differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbors and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that

"ARTICLE I.—The inhabitants of the United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and southern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joli on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company; and that the

American fishermen shall have liberty forever to dry and cure fish in any of the unsettled bays, harbors and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The British Plenipotentiaries agreed not to insist on an article giving their people the right to navigate the Mississippi.

The article above recited was accepted and incorporated in the treaty.

The rights of the people of the two countries, as settled by this Convention of 1818, (which bore date the 20th October of that year), remained unaltered for about thirty-six years, and the article just quoted is the one by which those rights are now, (since the revocation (1885) of the fishery articles of the Treaty of Washington of 1871), to be regulated. During a long course of years succeeding the treaty it was claimed on the part of the people of the British North American colonies that the fishermen of the United States habitually encroached on their fishing grounds of the coasts of the Atlantic Provinces.

The complaints consisted principally of remonstrances by the Provincial Governments and Legislatures to the Imperial authorities against the United States' fishermen fishing within three miles of the coast and within three miles of lines drawn from headland to headland, and against their entering ports, bays and harbors for the purposes of trading, procuring bait, and for other purposes not named in the Convention.

Numerous seizures were made by the Provincial marine police vessels and by British gun-boats which were sent to prevent encroachments by fishermen of the United States.

With a view to making the provisions of the Treaty of 1818 effective, the statute 59 George III, chap. 38, was passed (1819). Its principal provisions are as follows:—

It declared that except for the purposes before specified it should "not be lawful for any person or persons, not being a natural born subject of His Majesty, in any foreign ship, vessel or boat, nor for any person in any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry or cure any fish of any kind whatever within three marine miles of any coasts, bays, creeks or harbors whatever in any part of His Majesty's dominions in America, not included within the limits specified and described in the First Article of the said Convention, and that if such foreign ship, vessel or boat, or any persons on board thereof, shall be found fishing, or to have been fishing, or pre-

paring to fish within such distance of such coasts, bays, creeks or harbors within such parts of His Majesty's Dominions in America, out of the said limit as aforesaid, all such ships, vessels and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture and stores, shall be forfeited and shall and may be seized, taken, sued for, prosecuted, recovered and condemned by such and the like ways, means and methods and in the same courts as ships, vessels or boats may be forfeited, seized, prosecuted and condemned for any offence against any laws relating to the Revenue of Customs or the laws of trade and navigation, under any Act or Acts of the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland; provided that nothing contained in this Act shall apply, or be construed to apply to the ships, or subjects of any Province, Power or State in amity with His Majesty, who are entitled by treaty with His Majesty to any privilege of taking, drying or curing fish on the coasts, bays, creeks or harbors, or within the limits in this Act described; provided always, that it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbors of His Britannic Majesty's Dominions in America as are last mentioned for the purpose of shelter and repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever; subject, nevertheless, to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying or curing fish in the said bays or harbors, or in any other manner whatever abusing the said privileges by the said treaty and this Act reserved to them, and it shall for that purpose be imposed by any order or orders to be from time to time made by His Majesty in Council under the authority of this Act, and by any regulations which shall be issued by the Governor or person exercising the office of Governor in any such parts of His Majesty Dominions in America, under or in pursuance of any such Order in Council as aforesaid.

"And that if any person or persons, upon requisition made by the Governor of Newfoundland, or the person exercising the office of Governor, or by any Governor in person exercising the office of Governor in any other parts of His Majesty's Dominions in America, as aforesaid, or by any officer or officers acting under such Governor or person exercising the office of Governor, in the execution of any orders or instructions from His Majesty in Council, shall refuse to depart from such bays or harbors, or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act, every such person so refusing or otherwise offending against this Act shall forfeit the sum of two hundred pounds, to be recovered in the Superior Court of Judicature of the Island of Newfoundland, or in the Superior Court of Judicature of the colony or settlement within or near to which such offence shall be committed, or by bill, plaint or information in any of His Majesty's Courts of Record at Westminster, one moiety of such penalty to belong to His Majesty, His heirs and successors, and the other moiety to such person or persons as shall sue or prosecute for the same."

This was followed by Colonial Legislation on the same lines. Nova Scotia, New Brunswick and Prince Edward Island adopted enactments to the like effect, and also establishing the penalty of forfeiture of vessels found "fishing, or preparing to fish, or to have been fishing within three marine miles of the coasts, bays, creeks or harbors" and also a penalty of

£100 on the person in command if he should not truly answer questions put to him. These statutes also placed the burden of proof on the person disputing the validity of a seizure.

Year after year the fishermen of the United States maintained a system of encroachment and of trespass by fishing within three miles of the coast, and by entering, without due justification, the bays and harbors of the Provinces. Marine police cruisers were kept up by the Provincial Governments and the Imperial ships of war aided these in seizing from time to time the vessels which were so found trespassing. Condemnations of these took place under the Imperial and Colonial Statutes just cited.

In some cases these seizures were made for violations of the Customs laws. They were, nevertheless, in nearly every case, seizures practically for violations of the Convention of 1818 and of the Fishery laws.

The vessels seized were United States fishing vessels; the Customs officers along the line of coast of the different Provinces were in reality the fisheries police of British North America. The vessels, in most instances, frequented the harbors, ports and bays of Nova Scotia and New Brunswick, for purposes other than the four allowed by the Convention of 1818, viz., the purchase of wood and the obtaining of water and for shelter and repairs. The enforcement of the Customs regulations was for the avowed purpose of denying to such vessels all rights of access, excepting those which related to the right of asylum as recognized and preserved in express words by the Treaty of 1818.

The following is a list of the offences for which condemnation of United States fishing vessels took place:—

(*a*) Violation of Customs laws;
(*b*.) Fishing within the forbidden limits;
(*c*.) Anchoring or hovering inshore without necessity;
(*d*.) Lying at anchor inside bays, &c., to clean and pack fish;
(*e*.) Entering the forbidden limits to buy bait;
(*f*.) Preparing to fish within the prescribed limits;
(*g*.) Purchasing supplies;
(*h*.) Landing and transhipping cargoes of fish.

For upwards of twenty years this course of proceeding was carried on, with hardly any complaint from the Government of the United States against the British construction of the Treaty as to the headland question, or as to the right to purchase bait and supplies or to tranship cargoes. Any complaints which were transmitted were based on controversies as to the facts on which the seizures were made. The complaints indeed at that period were more frequent on the part of the British authorities. In January, 1836, the President directed the Secretary of the Treasury "to instruct the collectors to inform the masters, owners and others engaged in the fisheries that complaints had been made, and to enjoin upon those persons a strict observance of the limits assigned for taking, drying and curing fish by American fishermen under the Convention of 1818."

The Government of Nova Scotia not only maintained an effective marine police, by which numerous seizures were made, but they proceeded to close the Strait of Canso against fishermen of the United States.

In 1841, Mr. Forsyth, U. S. Secretary of State, directed Mr. Stevenson, Minister at London, to complain to Her Majesty's Government of the headland rule, of the closing of the Strait of Canso, and of the severe methods of procedure prescribed in the Nova Scotia Statute. This led to a reference to the Law Officers for an opinion, which was given in favor of the Provincial contention; and Lord Stanley, in November, 1842, in transmitting the opinion to the Governor of Nova Scotia, stated that the precautions taken by the Provincial authorities were "practically acquiesced in by the Americans."

In 1843 and 1844, strong remonstrances were made by the Government of the United States. It was contended that the views of the Provincial authorities, especially on the two questions, as to a line drawn from headland to headland, and as to the exclusion from harbors, &c., were in excess of the provisions of the Treaty. The Imperial Government, however, sustained the views of the Colonial authorities, and the seizures were continued. The question was formally raised as to the headland doctrine in reference to the Bay of Fundy. The schooner "Washington" had been captured in that bay ten miles from the shore. The bay is about 40 miles wide and 130 to 140 miles long. One of the headlands, it was urged, was in United States territory, and the Island of Little Menan belonged to the United States, and was situated nearly on the line from headland to headland, if the outer headlands were to be taken.

In 1853 a convention was made between Great Britain and the United States for the settlement of claims made by the citizens of either country upon the other country since the Treaty of Ghent. Commissioners were to be appointed to hear the claims, and, in case of disagreement, an umpire was to be chosen. The owner of the schooner "Washington," which had been seized in the Bay of Fundy, presented his claim to the Commissioners, and a disagreement resulted thereon as to whether he was entitled to recompense or not. Mr. Joshua Bates was chosen as umpire, and his view was that the claimant should receive $3,000, on the ground that the "Washington" was not liable to seizure in that part of the bay where she was fishing. This was in 1854.

The details involved in this decision and the effect of the decision itself, will be referred to more fully hereafter. It is only necessary to say here, that the decision had no binding effect, excepting as to the claim presented by the owner of the "Washington." It did not conclude all question as to the Bay of Fundy and had no applicability to any of the other bays on the British North American shore.

In 1845, however, Lord Aberdeen, in a letter under date of 10th March, consented that United States' fishermen should be admitted to the Bay of Fundy "as the concession of a privilege." Mr. Everett, on 25th March, 1845, accepted the concession as a matter of right, and it is worthy of note that this document, written twenty-seven years after the

Treaty was made, and after it had been many years enforced according to the "headland" interpretation, was the first dissent expressed by the Government of the United States to that interpretation. (*Sabine*, 419.) A long correspondence ensued, in which the British Government insisted that the admission to the Bay of Fundy was a "liberal concession," and that the headland doctrine could not be given up. The concession of the privilege with regard to the Bay of Fundy was never made in any binding form.

In 1845, Lord Stanley intimated to Lord Falkland, Lieutenant Governor of Nova Scotia, that the British Government "contemplated the further extension of the same policy by the adoption of a general regulation that the American fishermen should be allowed freely to enter all bays of which the mouths were more than six miles wide." This proposal was met by a strong remonstrance from the Governments of Nova Scotia and New Brunswick, and on the 17th September, 1845, Lord Stanley informed Lord Falkland: "We have abandoned the intention we had entertained on the subject, and shall adhere to the strict letter of the treaties * * * except in so far as they may relate to the Bay of Fundy, which has been thrown open to the North Americans under certain restrictions."

Matters remained thus, until negotiations were commenced for reciprocity in trade and for an arrangement as to the fisheries, resulting in the "Reciprocity Treaty" of 1854.

As the restrictions put upon American fishermen from trespassing on the fishing grounds after the War of 1812, resulted in the Convention of 1818, so the enforcement of the Treaty of 1818 resulted in the negotiations which led to the Reciprocity Treaty.

It has been unfairly charged against the British American Provinces and the Dominion of Canada, that our people were accustomed to treat with harshness and rigor the American fishermen resorting to our coasts, in the hope of thereby exacting such trade concessions from the States as were necessary for the growth of our commerce.

So far from being willing that the fisheries should be used as a make-weight in the negotiations regarding trade, the people of the Atlantic Provinces were largely dissatisfied with the concession of joint use of the fishing grounds as part of the arrangement of 1854.

The great expansion, both as regards population and internal improvements in British North America, since the Treaty of 1818, had made such relations advantageous to the United States. The people of British North America have always been willing that trade and commerce between the two countries should be extended in every reasonable way, but at every phase of the negotiations on this subject, the Government of the United States has interposed the fishery question as one on which concessions must be made.

The Reciprocity Treaty bears date 5th June, 1854. The following is the provision in reference to the fisheries:—

"Article 1. It is agreed by the high contracting parties that *in addition to the liberty secured to the United States fishermen by the above-mentioned convention of October 20th*, 1818, of taking, curing and drying fish on certain coasts of British North American colonies therein defined,

the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbors and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several islands thereunto adjacent (and, by another article, Newfoundland), without being restricted to any distance from shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the same coast in their occupancy for the same purpose. It is understood that the above-mentioned liberty applies solely to the sea-fishery, and that the salmon and shad fisheries and all fisheries in rivers and the mouths of rivers are hereby reserved exclusively for British fishermen."

It will be observed that again the taking of fish on our coasts was styled by the contracting parties a "liberty," instead of the "inherent right," resulting from joint discovery, possession and conquest, and recognized in the "partition" of 1783, which it has recently been claimed to have been.

This Treaty was terminated in March, 1866, after a year's notice, by the United States Government.

During its continuance the utmost latitude was given to American vessels claiming to be in any way interested in the fisheries, and such vessels resorted to the coast of British North America as freely for all purposes as the vessels of our own people.

The Treaty of 1854 having been discontinued, the Convention of 1818 revived and continued in force until the Treaty of Washington of 1871.

On the 20th of February, 1866, a Royal Proclamation was issued by the Governor General of Canada, notifying the people of the United States that their fishery privileges in British waters would cease on the 17th of March, and stating the penalties that would follow infractions of the Convention of 1818. Subsequently Her Majesty's Government agreed that those privileges might continue to be exercised during the whole of 1866, on payment of a trifling license fee of 50 cents per ton, although the commercial arrangements by which it is said (*Report of U. S. Committee on Foreign Affairs, No.* 4087, *February* 16*th*, 1887) that "the United States purchased the fishery provisions," were immediately withdrawn. The tariff of the United States on fish caught in Colonial vessels was almost prohibitory.

Repeated notices were given to United States fishermen, both by the Imperial and United States authorities, that the privileges given by the Treaty of 1854 could no longer be exercised. In order, however, to avoid harsh measures, such as the seizure of the American vessels, which had fished in fleets along the British North American coast for twelve years under the Reciprocity Treaty (and in increasing numbers) the system of issuing licenses was continued during 1867, 1868 and 1869. The fee charged at first of 50 cents per ton was raised to $1 per ton, and finally to $2 per ton.

The number of licenses issued in 1866 was 365, in 1867 it was 270, in 1868 it was 56, and in 1869 it fell to 25. It has, without foundation, been contended that the price charged for licenses was taken by both Gov-

ernments as the measure of the value of the fishery privileges. The fee was charged by the Canadian Government to preserve its right, at a period when hopes were held out that the pacific arrangements of 1854 would be renewed. It was paid by the United States fishermen freely, at first, in order to avoid seizure, but reluctantly and rarely in the later years, because the chances of detection and seizure were so rare on a coast line of thousands of miles where it was so difficult to visit all vessels resorting there, in order to see if they possessed a license. The danger which was pointed out by the Attorney General of Nova Scotia in 1845, as likely to arise from the United States' fishermen being allowed to fish inside the bays, was fully realized when the right to fish inshore depended on the possession of license. These were the words:

"The ease with which they may run into the shores—whether to fish or for obtaining bait, or for drawing off the shoals of fish, or for smuggling—and the facility of escape before detection, notwithstanding every guard which it is within the means of the Province to employ, will render very difficult the attempt to prevent violations of the remaining restrictions, while, in the case of seizures, the means of evasion and excuses, which experience has shown to be, under any circumstances, abundantly ready, will be much enlarged."

The number of licenses taken out by no means indicates the number of United States' fishing vessels that pursued the inshore fisheries. Great numbers of them were boarded and warned off, and no seizures were made, as there was a desire on the part of the Dominion authorities to avoid any cause of irritation which might retard a fair and satisfactory arrangement between the two countries. Indeed the instructions first issued by the Department of Marine and Fisheries of Canada required that the cruisers should issue licenses to those vessels which they found unprovided with them, and that a vessel should not be seized until after three warnings.

The system was costly to the Canadian Government, and ineffectual as a means of preventing even the most flagrant encroachment, and, by the close of the year 1869, it became apparent that further sacrifices of our fisheries would not be productive of any good result as regards a new agreement between the two Governments. Accordingly the system was put an end to in 1870. Orders were given by the British Government, in that year, to Admiral Wellesley to use the war vessels under his command to ensure the protection of Canadian fishermen and to co-operate with any United States force which might be sent for the purpose of maintaining order.

The Provinces had, in 1867, been formed into the Dominion of Canada and cruisers were dispatched to the fishing grounds by the Government.

In 1868, 1870 and 1871 the following enactments were adopted by the Parliament of Canada:

31 VICTORIA, CHAP. 61.

" An Act respecting fishing by foreign vessels.

]*Assented to 22nd May*, 1868.]

" Her Majesty, by and with the advice and consent of the Senate and " House of Commons of Canada, enacts as follows:

" 1. The Governor may, from time to time, grant to any foreign ship, " vessel, or boat not navigated according to the laws of the United King-

" dom, or of Canada, at such rate, and for such period not exceeding one " year, as he may deem expedient, a license to fish for or take, dry or cure " any fish of any kind whatever, in British waters, within three marine " miles of any of the coasts, bays, creeks, or harbors whatever of Canada, " not included within the limits specified and described in the first article " of the Convention between his late Majesty King George the Third and " the United States of America, made and signed at London on the 20th " day of October, 1818.

" 2. Any commissioned officer of Her Majesty's navy serving on board " of any vessel of Her Majesty's navy cruising and being in the waters of " Canada for purpose of affording protection to Her Majesty's subjects " engaged in the fisheries, or any commissioned officer of Her Majesty's " navy, fishery officer, or stipendiary magistrate on board of any vessel " belonging to or in the service of the Government of Canada and " employed in the service of protecting the fisheries, or any officer of the " Customs of Canada, sheriff, magistrate, or other person duly commis- " sioned for that purpose, may go on board of any ship, vessel, or boat " within any harbor in Canada or hovering (in British waters) within " three marine miles of any of the coasts, bays, creeks, or harbors in " Canada, and stay on board so long as she may remain within such place " or distance.

" 3. If such ship, vessel, or boat be bound elsewhere, and shall con- " tinue within such harbor or so hovering for 24 hours after the master " shall have been required to depart, any one of such officers or persons " as are above mentioned may bring such ship, vessel, or boat into port " and search her cargo, and may also examine the master upon oath " touching the cargo and voyage; and if the master or person in command " shall not truly answer the questions put to him in such examination, he " shall forfeit $400; and if such ship, vessel, or boat be foreign, or not " navigated according to the laws of the United Kingdom or of Canada, " and have been found fishing, or preparing to fish, or to have been " fishing (in British waters) within three marine miles of any of the coasts, " bays, creeks, or harbors of Canada, not included within the above-men- " tioned limits, without a license, or after the expiration of the period " named in the last license granted to such ship, vessel, or boat under the " first section of this Act, such ship, vessel, or boat, and the tackle, " rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.

" 4. All goods, ships, vessels, and boats, and the tackle, rigging, " apparel, furniture, stores, and cargo liable to forfeiture under this Act " may be seized and secured by any officers or persons mentioned in the " second section of this Act; and every person opposing any officer or " person in execution of his duty under this Act, or aiding or abetting " any other person in any opposition, shall forfeit $800, and shall be " guilty of a misdemeanor, and upon conviction be liable to imprisonment " for a term not exceeding two years.

" 5. Goods, ships, vessels and boats, and the tackle, rigging, apparel, " furniture, stores, and cargo seized as liable to forfeiture under this Act, " shall be forthwith delivered into the custody of the collector or other " principal officer of the Customs at the port nearest to the place where " seized, to be secured and kept as other goods, ships, vessels and boats, " and the tackle, rigging, apparel, furniture, stores and cargo seized are " directed by the laws in force in the Province in which such port is situ- " ate, to be secured and kept, or into such other custody and keeping as " the Governor in Council or a Court of Vice-Admiralty shall order.

" 6. All goods, vessels and boats, and the tackle, rigging, apparel, " furniture, stores and cargo, condemned as forfeited under this Act, shall, " by direction of the collector or other principal officer of the Customs at " the port where the seizure has been secured, be sold at public auction, " and the proceeds of such sale shall be applied as follows: The amount " chargeable for the custody of the property seized shall first be deducted, " and paid over for that service; one-half the remainder shall be paid, " without deduction, to the officer or person seizing the same, and the " other half, after first deducting therefrom all costs incurred, shall be paid " to the Receiver General of Canada, through the Department of Marine " and Fisheries; but the Governor in Council may, nevertheless, direct " that any ship, vessel, boat or goods, and the tackle, rigging, apparel,

" furniture, stores and cargo, seized and forfeited, shall be destroyed or be " reserved for the public service.

" 7. Any penalty or forfeiture under this Act may be prosecuted and " recovered in any Court of Vice-Admiralty within Canada.

" 8. The judge of the Court of Vice-Admiralty may, with the consent " of the person seizing any goods, ship, vessel or boat, and the tackle, rig- " ging, apparel, furniture, stores and cargo, as forfeited under this Act, " order the redelivery thereof, on security by bond, to be given by the " party, with two sureties, to the use of Her Majesty, and in case any " goods, ship, vessel or boat, or the tackle, rigging, apparel, furniture, " stores and cargo so redelivered is condemned as forfeited, the value " thereof shall be paid into court, and distributed as above directed.

" 9. Her Majesty's Attorney General for Canada may sue for and re- " cover in Her Majesty's name any penalty or forfeiture incurred under " this Act.

" 10. In case a dispute arises as to whether any seizure has or has not " been legally made, or as to whether the person seizing was or was not " authorized to seize under this Act, oral evidence may be heard there- " upon, and the burden of proving the illegality of the seizure shall be " upon the owner or claimant.

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

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

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

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

" 15. If on any information or suit brought to trial under this Act on " account of any seizure, judgment shall be given for the claimant, and " the judge or court shall certify on the record that there was probable " cause of seizure, the claimant shall not recover costs, nor shall the per- " son who made the seizures be liable to any indictment or suit on account " thereof; and if any suit or prosecution be brought against any person " on account of any seizure under this Act, and judgment be given against " him, and the court or judge shall certify that there was probable cause " for the seizure, then the plaintiff, besides the thing seized or its value, " shall not recover more than three and a-half cents damages, nor any " costs of suit, nor shall the defendant be fined more than twenty cents.

" 16. Any officer or person who has made a seizure under this Act " may, within one month after notice of action received, tender amends to " the party complaining, or to his attorney or agent, and may plead such " tender.

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

" 18. No appeal shall be prosecuted from any decree, or sentence of " any court touching any penalty or forfeiture imposed by this Act, unless " the inhibition be applied for and decreed within twelve months from " the decree or sentence being pronounced.

" 19. In cases of seizure under this Act, the Governor in Council may, " by order, direct a stay of proceedings; and in cases of condemnation " may relieve from the penalty, in whole or in part, and on such terms as " may be deemed right.

"20. The several provisions of this Act shall apply to any foreign "ship, vessel or boat, in or upon the inland waters of Canada; and the "provisions hereinbefore contained in respect to any proceedings in a "Court of Vice-Admiralty shall, in the case of any foreign ship, vessel or "boat, in or upon the inland waters of Canada, apply to, and any penalty "or forfeiture in respect thereof shall be prosecuted and recovered in one "of the Superior Courts of the Province within which such cause of prose-"cution may arise

"21. Neither the ninety-fourth chapter of the Revised Statutes of "Nova Scotia (third series), "Of the coast and deep-sea fisheries," nor the "Act of the Legislature of the Province of Nova Scotia, passed in the "twenty-ninth year of Her Majesty's reign, chapter thirty-five, amending "the same, nor the Act of the Legislature of the Province of New Bruns-"wick, passed in the sixteenth year of Her Majesty's reign, chapter sixty-"nine, entitled "An Act relating to the coast fisheries and for the preven-"tion of illicit trade," shall apply to any case to which this Act applies; "and so much of the said chapter, and of each of the said Acts, as makes "provision for cases provided for by this Act, is hereby declared to be in-"applicable to such cases.

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33 VICTORIA, CHAP. 15.

"An Act to amend the Act respecting fishing by foreign vessels.

[*Assented to 12th May*, 1870.]

"Whereas it is expedient, for the more effectual protection of the in-"shore fisheries of Canada against intrusion by foreigners, to amend "the Act entitled "An Act respecting fishing by foreign vessels," passed "in the thirty-first year of Her Majesty's reign: Therefore, Her Majesty, "by and with the advice and consent of the Senate and House of Com-"mons of Canada, enacts as follows:

"1. The third section of the above cited Act shall be, and is hereby "repealed, and the following section is enacted in its stead:

"'3. Any one of such officers or persons as are above-mentioned may "bring any ship, vessel or boat, being within any harbor in Canada, or "hovering (in British waters) within three marine miles of any of the "coasts, bays, creeks or harbors in Canada, into port, and search her cargo, "and may also examine the master, upon oath, touching the cargo and "voyage; and if the master, or person in command, shall not truly answer "the questions put to him in such examination, he shall forfeit $400; and "if such ship, vessel or boat be foreign, or not navigated according to the "'laws of the United Kingdom, or of Canada, and have been found fishing, "'or preparing to fish, or to have been fishing (in British waters) within "'three marine miles of any of the coasts, bays, creeks or harbors of Can-"'ada, not included within the above-mentioned limits, without a license, "'or after the expiration of the period named in the last license granted to "'such ship, vessel or boat under the first section of this Act, such ship, "'vessel or boat, and the tackle, rigging, apparel, furniture, stores and "'cargo thereof shall be forfeited.'

"2. This Act shall be construed as one with the said Act 'respecting "'fishing by foreign vessels.'"

"34 VICTORIA, CHAPTER 23.

"An Act further to amend the Act respecting fishing by foreign vessels.

"[*Assented to 14th April*, 1871.]

"Her Majesty, by and with the advice and consent of the Senate "and House of Commons of Canada, enacts as follows:—

"1. The fifth section of the Act respecting fishing by foreign vessels, "passed in the thirty-first year of Her Majesty's reign, chapter sixty-one, "is hereby repealed, and the following section is hereby enacted in its "instead:—

"'5. Goods, ships, vessels, and boats, and the tackle, rigging, apparel, "'furniture, stores, and cargo seized as liable to forfeiture under this Act "'shall be forthwith delivered into the custody of such fishery officer, or "'Customs officer, or other person as the Minister of Marine and Fisheries "'may, from time to time, direct, or retained by the officer making the "'seizure in his own custody, if so directed by the Minister, in either case "'to be secured and kept as other goods, ships, vessels, and boats, and the "'tackle, rigging, apparel, furniture, stores, and cargo seized are directed "'by the laws in force in the province in which the seizure is made, to be "'secured and kept.'

"2. The sixth section of the said Act is hereby repealed, and the "following section is hereby enacted in its stead:—

"'6. All goods, vessels, and boats, and the tackle, rigging, apparel, "'furniture, stores, and cargo condemned as forfeited under this Act, "'shall be sold by public auction, by direction of the officer having the "'custody thereof, under the provisions of the next preceding section of "'this Act, and under regulations to be from time to time made by the "'Governor in Council; and the proceeds of every such sale shall be "'subject to the control of the Minister of Marine and Fisheries, who "'shall first pay therefrom all necessary costs and expenses of custody "'and sale, and the Governor in Council may, from time to time, appor-"'tion three-fourths or less of the net remainder among the officers and "'crew of any Queen's ship or Canadian Government vessel, from on "'board of which the seizure was made, as he may think right, reserving "'for the Government and paying over to the Receiver General at least "'one-fourth of such net remainder to form part of the Consolidated "'Revenue Fund of Canada; but the Governor in Council may, never-"'theless, direct that any goods, vessel, or boat, and the tackle, rigging, "'apparel, furniture, stores, and cargo, seized and forfeited, shall be "'destroyed, or be reserved for the public service.'

"3. This Act shall be construed as one with the Act hereby amended; "and the sixth section of the said Act, as contained in the second section "of this Act, shall apply to all goods, vessels, and boats, and the tackle, "rigging, apparel, furniture, stores, and cargo, condemned under the said "Act before the passing of this Act, and to the proceeds of the sale thereof, "remaining to be applied and paid at the time of the passing of this Act."

In May, 1870, a circular was issued by the Secretary of the Treasury Department at Washington, warning masters of fishing vessels that the Dominion of Canada would issue no more fishing licenses. The circular recites the Convention and the Dominion Act of 1868 prohibiting the fishing by foreign vessels. It goes on to say that the Canadian Government had ordered that vessels "be chartered and equipped "for the service of protecting the Canadian inshore fisheries against "illegal encroachments by foreigners, these vessels to be connected with "the police force of Canada, and to form a marine branch of the same."

Another circular was issued by the same authority, dated 9th June, 1870, calling attention to an amendment which had been passed to the Canadian Statute. This circular says:

"Fishermen of the United States are bound to respect the British "laws for the regulation and preservation of the fisheries to the same "extent to which they are applicable to British and Canadian fishermen."

Referring to the amendment made in 1870, the circular goes on to say: "It will be observed that the warning formerly given is not "required under the amended Act, but that vessels trespassing are liable "to seizure without such warning."

Twelve seizures took place in 1870, three of these having been made by Her Majesty's war vessels. Two out of the twelve were for purchasing bait and were made subjects of contests in the Courts of Vice-Admiralty in Saint John and Halifax. These were the "White

Fawn" and the "J. H. Nickerson." These decisions will be referred to more fully hereafter.

As the Convention of 1818 followed the protection given to the fisheries from 1812, and the Reciprocity Treaty followed the protection given from 1818, so the protection which followed the license system was in turn succeeded by the Washington Treaty of 1871, the fishery clauses of which were as follows:—

"ARTICLE XVIII.

"It is agreed by the High Contracting Parties that, in addition to the "liberties secured to the United States fishermen by the Convention "between the United States and Great Britain, signed at London on the "20th day of October, 1818, of taking, curing, and drying fish on certain "coasts of the British North American Colonies therein defined, the inhab- "itants of the United States shall have, in common with the subjects of "Her Britannic Majesty, the liberty, for the term of years mentioned in "Article XXXIII of this Treaty, to take fish of every kind, except shell- "fish, on the sea-coasts and shores, and in the bays, harbors, and creeks "of the Provinces of Quebec, Nova Scotia and New Brunswick, and the "Colony of Prince Edward's Island, and of the several islands thereto "adjacent, without being restricted to any distance from the shore, with "permission to land upon the said coasts and shores and islands, and also "upon the Magdalen Islands, for the purpose of drying their nets and "curing their fish; provided, that in so doing they do not interfere with "the rights of private property, or with British fishermen, in the peace- "able use of any part of the said coasts in their occupancy for the same "purpose.

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

"ARTICLE XIX.

"It is agreed by the High Contracting Parties that British subjects "shall have, in common with the citizens of the United States, the liberty, "for the term of years mentioned, in Article XXXIII of this Treaty, to "take fish of every kind, except shell-fish, on the eastern sea-coasts and "shores of the United States north of the thirty-ninth parallel of north "latitude, and on the shores of the several islands thereunto adjacent, and "in the bays, harbors and creeks of the said sea-coasts and shores of the "United States and of the said islands, without being restricted to any "distance from the shore, with permission to land upon the said coasts of "the United States and of the islands aforesaid, for the purpose of drying "their nets and curing their fish; provided that, in so doing, they do not "interfere with the rights of private property, or with the fishermen of "the United States in the peaceable use of any part of the said coasts in "their occupancy for the same purpose.

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

"ARTICLE XX.

"It is agreed that the places designated by the Commissioners ap- "pointed under the first article of the treaty between the United States "and Great Britain, concluded at Washington on the 5th of June, 1854, "upon the coasts of Her Britannic Majesty's Dominions and the United "States, as places reserved from the common right of fishing under that "treaty, shall be regarded as in like manner reserved from the common "right of fishing under the preceding articles. In case any question "should arise between the Governments of the United States and of Her "Britannic Majesty as to the common right of fishing in places not thus "designated as reserved, it is agreed that a Commission shall be appointed

"to designate such places, and shall be constituted in the same manner, "and have the same powers, duties, and authority as the Commission "appointed under the said first article of the Treaty of the 5th of June, "1854.

"ARTICLE XXI.

"It is agreed that, for the term of years mentioned in Article XXXIII "of this treaty, fish-oil and fish of all kinds (except fish of the inland "lakes, and of the rivers falling into them, and except fish preserved in "oil), being the produce of the fisheries of the United States, or of the "Dominion of Canada, or of Prince Edward's Island, shall be admitted "into each country respectively free of duty.

"ARTICLE XXII.

"Inasmuch as it is asserted by the Government of Her Britannic "Majesty that the privileges accorded to the citizens of the United States "under Article XVIII of this Treaty are of greater value than those accor- "ded by Articles XIX and XXI of this Treaty to the subjects of Her Brit- "annic Majesty, and this assertion is not admitted by the Government of "the United States, it is further agreed that Commissioners shall be "appointed to determine, having regard to the privileges accorded by the "United States to the subjects of Her Britannic Majesty, as stated in "Articles XIX and XXI of this Treaty, the amount of any compensation "which, in their opinion, ought to be paid by the Government of the "United States to the Government of Her Britannic Majesty in return for "the privileges accorded to the citizens of the United States under "Article XVIII of this Treaty; and that any sum of money which the "said Commissioners may so award shall be paid by the United States "Government, in a gross sum, within twelve months after such award "shall have been given.

"ARTICLE XXIII.

"The Commissioners referred to in the preceding article shall be "appointed in the following manner, that is to say: One Commissioner "shall be named by the President of the United States, and Her Britannic "Majesty, and a third by the President of the United States and Her Brit- "annic Majesty conjointly; and in case the third Commissioner shall not "have been so named within a period of three months from the date when "the article shall take effect, then the third Commissioner shall be named "by the representative at London of His Majesty the Emperor of Austria "and King of Hungary. In case of the death, absence or incapacity of "any Commissioner, or in the event of any Commissioner omitting or "ceasing to act, the vacancy shall be filled in the manner hereinbefore "provided for making the original appointment, the period of three "months in case of such substitution being calculated from the date of "the happening of the vacancy.

"The Commissioners so named shall meet in the city of Halifax, in "the Province of Nova Scotia, at the earliest convenient period after they "have been respectively named, and shall, before proceeding to any busi- "ness, make and subscribe a solemn declaration that they will impar- "tially and carefully examine and decide the matters referred to them to "the best of their judgment, and according to justice and equity; and "such declaration shall be entered on the record of their proceedings.

"ARTICLE XXIV.

"The proceedings shall be conducted in such order as the Commis- "sioners appointed under Articles XXII and XXIII of this treaty shall "determine. They shall be bound to receive such oral or written testi- "mony as either Government may present. If either party shall offer "oral testimony, the other party shall have the right of cross-examination, "under such rules as the Commissioners shall prescribe.

"If in the case submitted to the Commissioners either party shall have "specified or alluded to any report or document in its own exclusive "possession, without annexing a copy, such party shall be bound, if the

"other party thinks proper to apply for it, to furnish that party with a copy "thereof, and either party may call upon the other, through the Commis- "sioners, to produce the originals or certified copies of any papers adduced "as evidence, giving in each instance such reasonable notice as the Com- "missioners may require.

"The case on either side shall be closed within a period of six months "from the date of the organization of the Commission, and the Commis- "sioners shall be requested to give their award as soon as possible there- "after. The aforesaid period of six months may be extended for three "months in case of a vacancy occurring among the Commissioners under "the circumstances contemplated in Article XXIII of this Treaty.

"ARTICLE XXV.

"The Commissioners shall keep an accurate record and correct minutes "or notes of all their proceedings, with the dates thereof, and may ap- "point and employ a secretary and any other necessary officer or officers "to assist them in the transaction of the business which may come before "them.

"Each of the High Contracting Parties shall pay its own Commis- "sioner and agent or counsel; all other expenses shall be defrayed by the "two Governments in equal moieties.

The fishery Articles of this Treaty were terminated, by notice from the United States, on the 1st July, 1885. While they were in operation, the provisions were carried out on the part of the Dominion of Canada with entire liberality. Not only were United States fishermen allowed, in unlimited numbers, to fish inshore, but every facility was given on our coast line for the transhipment of their cargoes, whether from the deep sea or inshore fisheries, and for the purchase of bait, ice and supplies of every kind. No restrictions were enforced against them.

It was decided by the Commission which sat at Halifax, under the provisions of the Treaty, that the privilege of resorting to our coasts for transhipping cargoes, purchasing bait, ice and supplies, was not a privilege accorded by the Treaty. It was one which at any moment might be withdrawn without breach of the Treaty provisions. Indeed this was fully admitted by the counsel and agent of the United States.

That Commission decided that the privileges accorded to the people of the United States, by the Treaty of 1871, were more valuable than the concessions made to the Canadians and inhabitants of Newfoundland by five and a half million dollars for a term of twelve years, during which the Treaty was necessarily in operation.

As a further instance of the manner in which the provisions of the Treaty were carried out on the part of Canada, it is to be noted, that although the Acts by which the Treaty became law did not come into force until 1st July, 1873, by Proclamation in the two countries, yet at the request of the Government of the United States the privileges of the inshore fisheries were conceded to the American fishermen in April, 1873, in order that they might enjoy the whole fishing season of that year. During that interval, and while the inhabitants of the United States were so admitted to the full Treaty privileges, the concessions which they gave in return, as to free markets in the United States, were withheld from our people, and duties were collected on our fish sent into their markets to the amount of many thousands of dollars. The Legislatures of Prince Edward Island—not then in the Confederation—and of Newfoundland pursued the same course as the Dominion Parlia-

ment. In the case of Prince Edward Island, the fisheries were thrown open two years in advance of the President's Proclamation, on the understanding that the President would ask Congress to refund the duties which should, in the meantime, be paid by the people of the Island to the United States. This arrangement was not carried out and the duties have been refunded by the Dominion of Canada.

While this was the treatment accorded to the fishermen of the United States by Canada, Prince Edward Island and Newfoundland, the policy pursued by the Government of the United States was not quite so generous. Although it was provided in the Treaty that "fish "oil and fish of all kinds (except fish of the inland lakes, and of the rivers "falling into them, and except fish preserved in oil), being the produce "of the fisheries of the United States or of the Dominion of Canada or of "Prince Edward Island," should "be admitted into each country respec- "tively free of duty," Congress, in 1875, imposed a duty on the packages containing our fish. This was practically a nullification of the benefits which the Canadian people were entitled to under the Treaty, as regards a large portion of our fish, but the remonstrances of the Dominion Government against such a breach of faith were unheeded.

In the case of Newfoundland, a ruling of the Treasury Department established that seal oil was not fish oil and must pay 20 per cent. duty.

On the part of Canada, immediately after the ratification of the Treaty, and before the ratifying statutes were proclaimed, the St. Lawrence was made free, and the Canadian Canals were opened to American vessels, on the payment of tolls, which were nominal, and did not cover, by any means, the cost of management and repair.

The United States had agreed that Her Majesty's subjects should "enjoy the use of the St. Clair Flats Canal on terms of equality with "the inhabitants of the United States; and engaged to urge upon the "State Governments to secure to the subjects of Her Britannic Majesty "the use of the several State canals connected with the navigation of the "lakes or rivers traversed by or contiguous to the boundary line between "the possessions of the High Contracting Parties, on terms of equality "with the inhabitants of the United States."

No facilities whatever were accorded to our vessels for using the canals of the several States.

When the fishery clauses of the Treaty ceased to operate, on the 1st July, 1885, the Canadian Government pursued the policy which it pursued on the termination of the Reciprocity Treaty in 1866. It refrained from resuming exclusive possession of the fisheries, and from excluding the American fishing vessels from the commercial privileges of transhipment of cargoes and purchasing bait, ice and supplies, until every effort was exhausted to obtain the continuation of the Treaty or the adoption of some other arrangement of a like kind.

On the 22nd June, 1885, an agreement was come to, by which all the privileges which had been accorded to fishermen of the United States were continued to them from the 1st July, 1885, for the whole fishing season of that year. All that the United States Government conceded was the promise by the President to bring the whole question before Congress, at the Session of December, 1885, and to recommend the appointment of a joint commission to consider the matter in the interest of

maintaining good neighbourhood and friendly intercourse between the two countries, thus affording a prospect of negotiation for the development and extension of trade—a promise which was fulfilled on the part of the President, but which was barren of any result. It is stated in the notice to the fishermen, signed by Mr. Bayard, Secretary of State, that this agreement proceeded from the "mutual good will of the two Governments," but the mutuality, as regards any substantial benefit conceded, has not yet been apparent to the Canadian people.

When the fishery season of 1886 opened, the Canadian Government had the declared determination of Congress, that no arrangement would be come to. Our Government had, therefore, no option but to protect once more the fisheries on our coasts.

As in former cases—after the termination of the Treaty of 1783, and after the termination of the Reciprocity Treaty of 1854—the United States' fishermen have continued to fish along the shores of Canada and to demand all the commercial privileges, such as the privilege to make purchases and to tranship cargoes, which they had enjoyed while the Treaty of 1871 was in force. The seizures have not been numerous, and in fact the officers of the Dominon Government have exercised the utmost leniency and forbearance in order to prevent, if possible, any want of harmony between the two countries, and in the hope that the warnings which were constantly given, and the few examples which had been made, would have the effect of inducing the American fishermen to abstain from trespassing in places where their rights and liberties had ceased.

The few seizures which were made, however, have provoked on the part of the United States, very emphatic remonstrances, and have been called "breaches of the Treaty" on the part of Canada.

It is not proposed to review at any length here, the statement of grievances which has been made on the part of the fishermen of the United States, because these have already been dealt with fully in correspondence so recent, as to be readily available. Nor is it deemed necessary to do more than simply, at this point, make reference to the recent correspondence between the Governments of the United States and of Great Britain on the one side, and the correspondence between the Canadian Government and Great Britain on the other, for the purpose of showing the present position of the negotiations and the steps which have led to the present conference.

It will be apparent from this statement of the case, that the Governments of Great Britain and Canada, have, from the termination of the Treaty of Washington —

1st. Endeavored with moderation and leniency to insist on our right to the inshore fisheries and on the exclusion of United States fishermen in the terms of the Treaty of 1818 ;

2nd. Denied the right of those fishermen to admission to our ports for purchases and for transhipment of cargoes, holding the same position which they have insisted on ever since the termination of the fishery article of the Treaty of 1783 when no other and more favorable arrangement was in force.

3rd. Maintained the right to establish the limit of the inshore fisheries by lines drawn across the bays and harbours—a right which has never been yielded, although it has not in late years been enforced by actual seizures.

INTERPRETATION OF THE TREATY.

I.—THE BAYS AND HARBORS.

It is claimed on behalf of the Canadian Government that the words of the Treaty which prohibit American fishermen from entering the bays, harbors, &c., of Canada, for any purpose other than the four enumerated, are to be interpreted in their plain and ordinary sense.

On this point the authorities are clear and unanimous. To undertake to give a comprehensive collection of them would require the citation of every author and of every jurist who has ever referred to such a point, as arising under treaty, statute or contract. They all declare that the task of interpretation does not begin if the words appear to be plain. Vattel says:—

> The first general maxim of interpretation is that, *it is not allowable to interpret what has no need of interpretation.* When the deed is worded in clear and precise terms; when its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it.
>
> Those cavillers who dispute the sense of a clear and determined article are accustomed to seek their frivolous subterfuges in the pretended intentions and views which they attribute to its author. It would be very often dangerous to enter with them into the discussion of those supposed views that are pointed out in the piece itself. The following rule is better calculated to foil such cavillers and will at once cut short all chicanery. *If he who could, and ought to have explained himself clearly and fully, has not done it, it is the worse for him;* he cannot be allowed to introduce subsequent restrictions which he has not expressed. This a maxim of the Roman law: *Pactionem obscuram iis nocere in quorum fuit potestate legem apertius conscribere.* The equity of this rule is glaringly obvious and its necessity is not less evident. (*Vattel's "Interpretation of Treaties," Liv.* II, *cap.* 17.)

One other example will suffice as an illustration of a great concourse of authorities:

Sedgewick, the American writer on the "Construction of Statutes," says, at page 194:—

> "The rule is, as we shall constantly see, cardinal and universal, that if the statute is plain and unambiguous, there is no room for construction or interpretation. The Legislature has spoken, their intention is free from doubt, and their will must be obeyed. '*It may be proper,*' it has been said in Kentucky, in giving a construction to a statute, to look to the effects and consequences, when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action. So too it is said by the Supreme Court of the United States, where a law is plain and unambiguous, whether it be expressed in general or limited terms the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."
>
> At the tribunal of Arbitration at Geneva, held under the Washington Treaty in 1872, a similar question arose. Counsel for Her Majesty's Government presented a supplemental argument in which the ordinary rules for the interpretation of treaties were invoked. Mr. Evarts, one of the Counsel for the United States, and afterwards Secretary of State, made a supplemental reply, in which the following passage occurs: "At the close of the special argument we find a general presentation of canons for the construction of treaties, and some general observations as to the light, or the controlling reason, under which these rules of the treaty should be construed. These suggestions may be briefly dismissed. It certainly would be a very great reproach to these nations, which had deliberately fixed upon three propositions, as expressive of the law of nations in their judgment for the purposes of this trial, that a resort to general instructions for the purpose of interpretation, was necessary. Eleven canons of interpretation drawn from Vattel are presented in order, and then several of them, as the case suits, are applied as valuable in elucidating this or that point of the rules. But the learned Counsel has omitted to bring to your notice the first and most general rule of Vattel, which being once understood, would, as we think, dispense with any consideration of the subordinate canons, which Vattel has introduced, to be used only in case his first general rule does not apply. This first proposition is that '*it is not allowable to interpret what has no need of interpretation.*'" (*Washington Treaty Papers, Vol. III, pp.* 446–7.)

In a letter of Mr. Hamilton Fish to the United States' Minister in England, on the same subject, dated 16th April, 1872, the following view was set forth :—

"Further than this it appears to me that the principles of English and American law (and they are substantially the same) regarding the construction of Statutes and Treaties and of written instruments generally, would preclude the seeking of evidence of interest outside the instrument itself. It might be a painful trial on which to enter, in seeking the opinions and recollections of parties to bring into conflict the differing expectations of those who were engaged in the negotiation of an instrument."—(*Washington Treaty Papers, Vol. II, page* 473.)

Equally distinct and equally unanimous are the authorities that, where the expressions of the instrument are clear, extrinsic evidence cannot be resorted to in order to explain or interpret them. In violation of this fundamental principle, time and again, in the discussion of questions which have arisen under the Convention, the authority of Mr. Rush has been appealed to, in order to show what the American Plenipotentiaries meant by the words of the article, relating to the fisheries, which bear on the question of the headlands. His letter was written after the event, and his opinion of what the American Plenipotentiaries understood by the article was entirely irrelevant. Even if the words used in the article were ambiguous, instead of being clear and distinct, the question would be—not what one set of the negotiators meant, but what the two contracting parties meant. In what sense was the article understood by the two powers who ratified it? The fishery article was a declaration of the rights of the American fishermen and a limitation of their liberties. According to an eminent authority on international law—

If a treaty be ambiguous in any part of it, the party who had the power, and on whom it was peculiarly incumbent to speak clearly and plainly, ought to submit to the construction most unfavorable to him.—(1 *Kent*, 174.)

The memorial of the United States to the German Emperor, as arbitrator under the Washington Treaty, on the Pacific boundary line, insists on this position in these words:

Hugo Grotius lays down the rule that the interpretation must be made again t the party which draughted the conditions: "*Ut contra eum fiat interpre atio, qui conditiones elocutus est*" But no one has expressed this more clearly than Vattel, who writes:

"Here is a rule which cuts short all chicanery: if he who could and should express himself plainly and fully, has not done so, so much the worse for him. he cannot be permitted subsequently to introduce restrictions which he has not expressed. It is the maxim of Roman law: An obscure contract harms those in whose power it was to lay down the law more clearly. The equity of this rule is self-evident, its necessity is not less obvious. There can be no assured convention, no firm and solid concession, if they can be rendered vain by subsequent limitations, which ought to have been announced in the act, if they existed in the intention of the contracting parties."

And again:

But the words of the present treaty are so singularly clear that they may claim protection under the first general maxim of international law on the subject of interpretation: "*Qu'il n'est pas pœmis d'interpreter ce qui n'a pas besoin d'interpretation.*"

The words of the Convention are:

And the United States hereby renounce forever any *liberty* heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, *bays*, creeks or *harbors* of His Britannic Majesty's dominions in America *not included within the above-mentioned limits.*

Provided, however, That the *American fishermen* shall be permitted to enter such *bays or harbors* for the purpose of shelter and of repairing damages therein; of purchasing wood and of obtaining water, and for no other purpose whatever.

The rule as to sovereignty, (at any rate, for all purposes connected with the fisheries), over an area extending for three miles from the coast, being beyond controversy, it is claimed that by these words of the Convention it is made clear that the intention and effect are that the three mile-line be drawn across the mouths of the bays and harbors.

Otherwise, in spite of the renunciation, the Americans retained the right to "enter such bays or harbors" for all purposes, and the words "bays" and "harbors" have no meaning in the prohibition.

One argument which has been, through a series of years, insisted upon on behalf of the United States, is that inasmuch as the Convention gave to American fishermen the right to enter the bays and harbors for the purpose of shelter, wood, water and repairs, it might be impossible for them to obtain the shelter that was necessary, if they were, during their fishing operations, to be kept out three miles from the headland lines. Against this view, it must be borne in mind, that the right of shelter did not originate in the words of the Convention. The Convention was not, as it has often been described as being, a charter to the American fishermen in that regard. By the usage of nations long prior to that, the vessels of friendly powers had the right of asylum in each other's places of shelter, and the Convention of 1818, after forbidding access to our bays and harbors to the fishing vessels of the United States, simply reserved the right of asylum, as not being within the prohibition. From that time forward the American fishing vessels were to be allowed to come in, as the vessels of every Power came in, for the purposes of shelter and repairs, fuel and water. They come in subject to the laws of the country which are applicable to all foreign vessels, and they have no peculiar privilege in that respect.

The American contention is, substantially, that because American fishermen, like all others, have the right of asylum within the headland line, they must have the right of fishing within the headland line, in order to make the right of asylum useful and available at all times. This is to make the right of fishing incidental to the right of asylum, whereas the two subjects have no necessary connection whatever. It is in effect to say that because they have the right of asylum they must, therefore, have the right of fishing.

The vessels of the world have been welcome to shelter in the ports of British North America, but it by no means follows that they have, therefore, the right to fish near our shores in order that they may avail themselves readily of our hospitality. The right of fishing has never in any part of the world been incidental to the right of asylum.

Another contention which has been set up is that the words "bays" and "harbors" must have been used in the same sense in all places in which they occur in the article, and that it would have been absurd to speak of the liberty "to take, dry and cure fish on certain coasts, bays, harbors, &c.," if three miles from the mouths of the bays and harbors was intended. It must be remembered, however, that it had been, and for some time continued to be, the practice of American fishermen to enter the bays and harbors to clean, cure and pack their fish, without landing for that purpose, and that seizures, therefor, actually took place. It is not very unreasonable to conclude that the practice was intended to be forbidden.

But are the words "bays" and "harbors" to have no meaning? Is the article to be construed as if the word "coasts" had been the only word used? It is a familiar rule that no construction is to be adopted which

treats as useless any part of the instrument to be construed. Meaning and effect are to be given to every word if possible. The American contention is that the smaller bays and indentations around the coasts were intended by these words. But where is the authority for that limitation? The words of the article were not "small bays" or "small harbors," nor were they limited by any reference to bays and harbors at the mouths of rivers and creeks. If the American contention that the words were used in the same sense as when taking, drying and curing fish on the "coasts, bays, harbors or creeks," and that it could not have been intended to speak of drying and curing fish outside of the bays and harbors, the argument would apply equally well to the small bays and harbors, and, indeed, to the three mile coast line also.

In the case of the *Direct United States Cable Company* versus *The Anglo-American Telegraph Company*, reported in *Law Reports* 2 *App. Cas.* 394, this question was discussed in the Judicial Committee of the Privy Council. Treating of the general rule of international law, Lord Blackburn said:

Passing from the common law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbors, estuaries, and bays land-locked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose. * * * It does not appear to their lordships that jurists and text-writers are agreed what are the rules as to dimensions and configurations, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination.

Coming, however, to this particular convention, these are the words of the judgment:

There was a convention made in 1818 between the United States and Great Britain relating to the fisheries of Labrador, Newfoundland and His Majesty's other possessions in North America, by which it was agreed that the fishermen of the United States should have the right to fish on part of the coasts (not including the part of the island of Newfoundland on which Conception Bay lies) and should not enter any 'bays' in any part of the coast except for the purposes of shelter and repairing damages, and purchasing wood, and obtaining water, and no other purposes whatever. *It seems impossible to doubt that this convention applied to all bays, whether large or small, on that coast*, and consequently to Conception Bay.

This decision has been treated with respect by American authorities, to whom the doctrine laid down was by no means new. In the case of *Stetson* versus *The United States*, the Court of Commissioners of Alabama Claims gave this decision of the Privy Council as a reason for holding that Chesapeake Bay was "wholly within the territorial jurisdiction and authority of the Government of the United States." The material parts of this judgment (32 *Alb L. J.* 484) are as follows:—

The learned counsel on behalf of the United States insists that the claimants ought not to recover—

First.—Because all the waters of the Chesapeake Bay, even such as are more than a marine league from shore, are territorial waters of the United States, and subject to the exclusive control and jurisdiction thereof, and that in consequence the "Alleganean" was not attacked nor the damage done on the "high seas," within the meaning of the term as used in the Act under which judgment is claimed.

Second.—Because the persons who destroyed the ship and the vessels employed by them, did not constitute a "Confederate cruiser" within the meaning of that term as used in the statute.

The term "high seas," as used by legislative bodies, the courts and text-writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts, it is held to mean the waters of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights, the "great highway of nations," it has been held to mean only so much of the ocean as is exterior to a line running parallel with the shore and some distance therefrom, commonly such distance as can be defended by artillery from the shore, and therefore a cannon-shot or a marine league (three nautical or four statute miles.) This court, after very able argument by learned counsel, and after much deliberation, has held that the term was used in the Act of 5th June, 1882, in the same sense in which it is employed by the international law writers. Rich *vs.* United States.

From this it necessarily follows that such portions of the waters of Chesapeake Bay as are within four miles of either shore form no part of the high seas. But much of the Bay is more than four miles from shore, and is accessible from the ocean without coming within that distance of the land. The distance between Cape Henry and Cape Charles, at the entrance of the bay, is said to be twelve miles, and it is stated that lines starting from points between the capes, four miles from each, and running up the bay that distance from either shore, would not intercept each other within 125 miles from the starting points. The evidence shows that the "Alleganean" was anchored between such lines at the time of destruction. Was she upon the high seas as the court defines the statutory term?

By common agreement, all the authorities assert that there are arms or inlets of the ocean which are within territorial jurisdiction, and are not high seas

Sir R. Phillimore (1 Int. Law, 200) says:

"Besides the rights of property and jurisdiction within the limits of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may under special circumstances be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are inclosed, but not entirely surrounded, by lands belonging to one and the same state * * * * *

"Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers."

"Grotius (Bk. II., ch. 3, secs. 7, 8) and Vattel (Vol. 1, bk. 1, ch. 22, sec. 291) assert substantially the same doctrine, and the later writers follow them. Wheat, Int. Law (Dana's 8th ed., p. 255) says:—

"The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers and adjacent parts of the sea, inclosed by headlands, belonging to the same State. The usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, along the coasts of the state. Within these limits its right of property and territorial jurisdiction are absolute, and exclude those of every other nation."

Chancellor Kent avows the general doctrine and makes much broader claims in reference to the jurisdiction of the United States over adjacent waters, and says (Com., vol. 1, p. 29, 30):

"Considering the great line of the American coasts we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction, and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lands stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod, and from Nantucket to Montaul Point, and from that point to the capes of the Delaware, and from the south Cape of Florida to the Mississippi."

Dr. Woolsey (Int. Law, sec. 60) upholds the general doctrine, but thinks the claims of Chancellor Kent are too broad, and rather "out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times."

Dr. Wharton (Int. Law, sec. 192) finished the subject with the conclusion: "That it would seem more proper to adopt the test of cannon-shot * * * * which would, in case of waters whose headlands belong to the same Sovereign, exclude all bays more than eighteen miles in diameter, assuming the range of cannon-shot to be nine miles. But this should be made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nation."

We are quite certain that none of the American courts have passed upon this subject, although decisions holding that specified waters are within or without the jurisdiction of the admiralty courts are numerous. The question has, however, been before the English courts upon two occasions at least.

Reg. *v.* Cunningham (Bell's Crown Cases, 72) was the case of a crime committed upon an American vessel lying in the British Channel, about three-quarters of a mile off the shores of the County of Glamorgan, in Wales, but below or exterior to low-water mark, and perhaps ten miles from the shores of the County of Somerset, in England. The prisoners were indicted and tried in Glamorgan. The question was whether the crime was committed within the County of Glamorgan or upon the high seas. It was held that it was within the county. This crime was committed, it is true, within the marine league from shore, but the court did not rest its conclusion upon that ground. Lord Chief Justice Cockburn, delivering the opinion of the Court, said:

"Looking at the local situation of this sea, it must be taken to belong to the counties, respectively, by the shores of which it is bounded. * * * * The whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded."

But perhaps the most thoroughly considered and important case is that of *Direct U. S. Cable Co. vs. Anglo American Tel. Co.* in the House of Lords (2 App. Cas., 349). It came up on an appeal from the Supreme Court of Newfoundland against an order confirming an injunction preventing the Direct Cable Company from landing their wire upon the soil of Newfoundland, on the ground that it would be an infringement of the rights of the Anglo-American Company. The cable, as a matter of fact, was buoyed in Conception Bay, more than a marine league from the shore, purposely to avoid coming within territorial jurisdiction. But it was asserted that the whole of Conception Bay was within the territory and jurisdiction of Newfoundland. The Supreme Court of the Province so held, and the determination was upheld by the House of Lords in a somewhat elaborate opinion.

This opinion states that Conception Bay is a body of water having an average width of fifteen miles, a distance of forty miles from the head of one of the capes at the entrance and fifty miles to the other, and a distance of twenty miles between the headlands. Coming to the question, the Lords say (p. 419):

"We find a universal agreement that harbors, estuaries and bays, land-locked, belonging to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation

occupying the adjoining coasts also occupies the bay, it is a part of the territory, and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation, some suggesting therefore a width of cannon-shot from shore to shore, some a cannon-shot from each shore, some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the British Channel which, in *Reg.* vs. *Cunningham*, was held to be in the county of Glamorgan.

"It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts, and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their lordships from attempting to fulfil it. But in their opinion it is not necessary. It seems to them that in point of fact the British Government has for a long time exercised dominion over this bay, and that their claim has been acquiesced in by other nations. * * * * This would be very strong in the tribunals of any country to show that by prescription this bay is a part of the exclusive territory of Great Britain. In a British tribunal it is decisive."

We must now examine the local circumstance touching the status of Chesapeake Bay, and then determine whether those waters should be held to be the open ocean or jurisdictional waters of the United States in the light of these authorities.

The headlands are about twelve miles apart, and the bay is probably nowhere more than twenty miles in width. The length may be 200 miles. To call it a bay is almost a misnomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely compassed out by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It cannot become an international highway; it is not and cannot be made a roadway from one nation to another.

The second charter of King James I to the Virginia Campany in the year 1609, granted 'all those lands, countries and territories situate, lying and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the sea coast to the northward 200 miles, and all along the sea-coast to the southward 200 miles, and all that space and circuit of land lying from the sea coast to the precinct aforesaid up into the land throughout from sea to sea, west and northwe-t, together with all the soils, grounds, havens, ports * * * * rivers, waters, fishings, &c.

This language would seem to place Chesapeake Bay within the boundary lines of Virginia. A line running north (as near as may be) from Point Comfort along the sea coast crosses the mouth of the Bay from Cape Henry to Cape Charles.

By the King James' charter to Lord Baltimore in 1632, erecting the territory of Maryland, the southern boundary line is made to cross Chesapeake Bay from Smith's Point at the mouth of the Potomac River to Watkin's Point, on the eastern shore, which apparently places a portion of this bay within the territory of Maryland. Had this not been intended, the boundary would presumably have followed the shore line around the bay.

It is a part of the common history of the country that the States of Virginia and Maryland have from the earliest territorial existence claimed jurisdiction over these waters, and it is of general knowledge that they still continue to do so.

The legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States. The Acts of July 31, 1789, ch. 5; August 4, 1790, ch. 35; and March 2, 1799, ch. 128, sec. 11, establishing revenue districts, provided that "the authority of the officers of the district (Norfolk to Portsmouth) shall extend over all the waters, shores, bays, harbors and inlets comprehended within a line drawn from Cape Henry to the mouth of James' River." By section 549, Rev. Stat. U. S., the eastern judicial district for Virginia embraces the "residue of the States' not included in the western district." The boundaries of the State include all of Chesapeake Bay south of a line running from Smith's Point to Watkin's Point, and hence the eastern district must embrace so much of the bay.

The position taken by this Government and by England and France in the matter of the British brig "Grange," captured in Delaware Bay, in 1793, by the French steamer 'l'Embuscade' (1 Am. State Papers, 147, 149), has, it seems to us, an important bearing upon the question under discussion. The brig was seized and the crew made prisoners, the two foreign Governments being at war. The British Government must have demanded that the United States compel France to release the captured vessel on the ground that the seizure was unlawful, as having been made in our territorial and neutral waters. The State papers do not show this demand, but it is not material. The opinion of the Attorney General was asked, and was given somewhat elaborately by Mr. Randolph (1 Op. Att'ys Gen'l, 32.) It quotes the text writers, and concludes that the whole of Delaware Bay is within the territorial jurisdiction of the United States, regardless of the marine league or cannon-shot limit from the shore. The learned Attorney General says: "In like manner is excluded every consideration of how far the spot of seizure was capable of being defended by the United States, for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the States of New Jersey and Delaware, up to the middle of the river, supersede the necessity of such an investigation? No. The cornerstone of our claim is that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea."

Acting upon the opinion of the Attorney General, the Secretary of State, Mr. Jefferson, demanded that France should make restitution of the "Grange," and set the prisoners taken upon her at liberty, which demand was promptly and cheerfully complied with by the French Government.

If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the "Grange" is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign powers, when passions were excited, and when such acquiescense was greatly against the immediate interests of one of the combatants, as well as against the general interest of both.

It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles.

Reflection upon the subject has caused the court to consider this question of very considerable national importance. Contingencies might arise which would make it of very grave import. The 'high sea' belongs to all alike. It is the great highway of nations. One cannot lawfully do anything upon it which any other has not the right to do. One cannot exercise sovereignty over the other. Can an American Court concede so much as to Chesapeake Bay? Other nations, by common consent of all, have well recognized peaceable rights, even in our territorial waters. Ought we to admit that they have any rights hostile to the United States, or can we permit belligerent operations between foreign nations within the shores of this bay? What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?

Considering therefore the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it, that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned, that it cannot become the pathway from one nation to another, and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the British Channel and Conception Bay, and bearing in mind the matter of the brig "Grange," and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States, and no part of the "high seas" within the meaning of the term as used in section 5 of the Act of June 5, 1872.

Daniel Webster, then Secretary of State, 6th July, 1852, wrote thus:

It would appear that by a strict and rigid construction of this article, fishing vessels of the United States are precluded from entering into the bays or harbors of the British Provinces, except for the purposes of shelter, repairing damages, and obtaining wood and water. A bay, as is usually understood, is an arm or recess of the sea, entering from the ocean between capes and headlands, and the term is applied equally to small and large tracts of water thus situated; it is common to speak of Hudson's Bay, or the Bay of Biscay, although they are very large tracts of water.

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

Mr. Webster, it is true, concludes this paper by a paragraph containing the words: "Not agreeing that the construction thus put upon the Treaty is conformable to the intentions of the contracting parties," but these words, coupled with what has just been quoted, rather imply that the contracting parties intended to say something different from what they actually said, than that what they have said will bear any other meaning than the British interpretation.

Some American writers have treated this passage as ill-considered. This criticism can hardly be applicable to the deliberate, diplomatic written utterance of so great a statesman. The question was not new in 1852. In March, 1841, Mr. Stevenson, United States Minister at London, wrote to Lord Palmerston setting forth the contentions on both sides. Seizures had been made for fishing in the Bay of Fundy long before. Mr. Everett, on May 25, 1844, wrote thus to Lord Aberdeen:

It was notoriously the object of the article of the treaty in question to put an end to the difficulties which had grown out of the operations of the fishermen from the United States along the coasts and upon the shores of the settled portions of the country, and for that purpose to remove their vessels to a distance not exceeding three miles from the same. In estimating this distance the undersigned admits it to be *the intent of the treaty as it is in itself reasonable to have regard to the general line of the coast, and to consider its bays, creeks and harbors - that is, the indentations usually so accounted—as included within that line.* But the undersigned cannot admit it to be reasonable, instead of thus following the general directions of the coast, to draw a line from the southwesternmost point of Nova Scotia to the termination of the northeastern boundary between the United States and New Brunswick, and to consider the arms of the sea which will thus be cut off, and which cannot, on that line, be less than sixty miles wide, as one of the bays on the coast from which American vessels are excluded. By this interpretation the fishermen of the United States would be shut out from the waters distant, not three but thirty miles, from any part of the colonial coast. The undersigned cannot perceive that any assignable object of the restriction imposed by the Convention of 1818, on the fishing privileg e accorded to the citizens of the United States by the Treaty of 1783, requires such a latitude of construction. It is obvious that by the terms of the treaty the farthest distance to which fishing vessels of the United States are obliged to hold themselves from the colonial coasts and bays is three miles. But owing to the peculiar configuration of these coasts, there is a succession of bays indenting the shores both of New Brunswick and Nova Scotia, within any distance not less than three miles—a privilege from the enjoyment of which they will be wholly excluded—in this part of the coast, if the broad arm of the sea which flows up between New Brunswick and Nova Scotia is itself to be considered one of the forbidden bays.

Here the contention is merely against the Bay of Fundy being regarded as a bay within the meaning of the treaty on account of its alleged exceptional character.

The "Washington" had been seized for fishing in the Bay of Fundy, ten miles from shore. The "Argus" was seized more than three miles from shore, under a claim that the headland line should be drawn from Cape North to the northern head of Cow Bay in Cape Breton.

The following citations from the brief presented to the Halifax Commission, on behalf of Her Majesty's Government, will be in point:

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

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

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

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

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

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

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

that portion of the sea which is without the *fauces terræ* on the sea-coast, in contradistinction to that which is surrounded or inclosed between narrow headlands or promontories; *for if the 'high seas' meant to include other waters, why should the supplemental words, 'arm of the sea, river, creek, bay,' &c., have been used?*" (United States *v.* Grush, 5 Mason's Admiralty Reports, p. 298.)

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

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

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

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

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

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

Again, the interpretation which is given to the measure of distance from bays must be given to the measure of distance from creeks and harbors, both of which, by the municipal law of the United States, equally as of Great Britain, are *infra corpus comitatus*, and whose waters are subject to the provisions of the municipal law precisely as the shores of the land itself. But it may assist in determining this question to keep in mind the rule that in contracts "on doit interpréter une clause par les autres clauses contenues dans l'acte, soit qu'elles précèdent ou suivent." (Pothier, *Obligations*, No. 96.) In other words, a subsequent clause may serve to interpret a former clause, if the latter be at all ambiguous Accordingly, we find the renunciation of the liberty to fish within three marine mile of any of the bays, creeks, or harbors of His Britannic Majesty's dominions followed by the *proviso* that American fishermen shall be permitted to *enter* such bays and harbors for certain specified purposes other than taking fish. In other words, they may prosecute their voyage for other purposes than fishing *within the entrance* of any bay or harbor, but may not take fish within three marine miles of any bay or harbor, *i. e.*, within three marine miles of the *entrance* of any bay or harbor. If this interpretation be not adopted, the *proviso* would be absurd; for if American fishermen are *implicitly* permitted to fish within three marine miles of the *shore* of any bay or harbor, they are permitted to *enter* such bay or harbor, if the breadth of the mouth be more than six miles, and the distance from the head of the bay or harbor from the entrance be more than three miles, for another purpose than for the purpose of shelter, or of repairing damages, or of purchasing wood, or of obtaining water.

But the convention expressly says, "*for no other purpose whatever.*" If, therefore, they cannot *enter* any bay or harbor for the purpose of prosecuting their occupation of fishing, it cannot be intended that they should be allowed to fish within three marine miles of the *shore* of any bay or harbor, as the two provisions would be inconsistent. Accordingly, as the question resolves itself into the alternative interpretation of *shore* or *entrance*, it follows that the correct interpretation which makes the language of the entire article consistent with itself is within three marine miles of the *entrance* of any bay, such entrance or mouth being, in fact, *part of the bay itself*, and the bay being approachable by fishing vessels only in the direction of the mouth or entrance.

That a bay of sea-water wider than six miles at its mouth may be within the body of a county is laid down by Lord Hale in his treatise *De Jure Maris et Brachiorum ejusdem* (Hargrave's *Tracts*, chapter 4): "An arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." This doctrine has been expressly adopted by Mr. Justice Story in De Lovio *v.* Boit (2 Gallison's *Reports*, p. 426, 2d ed.), in which, to use the language of Mr. Wheaton's argument in United States *v.* Bevans (3 Wheaton's *Reports*, p. 388), "all the learning on the civil and criminal jurisdiction of the admiralty is collected together." There is, consequently, no doubt that the jurisdiction of the municipal law over bays is not limited to bays which are less than six miles in breadth or three miles in depth, since the general rule is, as was observed by the same eminent judge in United States *v.* Grush (5 Mason, p. 300): "That such parts of rivers, arms, and creeks of sea, are deemed to be within the bodies of counties, where persons can see from one side to the other.

That the jurisprudence of the United States has recognized the principle of courts of municipal law exercising jurisdiction over bays at a distance more than three miles from the shore, is shown by the decision of the Supreme Court in the case of Church *v.* Hubbard. (2

Cranch's *Reports*, p. 187.) In this case an American brigantine, the "Aurora," when at anchor in the Bay of Para, on the coast of Brazil, and four or five leagues from Cape Paxos, was seized and condemned by the Portuguese authorities for a breach of the laws of Portugal on a matter of illicit trade. Chief Justice Marshall, in delivering the opinion of the court, said, "Nothing is to be drawn from the laws or usages of nations which proves that the seizure of the "Aurora" by the Portuguese Government was an act of lawless violence."

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

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

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

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

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

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

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

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

The words used in the 1st Article of the Convention of 1818 are, "On the coast of Newfoundland, on the shores of the Magdalen Islands, on the coasts, bays, harbors, and creeks from Mount Joly," &c.

The word "on" is thus used as applicable to shores, coasts, bays, creeks, and harbors, and the United States renounce any liberty to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors.

It is admitted that the liberty to fish is renounced within three miles of the coasts. If the contention of the United States, that this renunciation applies only to a specified distance from the shores of the coasts, bays, creeks, and harbors, and is to be ascertained by a line following the bays, creeks, and the indents thereof at a distance of three miles, be right, then shores, or coasts if synonymous with shores, is the only necessary word, and the words, "bays, creeks, and harbors," are without meaning—a construction which would be contrary to the rule which requires that effect be given to every word.

The word "bay," then, must have a meaning.

The distance, therefore, from headland to headland, ought not and cannot be confined to a measure of six miles in order to give exclusive dominion within the bay formed by the headlands.

The general principle is that navigable waters included in bays between two headlands belong to the sovereign of the adjoinining territory as being necessary to the safety of the nation and to the undisturbed use of the neighboring shores. (Puffendorf, b. 3, c. 5; Vattel, b. 1, c. 33.)

The difficulty of limiting the extent to which this privilege should be carried is thus stated by Azuni:—

"It is difficult to draw any precise or determinate conclusion amidst the variety of opinions as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories and beyond those portions of the sea which are embraced by

harbors, gulfs, bays, &c., and estuaries, and over which its jurisdiction unquestionably extends."—Azuni on the Maritime Laws of Europe, 1, p. 206.

After commenting on this passage of Azuni, which he cites, Kent says:—

"Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction, and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the cape of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between some other maritime powers, the use of the waters of our coast far beyond the reach of cannon shot, as cruising ground for belligerent purposes.

Chancellor Kent therefore considers that some distance between the headlands of more than six miles would properly be insisted on by the United States for securing the objects above mentioned, the safety of the territory, and other lawful ends.

The right of exclusive fishing is undoubtedly a lawful end. (Vattel, b. 1, c. 23.) And where the nation has an exclusive right it is entitled to keep the exercise of that right in its own power, to the exclusion of others.

In the Convention of 1818 no limited construction was put upon the word "bay." The treaty employs as distinct terms the words "coasts, bays, creeks and harbors." "Bay," therefore, should be taken in the plain and ordinary sense of the term, to mean a portion of the sea inclosed between headlands, which, together with the shores within them, belong to the same nation.

The entrance to this bay is marked or ascertained by a line drawn from headland to headland, whatever be the depth of the bay, and though the line drawn from headland to headland exceed six marine miles.

The United States renounced the right to take fish in such bays. The Treaty of Washington, 1871, frees them from such renunciation. The restriction or exclusion is altogether removed. The case of the Queen *vs.* Keyn (L. R. 2 Ex. Div. 63), so much relied on for the case of the United States, affords no support whatever to the position there taken. The question involved in that case was whether or not a foreigner commanding a foreign vessel could legally be convicted of manslaughter committed whilst sailing by the *external coast of England*, within three miles from the shore, in the prosecution of a voyage from one foreign port to another.

The court, by a majority of seven judges to six, held the conviction bad, on the ground that the jurisdiction of the common-law courts only extended to offenses committed within the realm, and that at common law such realm did not extend on the external coasts beyond low-water mark. None of the judges, however, doubted that Parliament had full power to extend the laws of the realm to a zone of three miles around the outer coast if it saw fit so to do. The Lord Chief Justice of England, by whose casting judgment the conviction was quashed, not only guarded himself expressly against being understood as throwing any doubt whatever upon the jurisdiction of the courts over inland or territorial waters, but emphatically affirmed such jurisdiction. "But," says he (p. 162), "only so much of the land of the outer coast as was uncovered by the sea, was held to be within the body of the adjoining county. If an offense was committed in a bay, gulf, or estuary, *inter fauces terræ*, the common law would deal with it because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties; but along the coast, on the external sea, the jurisdiction of the common law extended no farther than to low-water mark." Again, at p. 197, he thus expresses himself: "To come back to the subject of the realm, I cannot help thinking that some confusion arises from the term 'realm' being used in more than one sense. Sometimes it is used, as in the statutes of Richard II, to mean the land of England *and the internal sea within it*, sometimes as meaning whatever the sovereignty of the Crown of England extended or was supposed to extend over. When it is used as synonymous with territory, I take the true meaning of the term 'realm of England' to be the territory to and over which the common law of England extends. In other words, all that is within the body of any county, to the exclusion of the high seas, which come under a different jurisdiction only because they are not within any of those territorial divisions into which, among other things, for the administration of the law, the kingdom is parceled out. At all events I am prepared to abide by the distinction taken in the statutes of Richard II, between the realm and the sea." This clearly shows that as far back as the time of Richard II., beyond which legal memory is not permitted to run, the realm of England was known and understood to include within its bounds those inland waters which were inclosed from the high seas between headlands.

Continuously the right to exclude from the bays and harbors was insisted on by the British and Colonial Governments.

A copy of the letter of Mr. Forsyth to Mr. Stephenson, dated 27th March, 1841, having been sent to Lord Falkland, Lieutenant-Governor of Nova Scotia, on the 28th April, 1841, Lord Falkland wrote in reply to Lord John Russell, Secretary for the Colonies, stating that the greatest anxiety was felt by the inhabitants of the Provinces that the Convention of 1818 should be strictly enforced, and enclosing a copy of a report of a Committee on the fisheries of Nova Scotia, which had been adopted by the House of Assembly, and a case which had been stated at the request of that body for the opinion of the law officers of the Crown in England.

The questions submitted for the opinion were as follows :—

1. Whether the Treaty of 1783 was annulled by the war of 1812, and whether citizens of the United States possess any right of fishery in the waters of the Lower Provinces other than ceded to them by the Convention of 1818, and if so, what right?

2. Have American citizens the right, under that convention, to enter any of the bays of this Province to take fish, if, after they have so entered, to prosecute the fishery more than three marine miles from the shores of such bays, or should the prescribed distance of three marine miles be measured from the headlands, at the entrance of such bays, so as to exclude them?

3. Is the distance of three marine miles to be computed from the indents of the coasts of British America, or from the extreme headlands, and what is to be considered a headland?

4. Have American vessels, fitted out for a fishery, a right to pass through the Gut of Canso, which they cannot do without coming within the prescribed limit, or to anchor there or to fish there, and in casting bait to lure fish in the track of the vessels fishing, within the meaning of the convention?

5. Have American citizens a right to land on the Magdalen Islands, and conduct the fishery from the shores thereof, by using nets and seines, or what right of fishery do they possess on the shores of those islands, and what is meant by the term shore?

6. Have American fishermen the right to enter the bays and harbors of this Province for the purpose of purchasing wood or obtaining water, having provided neither of these articles at the commencement of their voyage in their own country, or have they the right only of entering such bays and harbors in cases of distress, or to purchase wood and obtain water, after the usual stock of those articles for the voyage of such fishing craft has been exhausted or destroyed.

7. Under existing treaties, what rights of fishery are ceded to the citizens of the United States of America, and what reserved for the exclusive enjoyment of British subjects?

These questions were submitted to the law officers of the Crown, Sir J. Dodson and Sir T. Wylde (afterwards Lord Truro), and answered as follows :—

We have the honor to report that we are of the opinion that the Treaty of 1783 was annulled by the war of 1812, and we are also of opinion that the rights of fishery of the citizens of the United States must now be considered as defined and regulated by the Convention of 1818, and with respect to the general question, "If so, what right?" we can only refer to the terms of the Convention as explained and elucidated by the observations which will occur in answering the other specific queries.

2. Except within certain defined limits, to which the query put to us does not apply, we are of opinion that, by the terms of the treaty, American citizens are excluded from the right of fishing within three miles off the coast of British America, and that the prescribed distance of three miles is to be measured from the headlands or extreme points of land next the sea of the coast, or of the entrance of the bays, and not from the interior of such bays or inlets of the coast, and consequently that no right exists on the part of the American citizens to enter the bays of Nova Scotia, there to take fish, although the fishing, being within the bay, may be at a greater distance than three miles from the shore of the bay, as we are of the opinion that the term headland is used in the treaty to express the part of the land we have before mentioned, excluding the interior of the bays and the inlets of the coast.

4. By the Treaty of 1818 it is agreed that American citizens should have the liberty of fishing in the Gulf of St. Lawrence, within certain defined limits, in common with British subjects, and such treaty does not contain any words negativing the right to navigate the passage of the Gut of Canso, and therefore it may be conceded that such right of navigation is not taken away by that convention, but we have now attentively considered the course of navigation to the Gulf by Cape Breton, and likewise the capacity and situation of the passage of Canso, and of the British dominions on either side, and we are of opinion that, independently of treaty, no foreign country has the right to use or navigate the passage of Canso, and attending to the terms of the convention relating to the liberty of fishery to be enjoyed by the Americans, we are also of the opinion that that convention did not either expressly or by implication concede any such right of using or navigating the passage in question. We are also of opinion that casting bait to lure fish in the track of any American vessel navigating the passage would constitute a fishing within the negative terms of the convention.

5. With reference to the claim of a right to land on the Magdalen Islands, and to fish from the shores thereof, it must be observed that, by the Treaty, the liberty of drying and curing fish (purposes which could only be accomplished by landing) in any of the unsettled bays, &c., of the southern part of Newfoundland, and of the coast of Labrador, is specifically provided for, but such liberty is distinctly negatived in any settled bay, &c., and it must therefore be inferred that if the liberty of landing on the shores of the Magdalen Islands had been intended to be conceded, such an important concession would have been the subject of express stipulation, and would necessarily have been accompanied with a description of the inland extent of the shore over which such liberty was to be exercised, and whether in settled or unsettled parts, but neither of these important particulars is provided for, even by implication, and that, among other considerations, leads us to the conclusion that American citizens have no right to land or conduct the fishery from the shores of the Magdalen Islands. The word "shore" does not appear to be used in the convention in any other than the general or ordinary sense of the word, and must be construed with reference to the liberty to be exercised upon it, and would therefore comprise the land covered with water, as far as could be available for the due enjoyment of the liberty granted.

6. By the convention the liberty of entering the bays and harbors of Nova Scotia, for the purpose of purchasing wood and obtaining water, is conceded in general terms, unrestricted by any restriction, expressed or implied, limiting it to vessels duly provided at the commencement of the voyage, and we are of the opinion that no such condition can be attached to the enjoyment of the liberty.

7. The rights of fishery ceded to the citizens of the United States, and those reserved for the exclusive enjoyment of British subjects, depend altogether upon the Convention of 1818, the only existing Treaty on this subject between the two countries, and the material points arising thereon have been specifically answered in our replies to the preceding queries.

We have, &c.,

(Sd.) J. DODSON,
(Sd.) THOS. WILDE.

(Sd.) Viscount Palmerston, K. B., &c.

This opinion has excited much comment, because it referred to the word " headland " as having been used in the Treaty, whereas that word is not there. But it is submitted that a careful examination of the opinion will lead to the conclusion that it did not by any means rest solely on the assumption that the word "headland" had been used. The language of the third paragraph of the opinion seems to make this plain.

From that time forward, until a comparatively recent period, the fishermen of the United States were excluded from the bays by lines drawn from headland to headland, except as to the Bay of Fuudy, which, in 1845, was opened to American fishermen, as a privilege, under circumstances which will presently be mentioned, and the purpose and right were announced of preventing them from passing through the Strait of Canso.

In 1843 the United States' fishing schooner "Washington," of Newburyport, was seized in the Bay of Fundy for fishing ten miles from the coast. Her seizure was made the subject of much diplomatic correspondence.

In a letter from Lord Aberdeen to Mr. Everett, dated the 15th April, 1844, the former says:—

Mr. Everett, in submitting this case, does not cite the words of the Treaty, but states, in general terms, that by the first article of such Treaty the United States renounced any liberty heretofore enjoyed, &c., &c. Upon reference, however, to the words of the Treaty, it will be seen that the American vessels have no right to fish, and indeed are expressly debarred from fishing in any bay on the coast of Nova Scotia.

* * * If the Treaty was intended to stipulate simply that American fishermen should not take fish within three miles of the coast of Nova Scotia, &c., &c, there was no occasion for using the word 'bay' at all. But the proviso at the end of the article shows that the word "bay" was used designedly, for it is expressly stated in that proviso that under certain circumstances the American fishermen may enter bays, by which it is evidently meant that they may, under these circumstances, pass the sea-line which forms the entrance to the bay.

This contention was replied to by Mr. Everett, but the British authorities adhered to their interpretation. Mr. Everett claimed that the Bay of Fundy had exceptional characteristics. He said on 25th May, 1844:

The existing doubt as to the construction of the provision arises from the fact that a broad arm of the sea runs up to the north-east, between the Provinces of New Brunswick and Nova Scotia. This arm of the sea being commonly called the Bay of Fundy, though not in reality possessing all the characters usually implied by the term "bay" has of late years been claimed by the provincial authorities of Nova Scotia to be included among " the coasts, bays, creeks and harbors" forbidden to American fishermen.

On 10th March, 1845, Lord Aberdeen wrote to Mr. Everett thus:

The undersigned will confine himself to stating, that after the most deliberate re-consideration of the subject, and with every desire to do full justice to the United States, and to view the claims put forward on behalf of United States' citizens in the most favorable light, Her Majesty's Government are nevertheless still constrained to deny the right of United States' citizens under the Treaty of 1818, to fish in that part of the Bay of Fundy, which, from its geographical position, may properly be considered as included within the British possessions.

Her Majesty's Government must still maintain—and in this view they are fortified by high legal authority—that the Bay of Fundy is rightfully claimed by Great Britain, as a bay within the meaning of the Treaty of 1818. And they equally maintain the position which was laid down in a note of the undersigned, dated the 15th of April last, that, with regard to the other bays on the British American coast, no United States' fisherman has, under that convention, the right to fish within three miles of the entrance of such bays, as designated by a line drawn from headland to headland at that entrance.

But while Her Majesty's Government still feel themselves bound to maintain these positions as a matter of right, they are nevertheless not insensible to the advantages which would accrue to both countries from a relaxation of the exercise of that right to the United States, as conferring a material benefit on their fishing trade, and to Great Britain and the United States, conjointly and equally, by the removal of the fertile source of disagreement between them.

Her Majesty's Government are also anxious at the same time that they uphold the just claims of the British Crown, to evince by every reasonable concession their desire to act liberally and amicably towards the United States.

The undersigned has accordingly much pleasure in announcing to Mr. Everett the determination to which Her Majesty's Government have come, to relax in favor of the United States' fishermen that right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States' fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach, except in the cases specified in the Treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.

In thus communicating to Mr. Everett the liberal intentions of Her Majesty's Government, the undersigned desires to call Mr. Everett's attention to the fact that the produce of the labor of the British colonial fishermen is at the present moment excluded by prohibitory duties on the part of the United States from the markets of that country, and the undersigned would submit to Mr. Everett that the moment at which the British Government are making a liberal concession to United States' trade might well be deemed favorable for a counter concession on the part of the United States to British trade, by the reduction of the duties which operate so prejudicially to the interests of the British colonial fishermen.

Remonstrances from the Governments of Nova Scotia and New Brunswick, against this policy being followed, as regards the other bays on the coasts, and on 17th September, 1845, Lord Stanley wrote to Lord Falkland stating that the policy would not be extended to the other bays.

It is observed by Sabine that nothing passed on this subject between the two Cabinets for more than six years, "though England retraced no steps after opening the Bay of Fundy."

Seizures continued to be made on the coasts of New Brunswick and Nova Scotia, including the Bay Chaleurs.

The case of the schooner "Washington" was made one of the matters of reference to the Commission appointed to consider the claims of subjects of the two countries, under the Convention of the 8th February, 1853. The Commissioners disagreed, and Mr. Joshua Bates was chosen umpire and made the following award:

The schooner "Washington" was seized by the revenue schooner "Julia," Captain Darby, while fishing in the Bay of Fundy, ten miles from the shore, on the 10th of May, 1843, on the charge of violating the Treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the Crown by the judge of the Vice-Admiralty Court, and, with her stores, ordered to be sold. The owners of the "Washington" claim for the value of the vessel and appurtenances, outfits, and damages, $2,483, and for eleven years' interest, $1,638, amounting together to $4,121. By the recent Reciprocity Treaty, happily concluded between the United States and Great Britain, there seems no chance for any further dispute in regard to the fisheries.

It is to be regretted that, in that treaty, provision was not made for settling a few small claims of no importance in a pecuniary sense, which were then existing; but, as they have not been settled, they are now brought before this Commission.

The "Washington" fishing schooner was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia.

It will be seen by the Treaty of 1783 between Great Britain and the United States that the citizens of the latter, in common with the subjects of the former, enjoyed the right to *take* and *cure* fish on the shores of all parts of Her Majesty's dominions in America used by British fishermen; but not to dry fish on the Island of Newfoundland, which latter privilege was confined to the shores of Nova Scotia, in the following words: "And American fishermen shall have liberty to dry and cure fish on any of the unsettled bays, harbors and creeks of Nova Scotia; but, as soon as said shores shall become settled, it shall not be lawful to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

The Treaty of 1818 contains the following stipulations in relation to the fishery:—

"Whereas differences have arisen respecting the liberty claimed by the United States *to take, dry*, and *cure* fish on certain *coasts, harbors*, and *creeks* of His Britannic Majesty's dominions in *America*, it is agreed that the inhabitants of the United States shall have, in common with the subject of His Britannic Majesty, the right to fish on certain portions of the southern, western, and northern coasts of Newfoundland; and, also, on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle; and thence, northwardly, indefinitely along the coast; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of the said described coasts until the same become settled, and the United

States renounce the liberty *heretofore enjoyed* or claimed by the inhabitants thereof to take, dry or cure fish *on or within three marine miles* of any of the coasts, bays, creeks, and harbors of His Britannic Majesty's dominions in America, not included in the above-mentioned limits: *Provided however*, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved for them."

The questions turns, as far as relates to the treaty stipulations, on the meaning given to the word "bays" in the Treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and *bays* of Newfoundland; but they had that right on the shores, coasts, *bays*, *harbors* and *creeks* of Nova Scotia; and, as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores *of the bays*, &c. By the Treaty of 1818 the same right is granted to cure fish on the coasts. bays, &c., of Newfoundland; but the Americans relinquished that right, *and the right to fish within three miles* of the *coasts, bays, &c., of Nova Scotia.* Taking it for granted that the framers of the treaty intended that the word "bay" or "bays" should have the same meaning in all cases, and no mention being made of headlands. there appears no doubt that the "Washington," in fishing ten miles from the shore, violated no stipulations of the treaty.

It was urged, on behalf of the British Government, that by "coasts," "bays," &c., is understood an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy, against Americans and others, making the latter a British bay. This doctrine of the headlands is new, and has received a proper limit in the convention between France and Great Britain of 2nd of August, 1839; in which "it is agreed that the distance of three miles, fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long; it has several bays on its coast; thus the word "bay," as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The Islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic Ocean. The conclusion is, therefore, in my mind, irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the Treaties of 1783 and 1818.

The owners of the "Washington," or their legal representatives, are, therefore, entitled to compensation; and are hereby awarded, not the amount of their claim (which is excessive), but the sum of $3,000, due on the 15th January, 1855.

It will be observed, as has been already stated, that the decision of Mr. Bates settled no principle whatever, but merely disposed of the pecuniary claim of the owners of the "Washington." Indeed that claim was the only matter referred in regard to this seizure. The Convention of 1853 was for the settlement of outstanding claims and no questions relating to the rights or powers of either country, or as to treaty interpretations were referred. Indeed it would have been absurd that either country should have been willing to accept the decision of Mr. Bates on a question of international law, as to the rights of either, or as to any interpretation of a treaty. Mr. Bates was in no sense an expert in regard to such matters; he was not even engaged in public affairs, and had only been known as a junior partner in an American branch of an English banking house. Of such little importance were the references considered, that the referee was chosen by lot in any case of disagreement by the commissioners. The reasons given by the umpire, such as they are, apply only to the Bay of Fundy, and he says, "the conclusion is, therefore, in my mind, irresistible that the Bay of "Fundy is not a British bay, nor a 'bay' within the meaning of the "word used in the Treaties of 1783 and 1818."

Mr. Bates said:

This doctrine of the headlands is new, and has received a proper limit in the Convention between France and Great Britain, of the 2nd August, 1839, in which it is agreed that the distance of three miles fixed as a general limit for the exclusive right of the fisheries upon the coasts of the two countries was with respect to bays, the mouths of which do not exceed ten miles in width, being measured from a straight line drawn from headland to headland,

We have already seen that the doctrine was by no means new—that it had been raised and enforced for nearly forty years previously in regard to the bays of British North America, and had for a long time been practically acquiesced in on the part of the United States, and had been fully explained as an important and practical question by Mr. Forsyth more than thirteen years before.

The agreement arrived at between France and Great Britain was not an interpretation of any existing treaty on the subject, but a compromise of rights, such as no other Power had a right to share in without express stipulation.

When Mr. Bates asserted that the doctrine of the headlands was new, he seems to have overlooked the fact, that for more than a century it had full recognition by all the writers on public law, and that the only question which could possibly arise was, whether the doctrine was applicable to the Bay of Fundy and the schooner "Washington," under the Convention of 1818. He perhaps overlooked, likewise, the fact that instead of being new, the doctrine had been established again and again in the courts of the United States, and in the writings of its jurists. When we come to examine further the reasons which induced his decision, confidence in its soundness is not increased.

The Bay of Fundy at its British headlands does not exceed the width of 45 miles. Mr. Bates conceived it to be 65 to 75 miles wide. He states that it has several bays on its coast; this might be said of any and every bay and harbor on the Atlantic, but he draws from that fact the inference that "the word 'bay,' as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay and the Bay of Bengal, over which no nation can have the right to assume sovereignty."

It is to be inferred from this, that, according to his decision, a bay can only mean an inlet which has no indentations on its coast, and that if it had indentations it can only be compared to the Bay of Biscay and the Bay of Bengal. His next reason is, that one of the headlands of the Bay of Fundy is in the United States, and that a line drawn from headland to headland would pass near the Islands of Grand Menan (British) and Little Menan (American). The accuracy of this statement can only be maintained by drawing the headland line to suit the purpose. There has been no contention, and there is none, that the line of exclusion in the Bay of Fundy should be drawn otherwise than from one part of British territory to another, and the "Washington" was inside such and not merely inside the headland which Mr. Bate imagined. It is difficult to see, however, how the case should be affected by the fact, if it were a fact, that the headland line would be *near* these islands. His next reason is, that the Islands of Grand Menan and Little Menan are represented in the geographies as situated in the Atlantic Ocean. It is not plain how this description "in the geographies" can bear on the interpretation of a Treaty. The conclusion of Mr. Bates might have been properly influenced by the fact that these islands *were* in the Atlantic Ocean, if they were so, or in the Bay of Fundy, as distinguished from the Atlantic Ocean, but how could it have been influenced by the description in the geographies? In so far as the circumstance was important, the *fact* and not the

description in the geographies was to be considered. Mr. Bates says, however, that the conclusion was to his mind "irresistible," &c.

The letter of Mr. Richard Rush, one of the negotiators of the Treaty of 1818, on this point has next to be referred to. As has already been remarked, to allow one of the parties to a contract to give it a construction by stating what was in his own mind when he executed it, is without a single instance in the history of contracts, excepting this, and in this singular instance Mr. Rush has been allowed to say that he meant exactly what he did not say, and in fact the contrary of what he said." He declares in fact that the words three miles off the coasts, bays, &c.," meant three miles off the *coasts* only.

Mr. Rush was interrogated thus:

DEPARTMENT OF STATE, WASHINGTON, 6th July, 1853.

SIR,—You are probably aware that within a few years past a question has arisen between the United States and Great Britain as to the construction to be given to the 1st Article of the Convention of 1818, relative to the fisheries on the coast of the British North American Provinces. For more than twenty years after the conclusion of that convention there was no serious attempt to exclude our fishermen from the large bays on that coast; but about ten years ago, at the instance of the provincial authorities, the home Government gave a construction to the 1st Article which closes all bays, whatever be their extent, against our citizens for fishing purposes. It is true they have been permitted to fish in the Bay of Fundy. This permission is conceded to them by the British Government, as a matter of favor, but denied as a right. The Government excludes them from all the other large bays.

Our construction of the convention is that American fishermen have a right to resort to any bay and take fish in it, provided they are not within a marine league of the shore. As you negotiated the convention referred to, I should be much pleased to be favored with your views on the subject.

I have the honor to be, &c.,
W. L. MARCY.

The Hon. RICHARD RUSH,
Sydenham, near Philadelphia.

The value of his communication is thus dealt with in the brief used before the Halifax Commission:

Mr. Rush, who negotiated the Treaty of 1818, in a letter to Secretary Marcy, dated 18th July, 1853, says:

"These are the decisive words in our favor. They mean no more than that our fishermen, whilst fishing in the waters of the Bay of Fundy, should not go nearer than three miles to any of those small inner bays, creeks, or harbors which are known to indent the coasts of Nova Scotia and New Brunswick. To suppose they were bound to keep three miles off from a line drawn from headland to headland on the extreme outside limits of that bay—a line which might measure fifty miles or more, according to the manner of drawing or imagining it—would be a most unnatural supposition.

"Similar reasons apply to all other large bays and gulfs. In signing the treaty we believed that we retained the right of fishing in the sea, whether called a bay, gulf, or by whatever name designated. Our fishermen were waiting for the word not of exclusion but of admission to these large outer bays or gulfs."

This reasoning of Mr. Rush evades the question. He admits the right of exclusion from some bays, but can only say as to larger bays (not defining or even describing what he means by larger bays) that it is not to be supposed the right of fishing in them would be signed away by the American negotiators, a supposition, however, which, it appears, Mr. Webster and other American statesmen did entertain and express.

Senator Soulé, in the Senate, 5th August, 1852, referring to the words of Mr. Webster already cited, said:

"Is England right? If we trust the Secretary of State, in the view which he takes of her claims, it would seem as if the terms of the letter of the treaty were on her side. This Mr Webster peremptorily admits, while others but debate it upon mere technicalities of language."

After quoting from Webster, Senator Soulé continued:

"Here the whole is surrendered; there is no escape from the admission. It was an oversight to make so large a concession to England. The concession was then made, was it not? If so, the dispute is at an end; and yet it were a hard task to justify the summary process through which England has sought to compel us to compliance with the concession, particularly as she had, to say the least of it, suffered our fishermen to haunt the Bay of Fundy, by express allowance in 1844."

On 12th August, 1852, Senator Butler, though expressing a desire to make further inquiries into the subject, said:

"We cannot go beyond the Treaty of 1818; and that what is a British bay? What is one of the bays and harbors of Great Britain?"

And after speaking of the clear concessions to American fishermen on some of the coasts, bays, &c., of Newfoundland, Senator Butler adds:

"But so far as regards the Bays of Nova Scotia and New Brunswick, we have no right under the terms of the treaty to fish in them if they can be regarded as British bays."

On 14th August, 1852, Senator Seward, answering the members of the Senate who had criticised the passage above quoted from Mr. Webster, said:

"I cannot assent to the force of the argument of the honorable Senator from Louisiana. I am the more inclined to go against it, because I think it is getting pretty late in the day to find the Secretary of State wrong in the technical and legal construction of an instrument. Let us test the argument. The honorable Senator says that where the government occupies both sides of the coast, and where the strait through which the waters of the bay flow into the ocean is not more than six miles wide, then there is dominion over it.

"Now, then, the Gut of Canso is a most indispensable communication for our fishermen from the Atlantic Ocean to the Northumberland Straits and to the Gulf of Saint Lawrence, for a reason which any one will very readily see by referring to the map; yet the Gut of Canso is only three-quarters of a mile wide. I should be sorry to adopt an argument which Great Britain might turn against us, to exclude us from that important passage. * * *

"Again I recall the honorable Senator's argument, viz:

"Two things unite to give a country dominion over an inland sea. The first is, that the land on both sides must be within the dominion of the government claiming jurisdiction; and then that the strait is not more than six miles wide; but that if the strait is more than six miles wide, no such jurisdiction can be claimed.

"Now, sir, this argument seems to me to prove too much. I think it would divest the United States of the harbor of Boston, all the land around which belongs to Massachusetts or the United States, while the mouth of the bay is six miles wide. It would surrender our dominion over Long Island Sound—a dominion which, I think, the State of New York and the United States would not willingly give up. It would surrender Delaware Bay; it would surrender, I think, Albemarle Sound, and the Chesapeake Bay; and I believe it would surrender the Bay of Monterey, and perhaps the Bay of San Francisco on the Pacific coast."

Senator Tuck, during the same debate, said:

"Perhaps I shall be thought to charge the Commissioners of 1818 with overlooking our interests. They did so, in the important renunciation which I have quoted; but they are obnoxious to no complaints for so doing. In 1818, we took no mackerel on the coasts of British possessions, and there was no reason to anticipate that we should ever have occasion to do so. Mackerel were then found as abundantly on the coast of New England as anywhere in the world, and it was not till years after that this beautiful fish, in a great degree, left our waters. The mackerel fishery on the provincial coasts has principally grown up since 1838, and no vessel was ever licensed for that business in the United States till 1828. The Commissioners in 1818 had no other business but to protect the cod fishery, and this they did in a manner generally satisfactory to those most interested."

It has been already mentioned that Great Britain, in making the concession to the American fishermen, in regard to the Bay of Fundy, declared that a privilege, and not a right, was conceded. Notwithstanding that the right was claimed on the part of the United States, Her Majesty's Government has adhered strictly to this position. In the case of all bays other than the Bay of Fundy, Her Government has refused to concede the privilege, and has enforced its views although no seizures were made.

Lord Aberdeen made this clear at the outset, in a letter to Mr. Everett, dated 21st April, 1845:—

In the meantime, however, the undersigned thinks it expedient to guard himself against the assupmtion of Mr. Everett, that it may have been his intention by his note of the 10th ultimo, to include other bays on the coasts of the British North American Provinces, in the relaxation which he therein notified to Mr. Everett, as to be applied henceforward to the Bay of Fundy. That note was intended to refer to the Bay of Fundy alone.

In every instruction which has been issued by Her Majesty's Government down to the present time, care has been taken to guard against the assumption that the right to exclude American fishermen from the bays had been yielded. The Government of Canada has taken the same course in the instructions which have been given to its officers engaged in the Fisheries Protective service.

The Bay of *Chaleurs* has been the subject of judicial decision in Canada. In the case of *Mowatt vs. McFee*, 5 *Supreme Court of Canada Reports*, *p.* 66, the question arose, whether or not under the Imperial Statute, 14–15 Vic., c. 63, regulatiug the boundary line between the former Province of Canada and New Brunswick, the Bay of Chaleurs was a part of the territory or territorial waters of Canada, and within the operation of the Canadian Fisheries Act, 31 V. c. 60. The judgment of the Supreme Court of Canada contains the following words:—

The Imperial Statute 14 and 15 V. c. 63, makes the boundary line between Old Canada and New Brunswick produced from the mouth of the *Mistouche* River at its confluence with the Restigouche down the centre of the stream of the Restigouche to its mouth in the Bay of

Chalcurs, on thence through the middle of that bay to the Gulf of St. Lawrence, so that the whole of the bay is within the present boundaries of the Provinces of Quebec and New Brunswick, and within the Dominion of Canada and the operations of the Fisheries Act.

It will be seen by reference to the protocols of the Treaty of Ghent and the declaration of the Commissioners, Messrs. Holmes and Barclay, p. 489 of Hertslett's collection of treaties, that the Bay of Fundy (and Passamaquoddy Bay, which is part of it) was treated as a British bay, and that certain islands therein were treated exceptionally and declared to belong to the United States. This could not have been had the Bay of Fundy been other than a British bay.

II.—SCOPE OF RESTRICTION.

It will be seen from what has been already stated, that the article proposed by the American plenipotentiaries was not so restrictive as the one finally adopted. The words were :—

That the American fishermen shall be permitted to enter such bays and harbors for the purposes only of obtaining shelter, wood, water and bait.

The words adopted were :—

That the American fishermen shall be permitted to enter such bays or harbors for the purposes of shelter and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever.

It has been suggested on the part of the United States Government, that the permission which was sought in reference to bait, in the American proposal, was a permission to catch such fish as was used for bait in the bays and harbors. It seems difficult to concur in that view, when it is considered how stringent the restrictions were against the inhabitants of the United States taking, drying or curing fish on or within three miles of any of the coasts, bays, creeks and harbors. If the object had been to reserve permission to fish for bait, it would doubtless have been inserted as a qualifying clause to the renunciation of the right to take, dry or cure fish, as by the use of the words "excepting for bait." Moreover, anyone acquainted with the pursuit of fishing is aware, that if a permission to the American fishermen to catch bait had been reserved, the restriction against fishing would have been practically useless. The right would have been secured to the fishermen of the United States to enter freely, at all times, the bays and harbors, and to engage in fishing, and the impossibility of distinguishing between the fish that should be caught for bait and the fish that should be caught for commercial purposes, would have rendered all the provisions of the treaty nugatory. It is difficult to suppose that when the American plenipotentiaries were making the renunciation of the right to take, dry or cure fish, on our coasts, they were seeking to insert a qualification which would have rendered the renunciation absolutely unimportant.

It has been suggested, against this view, that the fisheries which were pursued on our coasts were the cod-fisheries, and it would therefore have been easy to distinguish between the catching of fish that could be used for bait and the catching of such larger fish as the cod. While it is true that the cod fishery on our coasts was then a very important one, and while it is true that the cod fishery was probably one of the important subjects kept in view by the plenipotentiaries on both sides, it is by no means to be supposed that the mackerel fishery was so unimportant as to be overlooked and left unguarded.

In the year 1811, immediately preceding the war, the mackerel inspected in Massachusetts amounted to 19,632 barrels. The catch was, of course, not confined to the United States' coasts, their fishermen at that time, having the right to resort to the British coasts as well.

In the three years of the war, 1812, 1813 and 18 14, the aggregate quantity inspected in Massachusetts did not reach 11,000 barrels. In 1815, 8116 and 1817, the three years following the war, and preceding the treaty, the aggregate quantity inspected reached 84,397 barrels. These figures are taken from Sabine's report.

It appears from the official documents of the United States, that the same vessels were accustomed to catch both cod and mackerel. For instance, by the circular of the Controller of the Treasury in 1824, it was declared that the bounty could not be given to vessels catching both cod and mackerel, but only to those exclusively devoted to the catching of cod; and in 1832, a second circular was issued, indicating that vessels under mackerel licenses might, notwithstanding the permit to "touch and trade," be liable for Customs duties, on supplies purchased abroad, and perhaps even on the fish with which they should return.

It will be seen that the permission to obtain bait, was inserted by the American plenipotentiaries in their proposal among the enumerated things, other than fish which they were to be at liberty to obtain on our coasts, "shelter, wood, water and bait."

The British plenipotentiaries struck out the word "bait," inserted the word "purchasing" before the word "wood," the word "obtaining" before the word "water," and made the prohibition as to all other purposes more explicit and emphatic than it was in the American article.

All these changes were made, evidently to secure greater definiteness and precision, and yet it is contended on the part of the United States, that precision was not obtained at all, and that the definite expressions, so carefully inserted, are to receive a construction which indicates that some hidden meaning was intended which the plenipotentiaries on both sides refrained from expressing.

In the memorial of the United States to the Emperor of Germany (before mentioned) we find these words, referring to another treaty:

Finally and above all: there is a principle which not only controls the interpretation of treaties, but the results of investigation in every branch of human knowledge. A theory which implies confusion and contradiction is at once to be rejected, of two rival theories, that which most nearly reconciles all phenomena is to be preferred, the theory that reconciles all appearances and all circumstances is to be received as true. The interpretation of the treaty implies that the British, who exclusively draughted it, sowed the seeds of future dissension in the very instrument by which they proposed to settle every boundary question for ever, that among the negotiators of the treaty there were those who duped, and those who were duped.

It may fairly be urged, therefore, that both by insisting upon the omission of the word "bait," and by the insertion of the words "and for no other purpose whatever," the plenipotentiaries went as far as language could go, to secure the exclusion of American fishermen from our coasts for everything but the mere right of asylum.

It has been repeatedly said on the part of the United States, that it would have been an unreasonable and unheard of proceeding to stipulate that vessels and men engaged in so harmless and useful an industry as fishing, should be excluded from the waters of a friendly power, that the taking of fish upon our coasts must have been the only object of the

prohibition, and that the words "for no other purpose whatever" must have meant, for no other purpose in relation to the taking, drying or curing of fish.

In the first place, it may be remarked, that if that were the only object to be served, the words were unnecessary. The taking, drying and curing of fish within three miles of our coasts, bays, harbors, rivers and creeks had already been prohibited in words as strong and plain as the language admitted of. In the next place, the contention that a harmless pursuit like fishing, was not to be surrounded with such restrictions as to make the fishing vessels a forbidden class, overlooks all the important facts connected with the history of the fisheries in British North America. It disregards the fact that these fisheries, and the various establishments which were created in order to make them secure and easy of access, such as Halifax and Louisburg, were the objects of war for a long series of years between Great Britain and France—a war in which the people of New England actively participated. It overlooks the fact, that at one time the fisheries of British America were declared to be of more value than all Canada, and that the reduction of the stronghold of Louisburg, on account of its being, to a certain extent, the key to the fisheries and to the Gulf of St. Lawrence, was declared in England to be a sufficient recompense for all the disasters which the arms of England had sustained on the continent. From the time when the thirteen colonies separated from the Empire of Great Britain the competition and rivalry between the United States and the British American fishermen was intense, and was made the more so by the presence, in British North America, of thousands of loyalist refugees who were anxious to invoke the British power against the enjoyment, by the former colonists, of any rights in or about the British territories.

Innocent and laudable although the pursuit of fishing was, the result of this rivalry was to restrict American fishermen as a forbidden class on the coasts of British North America, and after the lapse of thirty-five years between the close of the revolutionary war in 1783, and the making of the Treaty of 1818, the fishermen of British North America had learned that if the United States' fishermen were not to be allowed to participate in the British American fisheries, they must be excluded by such express words as would make their presence on the coasts of British North America unlawful, except in cases in which the law of humanity required that they should be permitted to enter.

Stringent as the regulations were, as to navigation laws, it was intended to insert in the Treaty of 1818 a still more stringent provision against the entrance into our bays, harbors, &c., by foreign fishermen. Much has been said in recent correspondence on the part of the United States as to the unreasonableness of proscribing entrance by American fishermen for any other than the four enumerated purposes. It has been said to be an absurd construction that a vessel would violate the Convention by "entering a port to post a letter," "to send a telegram," "to buy a newspaper," "to obtain a physician, in case of illness," "or a surgeon in case of accident," "to bring off a passenger," "or even to lend assistance to the inhabitants." The answer to all this

is, that while all these purposes might be perfectly innocent, they were to be forbidden, because they could so easily be made a pretext for the continued presence on our coasts of United States' fishermen—the continued presence which would render the surveillance of police enormously expensive and useless after all.

It is comparatively easy to ascertain whether a fisherman resorts to our bays and harbors for shelter, or for repairs, or for wood, or water. The condition of the weather, and of his vessel, will establish the truth or error of his excuse, but if it were allowed to be a sufficient answer in all such cases, that the visiting vessel, perhaps really in pursuit of the fish, and unsuspecting the presence of a cruiser, was resorting to our coasts to "post a letter," "to send a telegram," "to take a passenger," "to obtain a physician," &c., it would be impossible to discriminate between the cases in which such an excuse was justifiable and those in which it was simply feigned.

The plenipotentiaries took a higher, and, indeed, the only effectual way of accomplishing the desired object, by using language which admitted of no misunderstanding, unless a misunderstanding is created for them by resort to artificial and ingenious doctrines of construction.

The plenipotentiaries moreover, made their article plain and explicit with the object of preventing subterfuge and equivocation, both on the part of subsequent construers of the treaty, and on the part of the fishermen themselves in their use of the privileges conceded to them, by the adoption of the closing words of the article—"they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them"—the privileges, namely, of fishing on certain coasts, as in Newfoundland, and of entering bays and harbors in other parts of the Provinces.

It has been said that if the right of asylum was the only right intended to be reserved to American fishermen, it would have been unnecessary to insert a stipulation to that effect in the treaty, because such asylum is allowed by the usage of nations.

It will be remembered, however, as has been already stated, that as regards the British American coasts, the American fishermen were an excluded class, and it was probably desired to make it plain that the right of asylum was not taken away, when so much else was taken away, by the sweeping prohibition. Moreover, it was not uncommon to stipulate, in treaties for the right of asylum, as many instances show.

It has been erroneously stated that the inshore fisheries alone were the subject with which the negotiators had to deal, and that, therefore, its restrictions must be taken as applicable only to them. Thence it is argued that no restriction as to the purchase of bait for the cod fishery was intended. The cod fishery, at the time when the convention was being negotiated for, and before, was actively pursued by both American and Colonial fishermen. They had the advantages of an extensive market, improved vessels and outfits and skilled labor and, besides all this, the policy of the United States was to give a bounty to their fishermen. Complaints against the severity of the competition which resulted were rife in all

the Provinces. From 1815 to 1818 the bounty paid in the United States to cod fishermen rose from $1,811 to $148,915. After the convention it gradually rose to $314,149 in the year 1838. In 1814, from the Island of Newfoundland alone were exported about 1,200,000 quintals, valued at more than $12,000,000, (*Sabine*, 230). Referring to the difficulties which occurred in the enforcement of the convention Schuyler, in his work on "American Diplomacy," says :—

> It will be seen that most of these difficulties arose from a change in the character of the fisheries. Cod, being caught on the banks, were seldom pursued within the three-mile limit, and yet it was to cod, and perhaps halibut, that all the early negotiations had reference."

Messrs. Rush and Gallatin, in their letter of 20th October, 1818, to the Secretary of State, admit that they had in view the effect that the renunciation would have on the deep sea fishery. They said they considered the renunciation only applied to the distance of three miles from the coasts, but they add : "This last point was the more important, as "with the exception of the fishing in open boats, within certain harbors, "it appeared * * that the fishing ground on the whole coast of Nova "Scotia is more than three miles from the shore, whilst on the contrary it "is almost universally close to the shore on the coast of Labrador. It is "in that point of view that the privilege of entering the ports for shelter "is useful, and it is hoped that with that provision a considerable portion "of the actual fisheries on the coast" (Nova Scotia) "will, notwithstanding "the renunciation, be preserved." *Annals of Congress*, 1819, *p.* 1527.

Mr. Dwight Foster, agent of the United States, said at the Halifax Commission: "It was the codfishery and the whale fishery that called "forth the eulogy of Burke over a hundred years ago. It was the codfishery "and the whale fishery for which the first and second Adams so strenuously "contended. P. 1592, *Halifax Commission Papers.* (*American edition.*)

Mr. Bayard was probably mistaken when he said, in his letter to the British Minister, at Washington, 10th May, 1886, "as it is admitted that "the deep sea fishing was not under consideration in the negotiation of "the Treaty of 1818," &c.

The United States' authorities contend that the privilege of entering the bays and harbors for the four enumerated purposes is a privilege greater than that enjoyed by the ordinary vessels carrying the flag of the United States, in this respect, that it is the privilege to enter without Customs dues and without observing any Customs restrictions, and they assert that their trading vessels enter as a matter of right. (*Confidential memo. for United States' Commissioners under the Joint High Commission.*) Without conceding this, but using it for the present as an illustration, it will be seen that the restrictions against American fishing vessels resorting so freely, for the four enumerated purposes, to our bays and harbors must necessarily have been precise, in order to avoid even an infraction of the Customs laws, to say nothing of the preservation of the fisheries.

It is claimed, however, on the part of the Government of Canada, as has been before stated, that the "privilege" thus alluded to was simply a continuation of the "right of asylum," and not a special privilege conferred on a special class of vessels. This right of asylum is admitted by neutral powers, even in time of war, to the armed vessels of the belligerents.

The following quotation is from the supplemental argument of Mr. Evarts before the Tribunal of Arbitration at Geneva, in August, 1872:—

What is the doctrine of the law of nations in regard to *asylum*, or *refuge*, or *hospitality*, in reference to the belligerents at sea during war? The words themselves sufficiently indicate it. The French equivalent of "relâche forcée" equally describes the only situation in which a neutral recognizes the right of asylum and refuge, not in the sense of ship-wreck, I agree, but in the sense in which the circumstances of ordinary navigable capacity to keep the seas, for the purposes of the voyage and the maintenance of the cruise, render the resort of a vessel to a port or ports suitable to, and convenient for, their navigation, under actual and *bona fide* circumstances requiring refuge and asylum.

It seems clear that from reasons of public policy, well established and defined, the American fishing vessels were, as to the coasts of the British North American Provinces, a specially prohibited class. The American contention that the right of entry was to be superior to all restrictions and regulations, would have made them a specially privileged class.

Various arguments as to the general extent and character of the prohibitory clause of the convention having thus been suggested, it is proposed to insert here some more extended observations on the right to purchase bait which is claimed for the United States' fishermen.

RIGHT TO ENTER TO OBTAIN BAIT, &c.

The claim of the United States to have its fishing vessels enter Canadian bays and harbors for the purpose of obtaining bait, ice and other supplies and transhipping their cargoes in British waters is resisted upon two grounds, namely, that there never was any treaty or stipulation in the nature of a treaty conferring this privilege, and that the Convention of 1818 expressly prohibits them from entering for any purpose whatever other than that of obtaining wood and water, or for shelter and repairs.

The contentions of the United States are mainly these: First; "The prohibition in the Convention of 1818 was in effect repealed or superseded by subsequent commercial arrangements"; and, second, "It is inhospitable and unneighbourly not to permit its fishing vessels to enter our bays and harbors, notwithstanding the Convention of 1818."

First.—There never was any treaty, or other, provision conferring upon the American fishing vessels this privilege. It will not be denied that there is no express stipulation conferring it. The most that is contended for is that under the treaties or enactments relating to commercial intercourse between the two countries the fishing vessels are entitled to the privileges granted to trading vessels of the United States in the harbors of the British North American Provinces.

Up to 1830 the United States had no commercial privileges for any of its vessels in the ports of the British North American possessions. In a letter from Mr. Daniel Manning, the Secretary of the Treasury of the United States, to the Hon. Perry Belmont, dated February 5, 1887, he says: "I am advised and concede that up to President Jackson's pro-"clamation of October 5th, 1830, set forth on page 817 of the 4th vol-"ume of the United States Statutes at large, this Government *had not* "*even commercial privileges for its vessels in Canadian ports.* We had "such privileges as colonists, we lost them as colonists, we regained "them in 1830 by an arrangement of legislation finally concerted with

"Great Britain, which was the result of an international understanding "that was in effect a treaty, although not technically a treaty nego- "tiated by the President ratified by the Senate signed by the parties "and the ratification formally exchanged by them."—*49th Congress, 2nd Sess., No.* 4087, *p.* 20.

He says in the same letter: "The Treaty of 1818 secured to our "fishermen what, up to that time, they did not have as a treaty right, "which was, admission to Canadian bays or harbors for the purpose of "shelter, and of repairing damages therein, of purchasing wood and of "obtaining water, *and for no other purpose whatever.* As colonists we "had those rights, but as colonists we lost them by just rebellion."—*Ib.* p. 19.

By reference to the provisions of the Treaties of 1794 and 1815 it will appear that while the subject of commercial intercourse between the United States and the British Possessions in Europe is expressly dealt with, the British possessions in America are not provided for. The Treaty of 1794 as to commercial privileges provided that it should "not extend to the admission of vessels of the United States into the seaports, harbors, bays or creeks of His Majesty's said territories in America."

When the Convention of 1818 was framed, an attempt was made to place the commercial intercourse between the two countries upon a permanent basis.

The American Secretary of State instructed Mr. Gallatin in a letter of 22nd May, 1818, as follows:—

"The other interests which the President hopes may be adjusted by "this negotiation are:—

"1. The intercourse with the British colonies in the West Indies "and North America. You are well acquainted with the failure of the "attempt to extend the Convention of 1815 to this intercourse at the "negotiation of the convention, and at a subsequent period, when four "additional articles were proposed on the part of Great Britain, a copy "of which you have. There was reason to believe that Lord Castlereagh "was personally well disposed to a more liberal expansion of the col- "onial intercourse, although the Cabinet was not entirely prepared for "it. The manner in which he has recently avowed a liberal commercial "principle in Parliament, and the approbation with which that avowal "was received, the obvious, though not declared, bearing which those "sentiments had both upon the South American contest and upon the "relations between the United States and the British colonies, the free "port Acts which we understand have been introduced into Parliament, "and are even said to have passed, strongly and concurrently indicate "that a change has taken place in the policy of the Cabinet on this sub- "ject; and we hope that now is precisely the favorable time for taking "advantage of it. Our own Navigation Act may, perhaps, contribute to "the same effect; and even should it operate otherwise, and confirm them "in their obstinate exclusion of our vessels from those ports, as it will "make their exclusion from ours to the same extent reciprocal, it leaves "us the more free to agree to the renewal of the Convention of July, 1815, "if nothing more can be obtained."—*Annals of Congress*, 1819, *p.* 503.

The American Plenipotentiaries, therefore, at the Third Conference, 17th September, 1818, submitted a proposal in the following terms:—

"ARTICLE C.

"And vessels of the United States shall, in like manner, have "liberty to import from any of the aforesaid ports of the United States, "into any of the aforesaid ports within the said Provinces of Nova "Scotia and New Brunswick, any of the articles, the growth, produce, or "manufacture of the said United States, the exportation of which from

"the said United States to the said provinces shall be allowed in British "vessels, and the importation of which into the said provinces from "every other foreign country or place shall not be entirely prohibited;

"And vessels of the United States shall have liberty to export from "the said provinces to the said United States, gypsum and grindstones, "the produce or manufacture of the said provinces; and they shall "likewise have liberty to export, in the same manner, any other article, "of the growth, produce or manufacture of the said provinces, the "exportation of which to every other foreign country shall not be "entirely prohibited."

In Article D will be found the British proposals on this subject, submitted at the fifth conference, 6th October, 1818.

The result of these negotiations, and the reason of the failure to incorporate any stipulation on the subject in the Convention of 1818, appears from the following letter from the Secretary of State to Mr. Rush, one of the American Plenipotentiaries :—

"DEPARTMENT OF STATE,
"WASHINGTON, 7th May, 1819.

"SIR,—From the documents transmitted by Mr. Gallatin and you, "relating to the negotiation of the commercial convention of the 20th "October last, it appears—

"That, at the third conference, a draught of two articles was pro- "posed by the American Plenipotentiaries for regulating the commercial "intercourse between the United States and (1) the British Islands in "the West Indies, and (2) the Provinces of Nova Scotia and New Bruns- "wick, in North America.

"That, at the fifth conference, the British Plenipotentiaries offered "the counter-project of an article for the intercourse between the United "States and Nova Scotia and New Brunswick; and, at the eighth con- "ference, an article for that between the United States and the British "West Indies.

"That, in presenting this last article, they stated that they could "not consent to sign an article upon that subject unless the American "Plenipotentiaries would accede, in substance, to the article proposed at "the fifth conference concerning Nova Scotia and New Brunswick, and "to an article proposed by the British Government on the 19th of March, "1817, concerning the trade between the United States and the Island "of Bermuda.

"And that the American Plenipotentiaries, not feeling themselves "authorized by their instructions to sign the West India article, as pro- "posed by the British Plenipotentiaries, agreed to take the whole ques- "tion, *ad referendum*, to their government."—*Ibid*, p. 1582.

These attempts having failed it was not until 1830 that the negotiations carried on by President Jackson, through Mr. McLane on the part of the United States, and Lord Aberdeen on the part of Great Britain, resulted in an arrangement which, up to the present, governs the commercial intercourse between the United States and British North American possessions. This is embodied in a Proclamation of the President, and in an Order in Council of the British Government.

The Proclamation, after recital, directs that "British vessels and "their cargoes are admitted to an entry in the ports of the United States, "from the islands, provinces and colonies of Great Britain, on or near "the North American continent, and north or east of the United States." —*Congressional Debates*, 1830, *p. cxci.*

The Order in Council is in the following terms:

"And His Majesty doth further, by the advice aforesaid, and in the "pursuance of the powers aforesaid, declare that the ships of and be- "longing to the United States of America may import from the United "States aforesaid, into the British possessions abroad, goods, the produce of those States, *and may export goods from the British possessions abroad, to be carried to any foreign country whatever.*—*Ibid* p. cxciii.

The proceedings before the Fishery Commission which sat at Halifax under the Washington Treaty, 1871, clearly show that the privileges now in dispute were enjoyed under no treaty or agreement between the two countries.

The American Counsel secured from that tribunal an important decision on the bait and transhipment questions.

The matter at issue can be shortly stated: Did the Washington Treaty of 1871 confer upon the United States' fishermen the privileges of purchasing bait, ice, supplies and transhipping cargoes in British waters, as was contended on the part of Great Britain, and if so, what price should be paid for them?

The British case claimed compensation for the privilege of access to the shores for purposes of bait, supply, &c., including the all important advantage of transferring cargoes, which enables American fishermen to double their profits by securing two or more full fares during one season.

In the answer filed by the United States to the British case, it was said:

"Suffice it now to observe that the claim of Great Britain to be "compensated for allowing United States' fishermen to buy bait and "other supplies of British subjects finds no semblance of foundation in "the treaty, by which no right of traffic is conceded. The United "States are not aware that the former inhospitable statutes have ever "been repealed—their enforcement may be renewed at any moment." —*Proceedings of Halifax Commission*, Vol. I., p. 123.

"That the various incidental and reciprocal advantages of the "treaty, such as the privileges of traffic, purchasing bait and other sup- "plies, are not the subjects of compensation, because the Treaty of "Washington confers no such rights on the inhabitants of the United "States, *who now enjoy them merely by sufferance, and who can, at any "time, be deprived of them by the enforcement of existing laws or re-enact- "ment of former oppressive statutes.*"—*Ibid* p. 136.

The Counsel for Great Britain insisted that these advantages were conceded by the Treaty of Washington, 1871, as incidental to the enlarged rights to fish thereby granted, or that they were not conceded at all. The Counsel for the United States failed to point out any stipulation whatever, existing between the two countries, under which their people enjoyed these privileges. The proclamation and Order in Council of 1830 were never mentioned. They resisted the contention that by implication the Washington Treaty secured to the United States these advantages, and preferred the alternative that they were not conceded at all, at least not by any express stipulation.

Mr. Foster, Agent for the United States, said: "The Treaty of Wash- "ington confers upon us no right whatever to buy anything in Her "Majesty's dominions."—*Ibid* p. 1541.

And after a reference to the Treaties of 1794 and 1815, which it is quite clear did not secure what was attempted to be secured in 1818 and was only secured in 1830, he said:

"Gentlemen, such I understand to be the footing on which com- "mercial intercourse stands between the two countries to-day, *if there is "any treaty* that governs commerce between the British North American "Provinces and the United States. And if this is not the case the re- "lations between the two countries stand upon that comity and com- "mercial freedom which exist between all civilized countries.—*Ibid*, 1542.

Mr. Dana, Counsel for the United States, said :—

"May it please your honors, it is clear to our minds that the "Treaty of Washington does not give us those advantages. That sub- "ject has been elaborated by the Agent of the United States and by "my learned friend (Mr. Trescot). In the first place it has been said in "answer to that contention, or rather it has been suggested, for it was "not said with earnestness as if the counsel for the Crown thought it "was going to stand as an argument, that those were treaty gifts to the "United States, and though they could not be found in any treaty, yet "they were necessarily implied in the Treaty of Washington. Take the "Treaties of 1783, 1818, 1854 and 1871, and they are nowhere referred to "according to any ordinary interpretation of language. The only argu- "ment I can perceive is this: You have enjoyed those rights. They do "not belong to you by nature or by usage, and must, therefore, be treaty "gifts ; though, we cannot find the language; yet they must have been "conferred by the Treaty of 1871 and the Treaty of 1854. May it please "this learned tribunal, we exercised all those rights and privileges be- "fore any treaty was made, except the old treaty which was abolished "by the war of 1812. Almost the very last witness we had on the stand "told your honors that before the Reciprocity Treaty was made we were "buying bait in Newfoundland, and several witnesses from time to time "have stated that it is a very ancient practice for us to buy bait and sup- "plies and to trade with the people along the shore, not in merchandise "as merchants, but to buy supplies of bait and pay the sellers in money "or in trade as might be most convenient. Now, that is one of those "natural trades that grow up in all countries ; it is older than any treaty, "it is older than civilized states or statutes. Fisheries have but one his- "tory. As soon as there are places peopled with inhabitants, fishermen "go there. The whale-fishermen of the United States go to the various "islands of the Pacific which are inhabited, and get supplies. To be sure "the whale fishery does not need bait, but the fishermen get supplies "for their own support and to enable them to carry on the fishery, and "they continue to do so until those islands come to be inhabited by more "civilized people. So it is with the Greenland fisheries Then come "restrictions, more or less, sometimes by treaty and sometimes by local "statutes, which the foreign governments feel themselves obliged to res- "pect ; if they do not, it becomes a matter of diplomatic correspondence, "and might be a cause of war."—*Ibid*, 1572.

"If your honors shall say that by the Treaty of 1818 the United "States did not renounce those rights, and did not notice them one way "or another, that is sufficient for us. If your honors shall decide that "so far as fishing within three miles is concerned, the United States re- "nounced the right to purchase anything except wood, then we submit "that the right of purchasing anything else has not been granted to us "by the Treaty of 1871, and therefore we cannot be called upon to make "any compensation.

"We are satisfied that the United States are permitted by the British "Government to do those acts, *whether it be from comity, from regard "to the necessities of fishermen, from policy, or from some other reason, "I know not*, and so long as we are not disturbed we are content. If "we are disturbed, the question will then arise, not before this tribunal, "but between the two nations, whether we are properly disturbed by "Great Britain ; and if we should come to the conclusion on both sides, "that there being a dispute on that subject which should be properly "settled, then it is to be hoped that the governments will find no diffi- "culty in settling it ; but this tribunal will discharge its entire duty "when it declares that under Article 18 of the Washington Treaty no "such rights or privileges are conceded to the United States."—*Ibid*, 1584.

The Commissioners consequently held that compensation could not be awarded for commercial intercourse between the two countries, nor for the advantages of purchasing bait, ice, supplies, &c., nor for the permission to tranship cargoes in British waters.

Sir A. T. Galt, one of the Commissioners, as if to emphasize the position taken by the United States, said, in the opinion given by him :

"But I am now met by the most authoritative statement as to what "were the intentions of the parties to the treaty. There can be no stronger "or better evidence of what the United States proposed to acquire "under the Washington Treaty than the authoritative statement which "has been made by their Agent before us here, and by their counsel. "We are now distinctly told that it was not the intention of the United "States, in any way, by that treaty, to provide for the continuation of "these incidental privileges, and that the United States are prepared to "take the whole responsibility, and to run all the risk of the re-enact-"ment of the vexatious statutes, to which reference has been made.

"I cannot resist the argument that has been put before me, in refer-"ence to the true, rigid, and strict interpretation of the clauses of the "Treaty of Washington. I therefore cannot escape, by any known rule "concerning the interpretation of treaties, from the conclusion that the "contention offered by the Agent of the United States must be acquies-"ced in.

"There is no escape from it. The responsibility is accepted by and "must rest upon those who appeal to the strict words of the treaty as "their justification. I therefore, while I regret that this tribunal does "not find itself in a position to give full consideration to all the points "that may be brought up on behalf of the Crown, as proof of the advan-"tages which the United States derive from their admission to fish in "British waters, still feel myself, under the obligation which I have in-"curred, required to assent to the decision which has been communi-"cated to the Agents of the two governments by the president of this "tribunal."

The United States counsel were willing, rather than admit the right of Great Britain to compensation, to have the American fishing vessels found their right to such important privileges upon the very vague references to sufferance or custom, or to be excluded altogether. They preferred to admit that during the periods covered by the Treaties of 1783, 1854 and 1871 they had enjoyed these privileges, not as incidental to the enlarged rights to fish thereby conferred upon them, but, without any leave or license, and *that* merely to escape the consequence of the British contention that they must pay for the twelve years' period covered by the Washington Treaty.

The contention that the United States has not enjoyed these privileges, by virtue of any stipulation or custom, is supported by the attitude taken by the British authorities.

Under the Treaty of 1783, which was afterwards abrogated such privileges may well have been allowed, as incidental to the right to fish. But, immediately on its termination, the fishing vessels of the United States were excluded from the bays, harbors, &c., of the British North American Possessions.

Lord Bathurst, in a letter to the Governor of Newfoundland, dated 17th June, 1815, says:

"On the declaration of war by the American Government, and the "consequent abrogation of the then existing Treaties, the United "States forfeited, with respect to the fisheries, those privileges which "are purely conventional, and, (as they have not been renewed by "stipulation in the present Treaty), the subjects of the United States "can have no pretence to any right to fish within the British jurisdic-"tion, or to use the British territory for purposes connected with the "fishery.

"Such being the view taken of the question of the fisheries, as far "as relates to the United States, I am commanded by His Royal High-"ness the Prince Regent, to instruct you to abstain most carefully from "any interference with the fishery, in which the subjects of the United

"States may be engaged, either on the Grand Bank of Newfoundland, in "the Gulf of St. Lawrence, or other places in the sea. At the same time "you will prevent them, except under the circumstances hereinafter "mentioned, from using the British territory for purposes connected "with the fishery, and will exclude their fishing vessels from the bays, "harbors, rivers, creeks and inlets of all His Majesty's possessions. In "case, however, it should have happened that the fishermen of the "United States, through ignorance of the circumstances which affect "this question, should, previous to your arrival, have already com- "menced a fishery, similar to that carried on by them previous to the "late war, and should have occupied the British harbors, and formed "establishments on the British territory, which could not be suddenly "abandoned without very considerable loss; His Royal Highness the "Prince Regent, willing to give every indulgence to the citizens of the "United States, which is compatible with His Majesty's rights, has "commanded me to instruct you to abstain from molesting such fisher- "men, or impeding the progress of their fishing during the present "year, unless they should, by attempts to carry on a contraband trade, "render themselves unworthy of protection or indulgence. You will, "however, not fail to communicate to them the tenor of the instructions "you have received, and the view which His Majesty's Government "take of the question of the fishery, and you will, above all, be careful "to explain to them that they are not in any future season to expect a "continuance of the same indulgence."—(*Brit. and For. State Papers, Vol. II, p.* 1172.)

Rear Admiral Milne gave the following instructions to Captain Chambers, the Commander of His Majesty's ship "Dee," dated 12th May, 1817:

"On your meeting with any foreign vessel fishing or at anchor in "any of the harbors or creeks in His Majesty's North American provinces, "or within our maritime jurisdiction, you will seize and send such "vessel so trespassing to Halifax for adjudication, unless it should "clearly appear that they have been obliged to put in there in conse- "quence of distress; acquainting me with the cause of such seizure, and "every other particular, to enable me to give all information to the "Lords Commissioners of the Admiralty."—*Annals of Congress*, 1819, *p.* 1499.

In a report from Captain Chambers we find the following language:—

8th June, 1817.

"SIR,—In compliance with your order of the 12th ultimo, I sailed "from Halifax on the 30th ultimo, but did not meet or receive any intel- "ligence of foreign fishing vessels being within our jurisdiction until "the 3rd instant, when, being off the Isle Maten, I was informed that "the whole of the banks to the westward (off Cape Sable and Shelburne) "were fished by American schooners; and that they continually resorted "to the creeks on this coast in order to catch their bait, clean their fish, "wood, water, &c.; this, of course, is highly detrimental to the interest "of the industrious fishermen on this coast. I was also informed that "the intricate harbors of Cape Negro and Ragged Island were their "resort most evenings, several going in; but more particularly on "Saturdays, when they remain till Monday, to procure bait for the en- "suing week. At the former place they had not been well received; "at the latter, I suspect, much encouragement had been given them by "an individual. * * *

"I beg further to state that, without the use of our harbors, it "appears impossible for any foreigners to carry on successful fishing on "this coast, which fishing has much injured our fishermen; and I have "every reason to believe that considerable smuggling of tobacco, shoes, "&c., is carried on by their boats. I beg leave to enclose a list of the "detained vessels, and also to inform you that, from some of the Ameri- "cans attempting to tamper with some of our boats' crews, and the "riotous conduct of others, I have been obliged to take precautionary "measures to prevent any of the vessels being run away with."

Mr. Monroe, in a letter to Mr. Adams, August 13, 1816, says:

"At the commencement of our conferences, Mr. Bagot informed us of "an order which had been issued by Admiral Griffith to the British "cruisers, to remove our fishing vessels from the coasts of those pro- "vinces, which he would endeavor to have revoked pending the negoti- "ation. His attempt succeeded. I shall endeavor to have this revo- "cation extended, so as to afford the accommodation desired until the "negotiation is concluded."—*Annals of Congress* 1815, *p.* 1479.

From 1823 until the Reciprocity Treaty in 1854 the fishing vessels of the United States were excluded from British North American bays and harbors by the ships of Great Britain and her Colonies. Many were seized and condemned, some for fishing within the three mile limit, but many on the ground that they were anchoring or hovering inshore during calm weather, without any ostensible cause, having on board ample supplies of wood and water, cleaning and packing fish inside of the bays, purchasing bait, and preparing to fish.

This will be seen by reference to the correspondence in *Senate Doc.*, 1851-52, Vol. 10, No. 100, and the report of *Sabine on the Fisheries.*

In 1852, the Hon. Joseph Howe, Provincial Secretary of Nova Scotia, in a letter to the Commander of the Revenue Cruiser "Responsible," dated 28th August, 1852, said:

"SIR,—I have to acknowledge the receipt of your letter of the 23rd "instant, and to acquaint you in reply to your enquiry, that no Ameri- "can fishing vessels are entitled to commercial privileges in provincial "ports, but are subject to forfeiture if found engaged in traffic. The "colonial collectors have no authority to permit freight to be landed "from such vessels, which under the convention can only enter our "ports for the purposes specified therein, and for no other."—*Journals of House of Assembly*, 1853, *Appendix* 4, *p.* 141.

Again, after the determination of the Reciprocity Treaty, fishing vessels were warned off and seizures made. The "J. H. Nickerson" was condemned for entering the Bay of Ingonish for the purpose of procuring bait.

After the termination of the Treaty of Washington the contention was again prominently raised in the case of the "David J. Adams," seized at Digby, for purchasing bait, ice, &c.

It will thus be seen that whenever there has been no treaty conferring larger fishing privileges than those conferred by the Convention of 1818, the British and Colonial authorities have disputed the claim of American fishing vessels to have access to our bays and harbors for purposes other than that of obtaining wood, water, shelter or repairs.

The claim was resisted on many grounds. The colonial fishermen complained of being "supplanted by American fishermen, even upon the "very shores of the British dominions." They considered it was not fair to compel them to come into competition with men who had an advantage over them in selling their catch in the American market. They complained of the "pre-occupation of British harbors and creeks in "North America by the fishing vessels of the United States." The colonists likewise had reason to complain of the clandestine introduction of prohibited goods into the British colonies by American vessels, ostensibly engaged in the fishery trade, to the great injury of the revenue, and to legitimate trade.

The United States also claims that the Order in Council of 1830, passed under the authority of the Imperial Act of 1825, chap. 113, qualified the Convention of 1818 and the Imperial Statute of 59 Geo. III, chap. 38, passed to make that convention operative. This contention was never raised previously to the discussion of the seizures which have taken place since the termination of the Washington Treaty.

In the course of the argument before the Halifax Fishery Commission, this Order in Council was never mentioned. The claim now is, that fishing vessels are entitled to procure bait, ice and other supplies, and to tranship cargoes in our ports because commercial privileges were extended by that order to American trading vessels.

It may be well to notice, 1st. That never once in all the correspondence previously to the negotiations, which resulted in the arrangement of 1830, is the subject of fishing vessels mentioned. 2nd. That under the statutes of the United States' fishing vessels were not allowed to engage in trade, even in their own ports, and that they have been forfeited for engaging in trade in foreign ports. The exceptional case of holding a permit to "touch and trade," will be dealt with hereafter. 3rd. Immediately before and after the changes of 1830, litigation and public discussion took place in both countries in respect to the seizure of American fishing vessels in the bays and harbors of the British North American possessions.

The Convention of 1818 deals specifically with fishing vessels and their rights and privileges in British waters. Is it possible that Mr. McLane, who was charged with no duty in respect to the fishing vessels, who never referred to them in his correspondence, who knew that the fishing vessels of the United States were not allowed by its statutes to engage in trade, could have intended to embrace within the scope of his arrangement a subject which was then a mooted matter, and to have intended a repeal of the prohibitory terms contained in the Convention of 1818 ? That Lord Aberdeen could have intended to disturb that Convention is impossible. Apart from the intention of the two Governments at that time, it can hardly be contended that the Order in Council related to vessels other than those importing goods into, or exporting goods from, the British possessions.

That order was connected with a proposal made on the part of the United States that if Great Britain would open its West Indian ports to United States vessels the United States would open its ports to British vessels coming from the West Indies, and also to the vessels coming from the British North American Provinces to United States ports.

The *quid pro quo* was not that if Great Britain would open its North American ports on the continent to United States vessels, the United States vessels would open its ports to continental North American vessels, but it was that if Great Britain would give American vessels liberty to engage in the West Indian trade, the United States being moved thereto by its desire to participate in the West Indian trade, would open its ports to both West Indian vessels and continental British North American vessels.

Mr. Cushing says:

"But the arrangement negotiated by Mr. McLane, under the instructions "of Mr. VanBuren of the 20th of July, 1829, was not in the form of a "treaty between the two governments. Congress volunteered to pass a "law for opening our ports without having any assurance that Great "Britain would open hers. Great Britain proceeded in such form and "to such an extent as she pleased, then to open her Colonial ports to us "by a mere Order in Council revocable at will. In the same way our "own Act of Congress is rovocable at the will of Congress. It was on "both sides, at any rate on ours, an experiment which we saw fit to try "on both sides without entering into any stipulations on the subject "obligatory either in their nature or in time."—*Cushing's Rep of* 1842.

A repeal of the specific terms of the Convention of 1818 was not effected.

Maxwell in his book on the construction of Statutes, page 212, says:—

"It is but a particular application of the general presumption "against an intention to alter the law beyond the immediate scope of the "Statute, to say that a general Act is to be construed as not repealing a "particular one, that is, one directed towards a special object, or a special "class of objects. A general later law does not abrogate an earlier "special one by mere implication *Generalia specialibus non derogant*, "the law does not allow the exposition to revoke or alter, by construc-"tion of general words, any particular Statute where the words may "have their proper operation without it. It is usually presumed to "have only special cases in view, and not particular cases which have "been already otherwise provided for by the special Act, or what is the "same thing, by a local custom."

But the Order in Council is not inconsistent with the Convention of 1818. It will be remembered that at the time the Convention was framed, the American Plenipotentaries were anxious to remove the system of non-intercourse which then existed between the two countries. They proposed in addition to the stringent provision, relative to the exclusion of vessels from entering our bays and harbors, a clause applicable to trading vessels, giving them commercial privileges as broad as those subsequently contained in the Order in Council of 1830. The clause proposed, so far as the same related to exportation from British Colonial ports by United States vessels, was in the following terms:—

"And they" (vessels of the United States), "shall likewise have "liberty to export, in the same manner, any other article of the growth, "produce or manufacture of the said provinces, the exportation of which "to any other foreign country shall not be entirely prohibited."

It will be noticed what a close resemblance this language bears to the language contained in the Order in Council. The American plenipotentiaries would hardly have proposed to insert in the Convention of 1818, side by side with the first clause prohibiting American fishing vessels from coming into our bays, harbors, &c., a further clause permitting them to come in. It could not have been intended to insert in the same Convention, two clauses inconsistent with each other, and yet it is contended, that a similar clause in the Order in Council of 1830, is inconsistent with the terms of the Convention of 1818, and has in effect superseded it. *Quoad* this subject.

The Imperial Act of 1825, which gave His Majesty power to pass this Order in Council, and under which alone the order has a legal existence, contains no provisions which enabled the order to take a wider

scope than it did take—namely to authorize the export of goods to be carried to foreign countries.

Throughout the legislation of Congress, distinction is made between fishing and trading vessels. For fishing vessels, they have what is termed "an enrolment" and "a license" to engage in any particular fishery. For trading vessels other tan those engaged in coasting which have licenses they have a system of registry similar to our own. This distinction is recognized in American decisions. The vessel engaged in the fishery, and licensed therefor, is prohibited from engaging in trade, and is subject to a penalty if she infringes that rule.

The following sections of the Revised Statutes of the United States clearly define the position of vessels engaged in the fisheries:—

Sections 4220, 4319, 4320 4321, 4337, 4361, 4377.

As a fact, they never did engage in *trade*. While they always were obliged, in the prosecution of the fisheries, to procure bait, ice and other supplies, and to enter foreign ports for wood and water, it was always held, that this was not a violation of their licenses, which permitted them only to engage in the fisheries, and that it was incidental to this employmet.

In the case of the "Nymph," *1st Sumner* p. 516, Mr. Justice Story says:—

"The next question is whether the license for employment in the "codfishing includes within its scope a license for a distinct employ- "ment in mackerel fishery. Notwithstanding the able and ingenious "argument of the counsel for the claimant, I am decidedly of opinion "that it does not. A license to be employed in the codfishing *ex vi* "*terminorum* cannot include any right or privilege except those which "are incident and belong to that particular branch of trade. A license "confers on the party whatever is necessary and appropriate to that "trade; for a right to carry on a business only includes all the usual "and customary means by which the end is to be accomplished."

Then it appears from *Desty on Shipping*, sec. 27, "merely touching "at or entering a foreign port for supplies or for any purpose other than "for trade, is not a violation of the statute."

It is now contended, that in a provision giving commercial privileges, fishing vessels which were not allowed to engage in commerce, and never did engage in commerce, are included, and that the parties who negotiated the arrangement intended that they should be included:—That while they could procure bait, ice and other supplies as incidental to the employment in the fisheries and were exempt from the requirements of trading vessels, they were entitled to the privileges of trading vessels in foreign ports, although not so entitled in their own.

It is claimed that a "permit to touch and trade at foreign ports" changes a fishing vessel at home into a trading vessel when she is in a foreign port. Its use has been explained by an American witness.

Mr. Fitz J. Babson, of Gloucester, Mass., was examined as a witness on behalf of the Government of the United States, before the Halifax Commission. His evidence is given in vol. 3, *Report of the Fishery Commission (American)* p. 2956.

"FITZ J. BABSON, Collector of Customs of Gloucester, Mass., called "on behalf of the Government of the United States, sworn and ex- "amined.

"*By Mr. Trescot:*

"Q. Are you collector at the port of Gloucester?—A. I am.

"Q. How long have you been so?—A. Eight years.

"Q. Is it your duty as collector to issue papers to all vessels going "out of Gloucester?—A. It is.

"Q. What is the character of the papers you issue?—A. Three "kinds—domestic and foreign—a register fishing license and coasting "license.

"Q. Does the register or fishing license include the privilege to touch "and trade, or is it a special issue?—A. The privilege to touch and "trade is simply what is connected with the fishing license by applica- "tion made upon the part of the captain or owner.

"Q. Explain what it is?—A A vessel taking a fishing license and "being desirous to touch and trade as part of the trip or the whole of it, "applies at the office for a permit to touch and trade, which is a paper "that is in connection with the fishing license and gives the same "power for that one voyage as a register.

"Q. Then, as I understand it, a fishing vessel sailing from Gloucester "with the intention to buy bait at Newfoundland, or to buy frozen her- "ring, would take out, besides a fishing license, a permit to touch and "trade?—A. It would.

"Q. What is the difference either in cost or in advantage between "taking out a permit to touch and trade, and taking a register?—A. A "permit to touch and trade would simply cost 25 cents. In case a "vessel under a fishing license wishes to take a register it has to give "up the license and take out a register, which would cost $2.25. The "other expenditures to which the vessel would be liable under a regis- "ter would be a tonnage tax of thirty cents per ton, and also an hos- "pital tax of forty cents per month on each individual member of the "crew for the time she had the register.

"Q. Under a register the vessel would have to enter and clear at "every port, and that is a certain additional cost?—A. Yes.

"Q. Take a Gloucester vessel that is going fishing and she thinks "she may want to purchase bait, or, at all events, to go and fish and "purchase frozen herring; if she takes a register, when she returned "with the cargo she would have to enter and clear, and if she went out "fishing she would have to enter and clear every voyage?—A. Yes.

"Q. Whereas, if it takes out a fishing license with a permit to touch "and trade she could go and come without any further entries?—A. "Certainly.

"Q. Then those vessels pay none of the duties you refer to?—A. With "a fishing license, with permit to touch and trade, no duties are exacted.

"Q. With regard to the hospital tax. That is paid on every entry? "—A. On every entry of a vessel under a register. No hospital tax is "exacted from our fishermen.

"Q. A vessel under a register would have to pay the hospital tax at "the port of entry without she had paid it at the port from which she "cleared?—A. At every new entry.

"Q. Then a vessel going out of Gloucester, which takes a permit to "touch and trade, would be considered as going on a trading voyage?— "A. Most certainly, it takes it for that purpose.

"Q. With regard to Gloucester vessels that go to buy frozen her- "ring, do they, as a general rule, take a license to touch and trade?—A. "They do.

"Q. It gives to the voyage, in the eye of the law of the United "States, a trading character?—A. Most certainly.

"Q. Do you mean that all Gloucester vessels that go fishing, say for "mackerel, take out permits to touch and trade?—A. No, only those that "buy frozen herring. We have never had occasion to issue permits to "touch and trade to other vessels. The mackerel fishing is conducted "under a general fishing license.

"Q. Does the permit to touch and trade confine them to purchase "herring, or does it authorize them to do a general trade?—A. It allows "them to trade in the products of any country, wherever they may be "on its shores, or to which they may go; otherwise they would be liable "to confiscation and seizure for trading under a fishing license.

"Q. Then, as far as the permit goes, a vessel goes out under it, say "mackerel fishing?—A. Yes.

"Q. And when it buys frozen herring it is in the way of trade?— "A. It is a commercial voyage.

"Q. Is there a drawback allowed on salt used in the fishing business "of the United States?—A. There is for all fish taken by American ves- "sels a drawback allowed to the amount of the duty, eight cents per "one hundred pounds. In 1872 the duty was eighteen cents per one "hundred pounds, and it has been reduced in the tariff to eight cents "per one hundred pounds."

* * * * *

"*By Sir Alexander Galt:*

"Q. In the return concerning lost vessels, do the coasters include "the herring fishing vessel?—A. No. The herring fishing vessels all "run under fishing licenses, with permits to touch and trade; these are "papers issued from our office, allowing vessels to pursue any business "under the laws of the United States. The coasting paper and the fish- "ing license are different papers, confining, of course, those who run the "vessels to sail under them, and to do such business as is specified in "these licenses.

"Q. Do vessels which take out fishing and trading licenses fre- "quently change their business?—A. They cannot do so; they are not "allowed to do it; they can only pursue the business for which they "take out a license. A permit to touch and trade is given only for one "voyage.

"Q. If a vessel goes to Fortune Bay with a fishing license, and a "touch and trade license, and returns to Gloucester, can she go out "again without renewing her license to touch and trade?—A. A fish- "ing license is given for one year; and a touch and trade license for a "voyage; and at the end of such voyage, the vessel surrenders that "permit. This permit is a peculiar paper, intended for that business "only."

The provisions of the Revised Statutes of the United States, which provide for the permit to touch and trade, are in the following terms:—

"Sec. 4364.—Whenever any vessel licensed for carrying on the "fishery is intended to touch and trade at any foreign port, it shall "be the duty of the master or owner to obtain permission for that purpose "from the collector of the district where such vessel may be previous to "her departure, and the master of every such vessel shall deliver like "manifests and make like entries both of the vessel and of the merchan- "dize on board, within the same time and under the same penalty as "are by law provided for vessels of the United States arriving from a "foreign port."

Sec. 4365.—"Whenever a vessel, licensed for carrying on the "fisheries, is found within three leagues of the coast with merchandize of "foreign growth or manufacture, exceeding the value of five hundred "dollars, without having such permission as is directed by the preceding "section, such vessel, together with the merchandize of foreign growth "or manufacture imported therein, shall be subject to seizure and for- "feiture."

The object of the law is manifest. It is to prevent vessels engaged in the coasting trade and fisheries from becoming the medium of the introduction of smuggled goods under the security and cover of their license.—*The Ocean Spray*, 4 *Sawy*, 110.

It cannot alter the employment or the character of the vessel. The vessel remains a fishing vessel, and, as such, comes within the letter and spirit of the Convention of 1818. It cannot seriously be contended that a nation, after entering into a Treaty providing for the exclusion of a particular class of vessels, can nullify the effect of that Treaty by passing a statute conferring upon that class of vessels another privilege incidental to the original course of their employment.

Second.—The Convention of 1818 contains an express stipulation prohibiting American fishing vessels from entering the bays and harbors of British North America for any other purpose than that of "shelter and "of repairing damages therein, of purchasing wood and obtaining "water."

In order to make the provisions of this Convention effectual, and to provide penalties for its violation, the Parliament of Great Britain passed an Act 59 Geo. III, chapter 38, before set out.

It will be observed that the narrow question whether fishing vessels can be condemned for purchasing bait and supplies, &c., within prohibited waters under the term "preparing to fish," (the expression used in the statute), does not arise. This is the main question in dispute in the case of the "David J. Adams" and "Ella M. Doughty."

Without a Statute it may be admitted that vessels cannot be confiscated and confiscation is claimed in these cases because these vessels were "preparing to fish," within the meaning of the Statutes. But whatever may be said in respect to the construction of the Statute, and the phrase "preparing to fish," it is evident that there can be no doubt in respect to the comprehensive negative terms of the Convention.

The law officers of the Crown, in England, on the 25th September, 1852, viz., Sir J. D. Harding, Advocate General, Sir F. Thesiger, Attorney General, afterwards Lord Chelmsford, and Sir F. Kelly, Solicitor General, afterwards Chief Baron of the Exchequer, gave an opinion, in reply to certain questions submitted by Vice-Admiral Seymour, then engaged in the protection of the fisheries. It and the questions submitted will be found in the *journals of the House of Assembly for Nova Scotia for* 1853, *appendix* 4, *pp.* 138 *to* 141.

The parts material to the question are extracted. The memorandum submitted says: "The fishing vessels of the United States are found in "great numbers, at Port Hood and adjacent harbors in Cape Breton, New "Brunswick and those of Prince Edward Island, where they pass their "Sundays, and the men land in great numbers, which leads to illegal "traffic and an undue influence over the inhabitants, and, from their num- "bers, are beyond control"

"Such entry not being included under causes admitted by the third "clause of 59 Geo. III, chap. 38, can a vessel so offending be seized by "Her Majesty's ships for a contravention of the Act? Or if she remains "or returns after receiving due notice of the illegality of the practice? "Or is the offence only punishable under the 4th clause, by the Colonial "authorities, after notice has been given, by imposition of penalty "recoverable in the Supreme Court of the Colony? And how are the "offenders to be detained in the latter case?"

* * * * * * *

"Additional query. I subjoin some queries or points respecting the "construction of the convention, which were held doubtful in this Pro- "vince when the late instructions to their vessels were framed. First,— "Has an American fishing vessel a right to enter a harbor of Nova Scotia "in serene weather, and afterwards proceed to sea without purchasing "wood and water, or is she liable to seizure under existing laws?"

In the opinion these questions were answered as follows:—

"My Lord,—We are honored with your Lordship's commands, signified in Mr. Addington's letter of the 16th instant, stating that with reference to the Queen's Advocate's letter of 30th July last, requesting to be furnished with certain documents relating to the North American fisheries, to enable the law officers of the Crown to furnish Your Lordship with a report upon certain points connected with that subject, he was directed to transmit to us therewith, two letters and their enclosures from the Admiralty and from the Colonial Office containing the information specified in the Queen's Advocate's letter, above referred to, and

Mr. Addington is pleased to request that we would report to Your Lordship, at our earliest convenience, upon the points stated in Vice-Admiral Seymour's memo., which was referred to us on the 26th July last.

In obedience to your Lordship's commands, we have the honor to report that:

First.— We are of opinion that the commanding officers of Her Majesty's ships or vessels are empowered to seize fishing vessels only in the cases mentioned in the 2nd section of the 59th George III, c. 38, viz., if found fishing, or to have been fishing, or preparing to fish, within the prescribed limits; and that they do not require any commission from the Governor, or officers administering the Government of the Colonies, to carry out the stipulations of the Convention of 1818: but that they may, by virtue of their instructions, enforce the terms of the convention by interrupting intruders, warning them off, and compelling them to desist from fishing.

Secondly.— With respect to the resort of fishing vessels of the United States to British harbors, in violation of the convention, but without the taking, or curing, or drying of fish, we are of opinion that vessels so offending cannot be seized by Her Majesty's naval officers, but that such offence is only punishable under the 4th section of the Statute 59 Geo. III, cap. 38; whether persons so offending may or may not be detained during the proceedings depends upon the local law of each colony.

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

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

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

Upon the general question as to the right of fishing from the shores of the Magdalen Islands, we are disposed to agree with the opinion thereon by Sir J. Dodson and Sir Thomas Wylde in their report dated August 30, 1841. If it should be considered advisable to prevent the commission of any such acts upon the Magdalen Islands (which are, in our opinion, in contravention of the convention), it may be done after warning, and without seizing vessels, by interrupting the fishermen and compelling them to depart. With reference to the further or additional queries or points subjoined to the memorandum of Vice-Admiral Sir George Seymour, we have the honor to report as follows:—

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

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

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

We have, &c.,

(Signed) J. D. HARDING.
FRED. THESIGER.
FITZROY KELLY.

The Earl of Malmesbury, &c., &c.

It is clear from this opinion (1st), owing to the phraseology of the Statutes, fishing vessels may not be condemned unless they are "preparing to fish" within prohibited waters, and it has been held since that this expression covers purchasing bait, supplies, &c. (2nd). American fishing vessels under the terms of the treaty cannot lawfully enter any harbor in Nova Scotia at all in serene weather, or otherwise than for shelter. (The right of entry for *wood and water* not being in that case in controversy.) (3rd). They can be interrupted and compelled to depart.

The argument has been advanced by an American writer in an article in the 5th volume of the American Law Review, p. 410, said to have been written by Mr. Pomeroy, author of a work on International Law. The language is as follows:—

2. *The claim of right to lie at anchor in the bays and harbors and other territorial waters for the purpose of cleaning and packing fish; or to procure bait therein by purchase or barter; or to prepare to fish while therein; or to land and tranship cargoes of fish.*

All of these acts are plainly unlawful, and would be good grounds for the confiscation of the offending vessel, or the infliction of pecuniary penalties. The treaty stipulates that

"American fishermen shall be admitted to enter such bays and harbors for the purpose of shelter, of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever." Even assuming, as has sometimes been urged, that the words "for no other purpose whatever" refer exclusively to matters connected with the business and process of fishing, the prohibition still covers all the acts enumerated. To use the bays and harbors as places of convenience in which to clean and pack fish, to procure bait, to prepare to fish, or to land cargoes of fish, would be an invasion of the exclusive fishing rights within the territorial waters secured to British subjects and denied to American citizens. "Preparing to fish" if permitted, would render it almost impossible to prevent actual fishing. When, from considerations of policy, statutes are made to declare some final result illegal, the Legislature uniformly forbids the preliminary steps which are directly connected with that result, lead up to it, and facilitate its accomplishment. Thus, if Congress should absolutely prohibit the landing of certain goods in our ports, the United States Government would doubtless listen with amazement to the complaint from foreign importers that "preparing to land" was also prohibited. All Customs and revenue regulations are framed upon this theory. The provisions of the Imperial and Canadian Statutes making it a penal offence for American vessels "to prepare to fish" while lying in territorial waters, seems, therefore, to be a "restriction necessary to prevent" their taking fish therein, and for that reason to be lawful and proper. We cannot assent to the views upon this particular subject contained in the recent message of President Grant.

3. *The claim of right to sell goods and buy supplies, other than wood and water, in the Canadian ports and harbors.*

Information, furnished by various consuls residing in the Dominion, shows that for a number of years past our fishing vessels have been permitted to carry merchandise, enter at the Custom houses, and buy supplies other than wood and water, but that this practice has recently been stopped. The President of the United States, in his last annual message to Congress, asserts that the right exists, and recommends measures for its protection This particular claim has not yet been made the subject of diplomatic correspondence between the two governments; but among the documents laid before Congress at its present session is a consular letter from which we quote:—

"It (the Treaty of 1818) made no reference to, and did not attempt to regulate the deep-sea fisheries, which were open to all the world. * * * It is obvious that the words 'for no other purpose whatever,' must be construed to apply solely to such purposes as are in contravention to the Treaty, namely, to purposes connected with the taking, drying or curing fish within three marine miles of certain coasts, and not in any manner to supplies intended for the ocean fisheries, with which the Treaty had no connection."

All this is clearly a mistake, and if the claims of American fishermen, partially sanctioned by the United States Executive, rest upon no better foundation, they must be abandoned. In fact the stipulation of the treaty in which the clause occurs, has reference alone to vessels employed in deep-sea fishing. It did not require any grant to enable our citizens to engage in their occupation outside the territorial limits, that is, upon the open sea; but they were forbidden to take, dry, or cure fish in the bays and harbors. They were permitted, however, to come into those inshore waters for shelter, repairs, wood and water, "and for no other purpose whatever." To what American vessels is this privilege given? Plainly to those that fish in the open sea. To say that the clause "for no other purpose whatever" applies only to acts connected with taking, drying or curing fish within the three miles' limit, which acts are in terms expressly prohibited, is simply absurd. It would be much more reasonable to say that, applying the maxim *noscitur a sociis*, the words "for no other purpose whatever" are to be construed as having reference solely to matters connected with regular fishing voyages, necessary, convenient or customary in the business of fishing, and are not to be extended to other acts of an entirely different and purely commercial nature.

President Grant declares that so far as the Canadian claim is founded upon an alleged construction of the Convention of 1818, it cannot be acquiesced in by the United States. He states that during the conferences which preceded the signing of this treaty, the British Commissioners proposed a clause expressly prohibiting American fishermen from carrying on any trade with British subjects, and from having on board goods except such as might be necessary for the prosecution of their voyages. He adds:—

"This proposition, which is identical with the construction now put upon the language of the convention, was emphatically rejected by the American Commissioners, and thereupon was abandoned by the British plenipotentiaries, and article 1, as it stands in the convention, was substituted." (3)

The President has been misinformed. The proposition alluded to had no connection with the privilege given in the latter part of article 1 to enter bays and harbors for shelter and other similar purposes; but referred expressly and exclusively to the grant contained in the former part of the article of a right to take, dry, and cure fish on the coasts and in the bays of Labrador and Newfoundland. This is apparent from a reference to the negotiations themselves. On September 17, 1818, the American Commissioners submitted their first *projet* of a treaty. The proposed article relating to the fisheries was nearly the same as the one finally adopted, including a renunciation of the liberty to fish within three miles of other coasts and bays. The proviso was as follows:—

"Provided, however, that American fishermen shall be permitted to enter such bays and harbors for the purpose *only* of obtaining shelter, wood, water, and *bait*." (4)

The British counter *projet* granted a liberty to take, dry, and cure fish on the coasts of Newfoundland and Labrador within much narrower limits than those demanded by the American plenipotentiaries. It admitted the fishing vessels of the United States into other bays and harbors "for the purpose of shelter, of repairing damages therein, of purchasing wood, and obtaining water, and for no other purpose." It contained also the following clause:—

REFERENCES.

(3.) President Grant's message, 1870, p. 11.

(4.) Am. State Papers. For. Rel., fol. ed., 1834, Vol IV., pp. 383–384, protocol of 3rd Conference, Art. A.

"It is further understood that the liberty of taking, drying, and curing fish granted in the preceding part of this article shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing *within the limits hereinbefore assigned for the use of fishermen of the United States.* And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States *engaged in the said fishery* to have on board any goods, wares and merchandise, except such as may be necessary for the prosecution of the fishery." (5)

Messrs. Gallatin and Rush replied, insisting upon a privilege to take, dry, and cure fish on the coasts of Newfoundland and Labrador within the limits first demanded by them, and added as the last sentence of their letter: "The clauses making vessels liable to confiscation in case any articles not wanted for carrying on the fishery should be found on board, would expose the fishermen to endless vexations." (6) On the 13th October, the British Commissioners proposed Article 1 as it now stands, which was accepted at once. (7.) There was no discussion of an alleged right of American fishermen to engage in trade, and no further allusion to the subject. Indeed, throughout all these conferences the American Commissioners were laboring to obtain as extensive a district of territory as possible on Newfoundland, Labrador and the Magdalen Islands for inshore fishing, and paid little attention to the privilege—then apparently of small value, but now important—of using other bays and harbors for shelter and kindred purposes. The British agents, on the other hand, endeavored to confine the former grant within narrow bounds, and to load it with restrictions. The rejected clause, concerning trade and carrying goods, was one of these restrictions, and in its very terms referred alone to the vessels taking, drying, and curing fish on the portions of the Newfoundland and Labrador coasts made free to our citizens. It should be noticed that the proviso finally adopted omitted the right originally demanded by the Americans of entering other bays and harbors for bait, and is identical with the one at first submitted by the British plenipotentiaries, strengthened by the addition of the word "whatever" after the clause "for no other purpose." It is evident, therefore, that the British Government is not estopped from opposing the claim now set up by American fishermen, and sustained by the President, by anything that occurred during the negotiations preliminary to the treaty.

Daniel Webster, when Secretary of State, published an important admission:

"It would appear that by a strict and rigid construction of this article, fishing vessels of the United States are precluded from entering the bays or harbors of the British Provinces except for the purpose of shelter, repairing damages, and obtaining wood and water." —Sabine, p. 264.

At the last Session of Congress, a report was presented by the Committee on Foreign Relations, which was intended to be a complete definition of the rights of American fishing vessels under the Convention.

In it we have the following conclusions:

Concluding then, from what has been before stated, that there is no serious difficulty in respect of the question where American fishermen can carry on their operations, it would seem to be easy to know precisely what our fishermen may and may not do in the territorial waters adjacent to the British dominions.

What they may do may be stated as follows:—

1. They have the liberty to take fish "on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands."

2. They have the right to take fish "on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands."

3. Also, "on the shores of the Magdalen Islands."

4. Also, "on the coasts, bays, harbors and creeks, from Mount Joly on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast," subject to any exclusive rights of the Hudson's Bay Company.

5. The right 'to dry and cure fish in any of the unsettled bays, harbors and creeks of the southern part of the coast of Newfoundland," before described, and of the coast of Labrador, without interfering with the rights of settlers, &c.

6. The right of American fishermen, in their character as such, to enter the bays and harbors of Great Britain in America for the purpose (*a*) of shelter, (*b*) of repairing damages, (*c*) of purchasing wood, (*d*) of obtaining water, and for no other purpose whatever.

But they are to be under such restrictions in respect of their entry into bays and harbors where they are not entitled to fish "as may be necessary to prevent their taking and drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The things that, by this Article, American fishermen must not do are:—

1. Fish within 3 miles of any of the shores of the British Dominions, excepting those specially above named.

2. *Enter within this 3-mile limit except for the purposes last stated.*

The American fishermen, in their character as such, purely, *must not enter the prohibited waters other than for the purposes of shelter, repairing damages, purchasing wood, and obtaining water,* and in doing this they are subject to such reasonable restrictions as shall be necessary to prevent their fishing or curing fish in prohibited waters or on prohibited shores, and thereby abusing the privilege of entering those waters for the necessary purposes stated.—*For. Cor. N. A. Fisheries,* 1886-87, *No.* 2.

REFERENCES.

(5.) *Ibid.* p. 390, protocol of 5th Conference, Art. A.

(6.) *Ibid.* p. 392.

(7.) *Ibid.* p. 394, protocol of 7th Conference, Art. A, and p. 397, protocol of 8th Conference.

The following is a report from Acting Secretary of State, A. Vail, to the President of the United States :—

"DEPARTMENT OF STATE, 14th August, 1839.

"In obedience to the directions of the President to report to him the treaty stipulations which bear upon the subject (the seizure of American fishing vessels on the coast of Nova Scotia); the conflicting questions of right, if any, which had arisen under them, and the nature and circumstances of the cases which have been presented to this Government by our citizens as infractions of right on the part of the British Authorities, the Acting-Secretary of State has the honor to state that the only existing treaty stipulations bearing upon the subject are found in the 1st Article, Convention 1818.

"Under this Article: (1.) American vessels are allowed, forever, to take, dry and cure fish on and along the coasts of Newfoundland and Labrador, within certain limits therein defined; (2.) The United States renounce, forever, any liberty before enjoyed by their citizens to take fish within three marine miles of any coasts, bays, creeks or harbors of the British Dominions in America, not included within the above limits, *i. e.* Newfoundland and Labrador; (3.) American vessels retain the privilege (under necessary restrictions to prevent their taking fish) of entering the bays, creeks and harbor of said possessions for the purposes of shelter, repairing damages, purchasing wood and obtaining water, and for no other purpose whatever.

"It does not appear that the stipulations in the article above quoted have since the date of the Convention been the subject of conflicting questions between the two Governments. The rights of the respective parties are so clearly defined by the letter of the treaty as scarcely to leave room for such questions of an abstract or general character."

The President subsequently appointed John S. Payne to the command of a United States vessel to proceed to the fishing grounds. Payne reported December 29th, 1839, and among other things said:

If the ground maintained by the Americans (fishermen) be admitted it will be difficult to prevent their procuring articles of convenience and *particularly bait* from which they are precluded by the Convention, and which a party in the Provinces seems resolved to prevent. Sen. Doc., 1st Sess., 32nd Congress, Doc. 10.

Whatever criticisms may have been passed by those interested in the American contention, on the decision in the case of the "J. H. Nickerson," which decided that "purchasing bait" was a "preparing to fish," the expression used in the *statute*, the main part of the judgment to the effect that there was a violation of the terms of the *Convention* remains unchallenged.

The decision was as follows :—

In the Vice Admiralty Court, 1871.

The "J. H. Nickerson."

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

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

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

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

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

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

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

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

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

"These privileges are explicitly and clearly defined, and to make assurance doubly sure, they are accompanied by a negative declaration excluding any other purpose beyond the purpose expressed. I confine myself to the single point that is before me. There is no charge here of taking fish for bait or otherwise, nor of drying or curing fish, nor of obtaining supplies or trading. The defendants allege that the "Nickerson" entered the Bay of Ingonish and anchored within three marine miles of the shore for the purpose of obtaining water and taking off two of her men who had friends on shore. Neither the master nor the crew on board thereof, in the words of the responsive allegation 'fishing, preparing to fish, nor procuring bait wherewith to fish, nor having been fishing in British waters, within three marine miles of the coast.' Had this been proved, it would have been a complete defense, nor would the Court have been disposed to narrow it as respects either water, provisions or wood. But the evidence conclusively shows that the allegation put in is untrue.

The defendants have not claimed in their plea what their counsel claimed at the hearing, and their evidence has utterly failed them The vessel went in, not to obtain water or men, as the allegation says, nor to obtain water and provisions, as their witness says; but to purchase or procure bait (which, as I take it, is a preparing to fish), and it was contended that they had a right to do so, and that no forfeiture accrued on such entering. The answer is, that if a privilege to enter our harbors for bait was to be conceded to American fishermen, it ought to have been in the Treaty, and it is too important a matter to have been accidently overlooked. We know, indeed, from the State Papers that it was not overlooked,—that it was suggested and declined. But the court, as I have already intimated, does not insist upon that as a reason for its judgment. What may be justly and fairly insisted on is that beyond the four purposes specified in the Treaty—shelter, repairs, water and wood—here is another purpose or claim not specified; while the treaty itself declares that no such other purpose or claim shall be received to justify an entry. It appears to me an inevitable conclusion that the "J. H. Nickerson," in entering the Bay of Ingonish for the purpose of procuring bait, and evincing that purpose by purchasing or procuring bait while there, became liable to forfeiture, and upon the true construction of the Treaty and Acts of Parliament, was legally seized.

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

The case of the "White Fawn" will be referred to hereafter. It differs from this only in the view taken of the *statute* and does not deal with the interpretation of the Convention.

RIGHT TO EXCLUDE.

Third.—It is objected, on the part of the United States, that the enforcement of the terms of the compact is harsh and unneighborly.

It is not competent for the nation which has negotiated so many shrewd bargains to say that there was any mistake in assenting to the terms of this Convention.

Mr. Webster, it seems, thought that there had been an oversight in connection with this Convention. But it appears that Messrs. Gallatin and Rush thoroughly weighed the words of the renunciation at least.

In a letter of 20th October, 1818, to the Secretary of State of the United States, after relating that they had insisted on the clause by which the United States renounced their right to fisheries relinquished by the Convention, they say:—

We insisted on it, with the view (1) of preventing any implication that the fisheries secured to us were a new grant . . . (2) Of its being expressly stated that our renunciation extended only to the distance of three miles of the coasts. This last point was the more important as, with the exception of the fishing in open boats, within certain harbors, it appeared from the communication above mentioned that the fishing ground on the whole coast of Nova Scotia is more than three miles from the shores, whilst on the contrary it is almost universally close to the shore on the coast of Labrador. It is in that point of view that the privilege of entering the ports for shelter is useful, and it is hoped that with that provision, a considerable portion of the actual fisheries on that coast (Nova Scotia) will, notwithstanding the renunciation, be preserved. *Annals of Congress* 1819, *p.* 1527.

In nearly all of the treaties now existing between the United States and other nations, two clauses are included, the one enabling their ships freely to enter the ports and harbors of the other nation, there to carry on with perfect freedom all kinds of trade; the other securing refuge for their vessels in distress. In respect to Great Britain, the Convention of 1818 contains a stipulation providing for asylum for its fishing vessels, but no treaty or provision exists which gives those fishing vessels the right to enter for any other purpose.

Without a treaty or agreement between the two nations this privilege cannot be claimed. An eminent writer on International Law, referring to the subject of the right to enjoy the fisheries of another country, says:—

Treaty engagements, in such matters, do not give any other right than that which is expressed in the specific terms, although there may be found, in the recitals of certain treaties, recognition of rights founded on grounds independent of all treaties. Thus there are early treaties between France and England, under which it was agreed that the subjects

of either Crown might fish anywhere in the seas which separate the two kingdoms during certain seasons of the year. The legitimate inference deducible from the fact that such fishery was made a matter of treaty engagement is that at other seasons of the year the subjects of the two Crowns had not a common right of fishing everywhere in those seas."—*Twiss, Law of Nations*, 2nd ed., p. 313.

The following principles in International Law are firmly established:

(1.) Ports and harbors are a part of the territory, and subject to the exclusive dominion of the state to which they belong, to the same extent as the land itself.

"Ports and harbors are manifestly an appendage to and even a part of the country, and are consequently the property of the nation."—*Vattel*, page 129.

(2.) Every nation may prohibit or allow commerce with all or any part of its dominions, may close or open its ports to foreign vessels or merchandise, and may grant the privilege wholly or partially, conditionally or unconditionally.

If authority is wanted, the following extracts from recognized authors will be useful:—

"RIGHTS OF COMMERCE.

But as every nation has the right, and is disposed to exercise it, of judging for itself, in respect to the policy and extent of its commercial arrangements, the general freedom of trade, however reasonably and strongly it may be inculcated in the modern school of political economy, is but an imperfect right, and necessarily subject to such regulations and restrictions as each nation may think proper to prescribe for itself. Every State may monopolize as much as it pleases of its own internal and colonial trade, or grant to other nations, with whom it deals, such distinctions and particular privileges as it may deem conducive to its interests. The celebrated English navigation Act of Charles II contained nothing, said Martens, contrary to the law of nations, notwithstanding it was very embarrassing to other countries. When the United States put an entire stop to their commerce with the world, in December, 1807, by laying a general embargo on their trade, without distinction as to nation, or limit as to time, no other power complained of it; and the foreign Government most affected by it, and against whose interests it was more immediately directed, declared to our Government that as a municipal regulation, foreign states had no concern with it, and that the British Government did not conceive that they had the right or the pretension to make any complaint of it, and that they had made none.—"Kent's Commentaries," 12th Ed., Vol. 1, pp. 32 and 33.

Since then a nation cannot have a natural right to sell her merchandises to another that is unwilling to purchase them, since she has only an imperfect right to buy what she wants of others, since it belongs only to these last to judge whether it be proper for them to sell or not; and finally, since commerce consists in mutually buying and selling all sorts of commodities, it is evident that it depends on the will of any nation to carry on commerce with another, or to let it alone. If she be willing to allow this to one, it depends on the nation to permit it under such conditions as she shall think proper. For in permitting another nation to trade with her, she grants that other a right; and every one is at liberty to affix what conditions he pleases to a right which he grants of his own accord (37).

Men and sovereign states may, by their promises, enter into a perfect obligation with respect to each other, in things where nature has imposed only an imperfect obligation. 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* (Prelim. § 24). The treaty that gives the right of commerce is the measure and rule of that right.

A simple permission to carry on commerce with a nation gives no perfect right to that commerce. For if I merely and simply permit you to do anything, I do not give you any right to do it afterwards in spite of me; you may make use of my condescension as long as it lasts, but nothing prevents me from changing my will. As then every nation has a right to choose whether she will or will not trade with another, and on what conditions she is willing to do it (§ 92), if one nation has for a time permitted another to come and trade in the country, she is at liberty, whenever she thinks proper, to prohibit that commerce—to restrain it—to subject it to certain regulations, and the people who before carried it on cannot complain of injustice.

Let us only observe that nations, as well as individuals, are obliged to trade together for the common benefit of the human race, because mankind stand in need of each other's assistance. (Prelim. §§ 10, 11 and Book I, § 88.) Still, however, each nation remains at liberty to consider, *in particular cases*, whether it be convenient for her to encourage or permit commerce; and as our duty to ourselves is paramount to our duty to others, if one nation finds herself in such circumstances that she thinks foreign commerce dangerous to the State, she may renounce and prohibit it. This the Chinese have done for a long time together. But, again, it is only for very serious and important reasons that her duty to herself should dictate such a reserve; otherwise, she could not refuse to comply with the general duties of humanity.

37. With respect to commercial intercourse with the *colonies* of a parent state of Europe, all the European nations which have formed settlements abroad have so appropriated the trade of those settlemen s to themselves, either in *exclusively* permitting their own subjects to partake of it, or in granting a monopoly to trading companies, that the colonies themselves cannot legally carry on hardly any *direct trade* with *other* powers; consequently the commerce in those possessions is not free to foreign nations, and they are not even permitted to land in the country, or to enter with their vessels within cannon shot of the shore, except only in

cases of urgent necessity. This has now become generally the understanding and law of nations as regards colonies, and the ships, &c., violating the rule are liable to seizure."—Vattel's Law of Nations, Ed. 1858, pp. 39 and 40.

"ON THE LIBERTY OF COMMERCE.

Men being by nature obliged to assist each other reciprocally, there exists a sort of general obligation for them to carry on commerce with each other. This obligation, however, is only an imperfect one; it does not go to hinder a nation to consult its interests * in the adoption of certain conditions or restrictions † in the commerce that it finds it convenient to carry on. Suppose even that one nation has, for a long series of years, carried on commerce with another, it is not obliged to continue so to do, if there are no treaties or agreementswhich require it. Still less can one nation oblige another to trade with it alone. It is permitted to promise one nation not to trade with such or such other nation; but, this case excepted, if two nations think proper to trade with each other a third has no right whatever to hinder it. In this sense the liberty of commerce is conformable to perfect natural right."—Marten's Law of Nations, Ed. 1802, p. 148.

*Only in cases of absolute necessity can one nation oblige another to sell to it a part of its superfluity. In time of peace, the humanity of the European powers will hardly ever reduce a nation to the necessity of exercising this right We have seen Russia permit the exportation of grain to Sweden in a season of scarcity in that country, when such exportation to other states was forbidden.

† The establishment of Customs and other duties, are not contrary to rigorous right; neither was the English Navigation Act.

The admissions of diplomatists are to the same effect, as extracts from their correspondence will show:—

"Our right either to open the ports of our colonies or to keep them closed as might suit our own convenience, our right to grant the indulgence of a trade with those colonies to foreign powers, wholly or partially, unconditionally or conditionally, as we might think proper, and, if conditionally, on what conditions we pleased was clear.—Letter from Right Hon. George Canning to Albert Gallatin, of 26th August, 1826, British and Foreign State papers, 1826-7, p. 467.

To allow a foreign ship to enter colonial ports at all and upon any terms is a boon * * * * The colonial trade on the contrary by the practice of all nations having colonies is a trade interdicted as a matter of course unless specifically granted. *Ib.* p. 471.

It is, as the undersigned has already said, the unquestionable right and it has within these few years been the invariable practice of countries having colonies to reserve to themselves the trade within those colonies, and to relax that reservation only under special circumstances and on particular occasions.—Canning to Gallatin, 11th September, 1826, *Ib.*, 465.

Foreign nations might equally complain of the one interdiction that of trade with the Mother Country as an innovation, but they have no just ground of complaint, and no other nation than the United States has ever complained of the interdiction of trade to the colonies because in all ages all nations having colonies have maintained such an interdiction.—Canning to Gallatin, of 22nd September, 1826, *Ib.*, p. 482.

Every nation has the abstract right generally, and not in reference to her colonies alone, to close or open her ports to foreign vessels or merchandise, and to grant the indulgence, wholly or partially, conditionally or unconditionally. The right has been and continues to be exercised occasionally by every nation in the shape of navigation prohibitory and restrictive laws, often operating unequally on different nations.—Letter from Gallatin to Canning, 22nd September, 1826, *Ib.*, p. 475.

The right of Great Britain, which is that of every nation, to prohibit or allow foreign commerce with any part of her dominions, is unquestionable. That right, in reference to her colonies, has never been denied by the United States, any more than with respect to any other part of her possessions; and it is admitted, that she may, within her own jurisdiction, prescribe the conditions on which such commerce shall be tolerated, and at her will again interdict the intercourse thus permitted.—Gallatin to Canning, 28th September, 1826, *Ib.*, 486.

It is the undoubted right of every nation to prohibit or to allow commerce with all or any part of its dominions, wherever situated, and whatever may be their denomination, parental or colonial, or the modes of government in the respective ports. It may prescribe for itself the conditions on which the foreign trade is tolerated, but these conditions are not obligatory upon other nations, unless they in some form assent to them. All such conditions in respect to foreign powers are in the nature of proposals which they are as free to accept or decline as the other party was to tender them. If a nation has colonies, it may unquestionably reserve to itself exclusively the right of trading with them".—Mr. Clay to Mr. Gallatin, 11th November, 1826, *Ib.*, p. 589.

In agreement with these authorities the argument of Mr. Pomeroy in the article 5th, "*American Law Review*," *p.* 414, already alluded to, is at least forcible:

"We must fall back, then, upon the accepted doctrines of International Law. Every nation has the undoubted right to prescribe such regulations of commerce carried on in its waters, and with its citizens, as it deems expedient, even to the extent of excluding entirely some or all foreign vessels and merchandise. Such measures may be harsh, and under some circumstances a violation of inter-state comity, but they are not illegal. At all events, it does not become a government to complain, which now maintains a tariff prohibitory as to many articles, and which at one time passed a general embargo and non intercourse Act. There seem to be special reasons why the Dominion authorities may inhibit general commerce by Americans engaged in fishing. Their vessels clear for no particular port; they are accustomed to enter one bay or harbor after another as their needs demand; they might thus carry on a coasting trade; they would certainly have every opportunity for successful smuggling. Indeed this whole subject legitimately belongs to the local customs and revenue system, and not to the fisheries. We are thus forced to the conclusion that American fishermen have no right to enter the bays and harbors in question and sell goods, or purchase supplies other than wood and water".—*American Law Review, vol.* 5, *p.* 413.

In a late book upon the subject of International Law by Professor Pomeroy, edited by Mr. Woolsey, Professor of International Law at Yale College, 1886, we have much the same opinion expressed. That article says, s. 161:—

"He (the Sovereign) has the right therefore to place restrictions upon the freedom of commerce of his subjects. He can prohibit the importation of certain commodities and the exportation of others. The power of the sovereign in this respect is incontestable, it is recognized by all writers. He may restrain commerce within his state, interdict it entirely to all foreigners, or to some only. In a word, he is, in respect to other nations, the sole depository of the free faculty of commerce."

A dispute having arisen in 1831 as to the seizure of American vessels, the "Harriet," "Breakwater" and "Superior," for fishing seals on the shores of the Falkland Islands, the following doctrine was propounded by the American Chargé d'Affaires, Mr. Francis Bayliss. It must be remembered that he was claiming the largest possible privileges for American fishing vessels.

In a communication to the Minister of Grace and Justice, administering the Department of Foreign Affairs, Buenos Ayres, dated the 10th of July, 1832. He says:—

The ocean fishery is a natural right, which all nations may enjoy in common. Every interference with it by a foreign power is a national wrong. When it is carried on within the marine league of the coast, which has been designated as the extent of national jurisdiction, reason seems to dictate a restriction, if, under pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the sovereign of the coast, he has a right to prohibit it; but, as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real one, not an imaginary one. No such evil can be apprehended on a deserted and uninhabited coast; therefore, such coasts form no exception to the common right of fishing in the seas adjoining them. All the reasoning on this subject applies to the large bays of the ocean, the entrance to which cannot be defended; and this is the doctrine of Vattel, ch. 23, sec. 291, who expressly cites the Straits of Magellan as an instance for the application of the rule.

As to the use of the shores for the purposes necessary to the fishery, that depends on other principles. When the right of exclusive dominion is undisputed, the sovereign may, with propriety, forbid the use of them to any foreign nation, provided such use interferes with any that his subjects may make of them; but where the shore is unsettled and deserted and the use of it, of course, interferes with no right of the subjects of the power to which it belongs, then it would be an infringement of the right to the common use of the shores, as well as of the ocean itself, which all nations enjoy, by the laws of nature, and which is restricted only by the paramount right which the sovereign of the soil has to its exclusive use, when the convenience or interests of his subjects require it, or when he wishes to apply it to public purposes. It is true, that he is the judge of this interest, and of the necessity of using it for his public purposes—but justice requires that where no such pretension can be made, the shores, as well as the body of the ocean, ought to be left common to all.

These principles seem to have dictated the Articles in the Treaties between the United States and Great Britain.—20 Brit. & For. Papers, 1832-1833, p. 350.

PRACTICE OF ALL NATIONS TO EXCLUDE.

All nations possessed of fisheries have insisted, in their Conventions, statutes and usages, upon excluding altogether from their fishing limits, the fishing vessels of the subjects of other countries, or, if they allow them to enter, they have subjected them to regulations sufficiently stringent to prevent their engaging in fishing or encroaching upon territorial rights or revenue laws.

By the regulations made under the agreements between Great Britain and Germany of 1868 and 1874, relative to the fisheries, the access to fishing waters is rigidly guarded.

In the case of the German fishing limits, after carefully bounding and defining them, it is provided that:

English fishing boats are not at liberty to enter those limits, except under the following circumstances, namely:

(1.) When driven by stress of weather or by evident danger; (2.) When carried in by contrary winds, by strong tides, or by any other cause beyond the control of the master and crew; (3.) When obliged by contrary winds or tides to beat up in order to reach their fishing grounds, and when from the same cause of contrary wind or tide, they could not, if they

remained outside, be able to hold on their course to their fishing ground; (4.) When, during the herring fishing season, English fishing boats shall find it necessary to anchor under shelter of the German coasts in order to await the opportunity for proceeding to their fishing ground; (5.) When proceeding directly to any port of the German Empire, open to Englishmen for the sale of fish, where the cargo is to be sold.

Fishing boats, not of German nationality, which pass within the limits above mentioned, without being compelled to do so by any of the circumstances above mentioned, and not being on their direct way to a port for the sale of fish, will be liable to be turned back, and in the event of their resisting, or in the event of their being found fishing within the limits above described, will be arrested and proceeded against before the nearest competent authority.—*Twiss' Law of Nations, p.* 315.

On the 11th of November, 1867, a convention was made between Great Britain and France, relative to fisheries in the seas between Great Britain and France, ratified 14th January, 1868.

By Article 32 it is provided that the fishing boats of the one country shall not enter within the fishery limits fixed for the other country, except under provisions similar to those between England and Germany.—*Brit. and For. State Papers*, 1866–1867, *Vol.* 57, *p.* 22.

This convention was a revision of the convention of 2nd of August, 1839 (*Vol.* 27, *p.* 983), and of the Regulations of 23rd June, 1843 (*Vol.* 31, *p.* 165), which contain equally stringent provisions.

If a vessel was forced within the fishery limits, under the exceptional circumstances mentioned in these conventions, she was obliged to indicate her distress by exhibiting a particular flag.

A convention between Great Britain and France, relative to the rights of fishery on the coast of Newfoundland and the neighboring coasts, was entered into 14th January, 1857.

The right to purchase bait by the French was made the subject of an express stipulation, in the following terms:—

"French subjects shall have the right of purchasing bait, both herring and capelin, throughout the south coast of Newfoundland, including for this purpose the French islands of St. Pierre and Miquelon, at sea or on shore, on equal terms with British subjects, without any restriction on the practice of such fishery by British subjects, and without any duty or restriction being imposed either on British or French subjects in respect of such traffic, or upon the export of such bait, on the part of Great Britain or the Colony."—*Brit. and For. State Papers, Vol.* 47, *p.* 15.

On the 28th October, 1790, a Convention was entered into at San Lorenzo between the Governments of Spain and England for settling various disputed points relative to fishing, navigation and commerce in the Pacific and South Seas, and at the same place ratifications were exchanged on the 22nd November following. By this treaty, after regulating various other points, it was agreed in Article IV as follows:—

His Britannic Majesty engages to take the most efficient measures to prevent the *navigation and fishing of* His subjects in the Pacific ocean or in the South Seas from being made *a pretext for illicit trade* with the Spanish settlements, and, with this view, it is moreover expressly stipulated that British subjects shall *not navigate or carry on their fisheries* in the said seas within the space of ten leagues from any part of the coasts already occupied by Spain.—*Hertslett's Collection of Treaties, Vol.* 2, *p.* 259.

On the 12th February, 1872, the King of Denmark issued an Ordinance containing certain modifications of the Ordinance of June 13th, 1787. Its provisions were as follows:—

We, Christian IX, &c., &c., hereby proclaim that, having received the respectful advice of our faithful Althing on the project laid before it for an Ordinance containing certain modifications of the Ordinance of June 13th, 1787, Chap. 1, &c., we ordain and command as follows:—

1. If the fishermen of foreign nations ply any kind of fishing near the coasts of Iceland within the limit of the territorial waters, as settled by general international law, or as may be established by special international convention for Iceland, they shall be punished by fines of from 10 to 200 rix dollars.

2. The same penalty shall be incurred by foreign fishermen who take ashore what they have caught, whether it be on the strand itself or on the islands and islets near the coasts, for the purpose of preparing the fish there. If any damage be done thereby it must be made good besides, according to the general provisions of the law.

3. When foreign fishermen take refuge in a port, notice thereof is to be given without delay to the local authority, who is to take care that the commercial and customs' laws be not thereby evaded or transgressed. If it be for the purpose of seeking medical aid for any disease that has broken out amongst the crew, the quarantine regulations are to be observed.

For the examination and certification of the respective ship's papers, 4 skilling are to be paid to the authority concerned for each ton of the ship's burthen, with an addition of half this duty if, according to manifesto of December 28, 1836, Sec. 9, the certification be done by a duly authorized deputy on behalf of the Sysselmand.

Transgression of the provisions in the present section is to be punished by fines to the amount fixed in Sec. 1.

4. The Antmand shall be authorized to grant to foreign fishermen, through the respective directors of police, permission to lay up at the following places, namely, Reykjavik, Vestmanno, Stykkisholm, Isafjord, Akureyri, and Eskefjord, such articles belonging to their occupation as they have no occasion to take home with them in the interval between two successive voyages; they shall not have to pay tonnage duty for this, but shall make a contribution not exceeding 50 rix dollars to the local charities, and the persons concerned shall submit to the arrangements which the police director may consider necessary as a security against trading, with the articles in store, or other abuse of the permission. If the storekeeper transgress the orders given in this respect, he is to be punished by a fine of from 10 to 200 rix dollars, whilst, if there has been any trading with the goods in store, the tonnage duty will afterwards have to be paid, according to the law of April 15, 1854, for the ship or ships from which they were discharged. The goods in store are liable for the fine and duty, and the respective authorities have a right to dispose of such part of them as may be necessary to produce the amount.

5. All persons who are engaged in the fishing trade from Iceland, whether on their own account, or as native or foreign companies having establishments there, shall be answerable for the tonnage duty fixed by the law of April 15, 1854, for the ships which export the produce of the fishery prepared in Iceland.

6. Legal proceedings on account of the offences specified in the Ordinance are to be treated as public police cases. The prescribed fines are to be paid into the provincial exchequer of Iceland.

7. This Ordinance comes into force on the 1st of July, 1872.—British and Foreign State Papers, 1873-4, Vol. 65, p. 606.

On the 17th December, 1875, the following proclamation was issued by the King:—

We Christian IX, &c., &c., do make known:—

The Althing has voted and we have by our consent confirmed the following law:—

Art. 1. When a foreign fishing ship enters any harbor of Iceland for refuge, and the crew wishes or wants to communicate with the inhabitants, the Master of the ship ought, within 24 hours of having dropped her anchor, to give notice thereof to the master of the police or the Repstyrer whom it concerns, who ought then to examine the ship's papers, and to see that the laws on the commerce and the taxes of the country be not infringed nor eluded by the crews of such vessels, and if found necessary, to make without delay researches in this respect.

For the examination of the ship's papers are to be paid to the master of the police or Repstyrer—in case the vessel has not already, during the same fishing expedition, visited an Icelandic harbor where she has had her papers examined—10 ore per ton of the burden of the vessel; in the opposite case, 5 ore per ton; whereupon the muster roll of the vessel ought to be provided with a visa that such examination has taken place, and the duties prescribed have been paid.

The duties, in such cases where the examination has been made by the Repstyrer on behalf of the master of the police, are to be equally divided between him and the master of the police.

If a foreign vessel runs into a harbor in search of medical assistance against any disease broken out among the crew, the laws of quarantine should be applied.

If any foreign vessel, because of ice or tempestuous weather, is compelled to enter a harbor without any of the crew going on shore or having any communication with the inhabitants, it shall not be necessary to have the ship's papers examined, even if the said vessel remains at anchor until she can run out again without danger.

II.—Any infraction of the regulation of this law is subject to penalties of from 10 to 200 kroner, according to circumstances.

III.—The present law is to replace Article III of the Ordinance concerning the fishing of foreigners near Iceland, &c., of the 12th of February, 1872, which article is hereby repealed.

Whereto all whom it may concern have to conform.

Done at Amalienborg on the 17th of December, 1875, under our royal hand and seal.

[L.S.] CHRISTIAN, R.

J. NELLEMANN.

—British and Foreign State Papers, 1874-5, Vol. 66, p. 590.

In 1833 the Government of Peru issued a decree prohibiting foreign vessels fishing along the coasts, and on the islands of Peru, and declaring that the captains of foreign vessels who evaded the order should be treated as smugglers. It was alleged that American vessels which had approached them for the purpose of killing whales and seals had committed great abuses, and, under the pretext of fishing, had carried on a very extensive smuggling trade. The British schooner "Campeadora"

had, in violation of this decree, been employed, it is alleged, in killing seals on the desert islands of Lobos, which were distant about ten leagues from the shore.

Lord Palmerston in a despatch of August 30th, 1836, says:—

It would, therefore, appear that the Peruvian Government have a right to prohibit foreign vessels from fishing upon the coast immediately adjoining to those islands, as well as upon the coasts of Peru itself.—*British and Foreign State Papers*, 1837–38, *p.* 1218.

In 1831 an application was made to the Government of the United States, by the British Minister, for permission for the fishermen of the Bahamas to fish on the coast and in the waters of Florida.

The letter of the Governor of the Bahamas to the British Consul at St. Augustine which was forwarded to the Secretary of State was in the following terms:—

NASSAU, 16th May, 1831.

SIR,—It having been represented to the Governor, by persons interested in Bahama shipping, that the inhabitants of this colony, in their vessels, were, from time immemorial, freely permitted to catch fish and turtle on the coast of Florida and its vicinity; that this custom of such long standing continued in full operation up to the cession of the Floridas to the United States, and even then met with no interruption while the intercourse with the British colonies and the United States was open. I have now the honor, by command of His Excellency, to inquire of you if there will be any hindrance or objections to the Bahama vessels catching fish or turtle on the coast of Florida and its vicinity, as heretofore, now that the interruption of the intercourse is happily, and for the mutual benefit of both countries, restored.

I have, &c.,

(Sgd.) C. R. NESBITT,
Deputy Secretary.

JAMES BAKER, Esq.,
His Britannic Majesty's Consul.

—From *Cong. Docs.*, 1852–53. *Senate Doc.* 45, 32*nd Con.*, 2*nd Sess.*, *p.* 3.

A report from Mr. Duval, Governor of Florida, was elicited by this application. The following is a précis of his report:

(*a*) That those fisheries were very valuable. (*b.*) There are a number of vessels, generally smacks, from twenty to fifty tons burden, employed solely in that business, and several persons pursue it, and also the employment of sailors for wrecking in the same vessel. (*c.*) Difficulties occurred between residents of the Bahamas who visited the coasts in vessels under the pretext of fishing, and in consequence of the improper conduct of the former, in a variety of ways, and among others, in taking vessels across the gulf stream into Nassau and other places, for the adjudication of salvage for services rendered on the coasts and in the waters and jurisdiction of Florida, the people of Florida resolved to force all foreigners to forsake these fisheries, and also the wrecking business. No violence was, it is believed, committed, but they coalesced and avoided all amicable association with the foreigners, refused to furnish provisions or aid them in any manner, threw every possible obstacle in their way, enforced vigorously the revenue laws of the United States relating to foreign vessels in such waters, and also the laws regulating intercourse with the Indians, and adopted many other expedients extremely vexatious to those against whom they operated. After some time, in consequence of the conduct of the wreckers from the Bahamas, the Act of 3rd March, 1825, entitled: "An Act concerning wrecks on the coast of Florida," was passed by Congress. No officer had authority or instructions from, nor was any person incited, aided or countenanced by, either the national or territorial Governments in driving the fishermen and wreckers of the Bahamas from those coasts, except as to such assistance as was afforded by the legal prosecution in the courts authorized by the Act of Congress above noticed. (*d.*) The Seminoles, by the treaty, were not allowed within fifteen miles of the sea, but it was found necessary to suffer them to visit the coasts and obtain fish. Upon the extension of the favor asked for (liberty to fish), it would be next to impossible to prevent association between them and the foreign fishermen, and such intercourse would inevitably lead to infractions of the laws of the United States in regard to trading with them, would be destructive of all government over the Indians, and might lead to the most dangerous consequences. (*e.*) Check and restraint, and facilities for detection, apprehension and punishment existed with regard to citizens of the United States, who might violate the revenue laws of the United States and other laws of the General and Territorial Governments that could not be imposed upon non-resident foreigners approaching these coasts in vessels. Indeed such opportunities, for smuggling especially, would be afforded to foreigners by the extension of this privilege, that it could not be prevented. (*f.*) If the privilege was granted, it was feared that it would again be used as a pretext to enable interference and competition with citizens of the United States in the business of wrecking, and would lead to collision, disputes and difficulties, and engender feelings calculated to disturb the harmony which between two nations having the same origin, laws and language, should be preserved as a matter not merely of reciprocal interest, but of mutual pride.

It was added:

If the President, however, should conceive the National Government possesses the power, and that either courtesy to the British Government or the interests of our own renders an express grant or extension of the privileges asked for proper or advisable, it is trusted that it will be granted only with conditions that will render those who use the fisheries amenable to

such laws as may be enacted for the regulation of these fisheries, and liable for such equivalents as may be imposed upon them, equally with all others for such liberty, by our territorial legislators."

It appeared, however, as may be seen by a reply to an inquiry from the Governor of the Bahamas (see his letter of 27th January, 1832), that:

There is no law or regulation in force to prevent vessels or craft of any description, belonging to citizens of the United States, from fishing on the Bahama Banks if they think proper.—*Ib.*, p. 8.

In case it may be thought that there was anything in connection with the wrecking business which was considered objectionable, reference may be made to the letter of J. D. Westcott, United States Senator, hereinafter referred to, in which he says:

The wrecking or salvage business is as fair and honest a calling, and as meritorious as any pursued in the country, and it deserves encouragement and protection as much as any.

In a letter, dated 31st May, 1847, J. D. Westcott, United States Senator, addressed to Mr. Buchanan, the Secretary of State, as follows:

The files of your Department will show that *more than once* the British Government, at the instance of the Bahamian colonial authorities, have sought to get from the Federal Government of the United States permission to participate in these employments in our waters and on our coasts; and have represented the matter as trifling and unimportant. It is not so. If you will refer to the files of your Department—I think in 1831 or 1832—you will find, in my handwriting, an elaborate communication from the then Governor of the territory of Florida, in answer to a letter from Mr. Livingston, Secretary of State, upon this subject. The British Minister had made application for permission to the Bahamians to fish and catch turtle on our coasts, which was remonstrated against by the Executive of Florida in decided terms. In Florida it was well understood that the permission, if granted, would afford an opportunity to the Bahamians to interfere in the business of wrecking on our coasts. Instances have occurred since the cession, of vessels wrecked *within our jurisdiction*, and being aided by Bahamian wreckers, the property has been taken to Nassau for adjudication of the salvage. The Bahamians have been continually seeking to edge themselves into this business, which was a source of great profit to them before the cession. All the efforts to get permission to fish and turtle, &c., are with an eye to participation in wrecking on our coasts, or in our waters. It cannot be expected that our citizens should acquiesce in a permission to foreigners to thus interfere in business, that upon legitimate and well settled principles, belongs exclusively to citizens of the United States.

NECESSITY FOR EXCLUDING FISHING VESSELS

It is thought that many of the reasons given to show the necessity for the exclusion of the Bahama fishermen from the coasts of Florida will apply to the case of the exclusion of American fishermen from territorial waters, except when entering for one of the four purposes mentioned in the Convention of 1818.

The necessity for such exclusion from fishing limits is easily demonstrated. Why did the framers of the Convention of 1818, in the somewhat exceptional and extreme case of fishing vessels being obliged to enter our bays and harbors for refuge or repairs, for wood or water, take the precaution to guard the conditions of that entry with a provision that they should be "subject to such restrictions as should be necessary to prevent them taking, drying or curing fish therein or in any other manner whatever, abusing the privileges thereby secured to them?" And if the entry in such an exceptional case was so carefully provided for, and the danger of clandestine fishing and abuse and encroachment so specifically anticipated, how much greater was the necessity for prohibiting altogether fishing vessels from entering territorial waters, except when in distress, or in want of wood or water? To concede to them the privilege to enter for bait or supplies, or to tranship cargoes, without stipulation or regulation, would completely nullify the renunciation of the United States in respect to fishing. Perhaps, from the British standpoint the history of the Convention and of the north-eastern fisheries has justified the anticipation of abuse.

With respect to all laws relating to game, the revenue or the fisheries, where great difficulties beset the detection of their infringement, every possibility of violation must be prevented. The preliminary steps to infringement must be guarded against. To allow fishing vessels, with fishing implements on board, inside of the fishery limits, is but to allow them to fish. It would be impossible to prevent abuse. The difference between the off shore and bank fishing vessels, and the inshore fishing vessels, is not easily noticed at a distance. The constant access to harbors of large fleets of vessels throughout the whole fishing season, renders impossible the thorough administration of the revenue laws of the country. The cost of a marine police would be too great; the inconvenience of ensuring a regard for the rights and laws of the nation would be too burdensome.

In 1837 the Legislature of Nova Scotia suggested a few of the difficulties. The following appears in its records:—

The committee further report that the construction of distinguished lawyers and the legitimate construction of the convention is, that the citizens of the United States cannot conduct their fishing within three marine miles of the headlands of the coast of Nova Scotia, and have no liberty to enter the bays, harbors or creeks thereof except for shelter and to purchase wood or obtain water, and only then on proof of having left their own ports sufficiently supplied for the voyage; yet on enquiry and hearing evidence it is proved beyond all doubt, by witnesses of unquestionable character, that the fishing vessels of that country resort to our shores with as little concern as they quit their own; that contrary to the terms of the Convention, they purchase bait from the inhabitants, and in many instances set their own nets within the harbors of the Province, and on various occasions have, by force, coerced the inhabitants to submit to their encroachments, and they land on the Magdalen Islands and pursue the fishery therefrom as unrestricted as British subjects, although the Convention cedes no such right. The consequence following in the train of these open violations of a solemn treaty are illicit trade, destruction of the fishery by the means of conducting it, interruption of that mutual confidence which ought always to exist between the merchants and fishermen of a country, inducing the former to supply and the latter to make payments with punctuality, and finally the luring from our shores, by means of bounties, the youth of our country to their employment, reducing our population and impoverishing our Province, while they add strength and vigor to their own, for proof of which your committee refer to the documents hereto annexed and numbered from 1 to 3.—*Nova Scotia Journals* 1837, *App. No. 75, p.* 3.

And the House of Assembly of Nova Scotia in 1851, adopted a report containing the following language in respect to a very limited area affected by the granting of liberty of passage to American fishing vessels through the Straits of Canso, viz.:—

When that necessity does not exist, it would be unwise any longer to permit American fishing vessels to pass through the Gut of Canso, for the following, among many other reasons which could be given, if necessary: In the month of October, the net and seine fishery of mackerel in the Bay of St. George is the most important to the people of that part of the country, and requires at the hands of the Legislature every legitimate protection. Up to this period American fishermen, using the passage of the Gut of Canso, go from it into St. George's Bay, and not only throw out bait to lure the fish from the shores where they are usually caught by our own fishermen, but actually fish in all parts of that bay, even within one mile of the shores. It is also a notorious fact that the American fishing vessels in that bay annually destroy the nets of the fishermen by sailing through them and every year in that way do injury to a great extent—and this upon ground which they have no right to tread. Remonstrances have therefore been made to the American Government against such conduct; but the answer has invariably been, to protect ourselves in that respect. Had the United States Government adopted suitable measures to prevent its citizens from trespassing as before mentioned, it would not be necessary for this Legislature to put any restriction on their use of the passage in question: but as the onus has been thrown upon this Legislature, it is clearly its duty to adopt the most efficient and least expensive means of protection. If the privilege of passage is exercised through the Gut of Canso and the bay in question, it is next to impossible to prevent encroachments and trespasses upon our fishing grounds by American citizens, as it would require an expensive coast-guard by night and day to effect that object, and then only partial success would result. It would be unreasonable to tax the people of this country to protect a right which should not be invaded by foreigners, and which can only be invaded and encroached upon by our permitting foreigners to use a passage to which they are not entitled. Without, therefore, any desire unnecessarily to hamper American citizens in the enjoyment of that to which they are justly entitled, your committee consider it their imperative duty to recommend such measures for the adoption of the House as will in the most effectual way protect the true interests of this country. The outlay necessarily required to watch properly the operations of foreign fishing vessels in the Bay of St. George, so as to prevent encroachment, amounts to a prohibition of its being accomplished: and it therefore becomes indispensable that such vessels be prohibited from passage *through* the Gut of Canso. The

strait will always be, to vessels of all classes, a place of refuge in a storm, and American fishing vessels will be entitled to the use of it as a harbor for the several purposes mentioned in the treaty. It can be visited for all these purposes without a passage through being permitted; and your committee therefore recommend that an Act be passed authorizing the Governor, by and with the advice of his Executive Council, by proclamation either to impose a tax upon foreign fishing vessels for such amount as may be provided in the Act, or to prohibit the use of such passage altogether.—32nd Congress, 2nd Sess.

A memorial was transmitted to the Imperial authorities dated September 2, 1852, in which the following paragraph was contained:—

By the terms of the Convention of 1818, the United States expressly renounced any right of fishing within three marine miles from the coasts and shores of these colonies, or of entering their bays, creeks and harbors, except for shelter, or for wood and water.

If this restriction be removed, it must be obvious to Your Excellency that it will be impossible to prevent the Americans from using our fishing grounds as freely as our own fishermen. They will be permitted to enter our bays and harbors, where and at all times, *unless armed vessels are present in every harbor*, they will not only fish in common with our fishermen, but they will bring with them contraband goods to exchange with the inhabitants for fish, to the great injury of colonial traders, and loss to the public revenue. The fish obtained by this illicit traffic will then be taken to the United States, where they will be entered as the produce of the American fisheries, while those exported from the colonies in a legal manner are subject to oppressive duties.—Sabine, p, 450.

If the necessity for exclusion and for imposing guards upon the access to territorial waters existed in 1818, how much has that necessity increased? Then large areas of our coasts were almost uninhabited; now we have a greatly increased population, and a greatly increased trade has sprung into existence. The use of our territorial waters and shores by the citizens of another country, always a serious matter to the subjects of the Crown of Great Britain, would now be a positive inconvenience and a burden. Competition and rivalry, which existed slightly in 1818, have increased as the industry has increased, and while the industry has increased the necessity for vigilance has become greater. A higher tariff has enhanced the difficulties of administering the revenue laws. The nations possessed of fisheries are making more stringent regulations in regard to them, and while the untenable claims in respect to extended limits from the shore are necessarily now abandoned, the exclusive enjoyment of the fisheries, and rights pertaining thereto, are more firmly insisted on.

Exclusiveness becomes more necessary as competition become more active and the people of he United States have not been slow to apply this principle in regulating the terms on which others can have access to their markets, while they complain of its application to the fishing grounds of a neighboring country, whence the supplies for those markets have largely to be drawn.

THE STATUTES.

At the first session of the British Parliament, after the ratification of the Convention of 1818, the Act 59 Geo. III, chap. 38, was passed. It is entitled "An Act to enable His Majesty to make regulations with respect to the taking and curing of fish on certain parts of the coasts of Newfoundland and Labrador, and His Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America." It was assented to on the 14th June, 1819. It is already set out *verbatim* in this memorandum.

Up to 1836 no orders had been made by His Majesty in Council, and no regulations had been made by the Governor of any North

American colony under an Order in Council, although section 3 of that Act authorized such orders and regulations. The provisions of the convention, it will be remembered, contemplated and authorized the making of such restrictions as might be necessary to prevent the United States' fishermen from taking, drying or curing fish in the said bays or harbors, or in any other manner whatever abusing the privileges reserved to them.

It was also then found, that, since the Imperial Act did not designate the persons who were to make the seizures, the statute was liable to be evaded and the fishery carried on contrary to the terms of the convention.

In Nova Scotia, where its provisions had been most frequently violated, the necessity for such regulations and restrictions first became apparent. On the 12th day of March, 1836, an Act was passed, entitled, "An Act relating to the fisheries and for the prevention of illict trade in the Province of Nova Scotia and the coasts thereof,—Acts of 1836, 6 Wm. IV, c. 8 (N. S.) The preamble is in the following terms:—

Whereas by the convention (made between His late Majesty King George the Third and the United States of America, signed at London, on the twentieth day of October, in the year of our Lord one thousand eight hundred and eighteen) and the statute (made and passed in the Parliament of Great Britain in the fifty-ninth year of the reign of His late Majesty King George the Third) all foreign ships, vessels, or boats, or any ship, vessel, or boat other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, found fishing, or to have been fishing, or preparing to fish, within certain distances of any coast, bays, creeks, or harbors whatever, in any part of His Majesty's dominions in America not included within the limits specified in the first article of the said convention are liable to seizure; and whereas the United States did by the said convention renounce forever any liberty enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America, not included in the above-mentioned limits: *Provided, however*, That the American fishermen should be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purposes whatever, but under such restrictions as might be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them; and whereas no rules or regulations have been made for such purpose, and the interests of the inhabitants of this island are materially impaired; and whereas the said Act does not designate the persons who are to make such a seizure as aforesaid, and it frequently happens that persons who are to make such seizure as aforesaid, infringing the articles of the convention aforesaid, and the enactments of the statute aforesaid, on being taken possession of, profess to have come within said limits for the purpose of shelter and repairing damages therein, or to purchase wood and obtain water, by which the law is evaded, and the vessels and cargoes escape confiscation, although the cargoes may be evidently intended to be smuggled into this Province, and the fishery carried on contrary to the said convention and statute"

The Act is in the same terms as the Act passed by the Dominion of Canada immediately after the Confederation, 31 Vic., ch. 61 (Canada), and is given in substance in the introduction to this memorandum.

By the 18th section of the Act of Nova Scotia, it was enacted:—

That this Act shall not go into force or be of any effect, until His Majesty's assent shall be signified thereto, and an order made by His Majesty in Council, that the clauses and provisions of this Act shall be the rules, regulations and restrictions respecting the fisheries on the coasts, bays, creeks or harbors of the Province of Nova Scotia.

This Act received the assent and ratification of His Majesty by an Imperial Order in Council which will be found in the *Nova Scotia Journals of the House of Assembly*, 1837, *Appendix* 1, *page* 2.

Another Order of His Majesty in Council, dated 15th June, 1836, was made declaring that the clauses and provisions of this Act of the Province of Nova Scotia, Chapter 8 of the Acts of 1836, should be the rules, regulations and restrictions respecting the fisheries on the coasts, bays, creeks or harbors of Nova Scotia (*Ibid*, p. 3); notification thereof was duly gazetted in the Province.

This Order in Council, and the regulations under it, are referred to in the opinion of the law officers of the Crown of 25th September, 1852, and also in the opinion of 6th August, 1853, already set out.

The Orders are in the following words:—

At the Court at St. James, the 15th June, 1836.

PRESENT:

The King's Most Excellent Majesty.

Lord Chancellor,	Lord John Russell,
Lord President,	Viscount Palmerston,
Lord Privy Seal,	Viscount Melbourne,
Lord Steward,	Lord Halland,
Lord Chamberlain,	Lord Glenelg,
Marquis of Winchester,	Mr. Poulett Thompson,
Earl of Albermarle,	Sir John Hobhouse, Bart,
Earl of Minto,	Mr. Chancellor of the Exchequer.

Whereas, the Governor of His Majesty's Province of Nova Scotia, with the Council and Assembly of the said Province, did, in the month of March, 1836, pass an Act, which has been transmitted, entitled as follows, viz.:—

No. 1651. An Act relating to the Fisheries, and for the prevention of Illicit Trade, in the Province of Nova Scotia, and the Coasts and Harbors thereof.

And whereas, the said Act has been referred to the Committee of Lords of His Majesty's Most Honorable Privy Council, appointed for the consideration of all matters relating to Trade and Foreign Plantations; and the said Committee have reported as their opinion to His Majesty that the said Act should receive His Majesty's Special Confirmation; His Majesty was thereupon, this day, pleased by and with the advice of His Privy Council, to declare his Special Confirmation of the said Act, and the same is hereby specially confirmed, ratified, and finally enacted accordingly. Whereof the Governor, Lieutenant Governor or Commander-in-Chief of His Majesty's Province of Nova Scotia, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) C. E. GREVILLE.

At the Court at St. James, the 6th July, 1836.

PRESENT:

The Kings Most Excellent Majesty.

Lord Chancellor,	Lord John Russell,
Lord Steward,	Viscount Palmerston,
Lord Chamberlain,	Viscount Melbourne,
Marquis of Winchester,	Viscount Howick,
Earl of Albermarle,	Lord Glenelg.
Earl of Minto,	

Whereas, by an Act, passed by the Lieutenant Governor, Council and Assembly, of the Province of Nova Scotia, on the 12th day of March, 1836, entitled: "An Act relating to the Fisheries and for the prevention of Illicit Trade in the Province of Nova Scotia, and the Coasts and Harbors thereof, it is amongst other things, enacted, that the said Act shall not go into operation or be of any effect until His Majesty's Assent shall be signed thereto, and an Order be made by His Majesty, in Council, that the clauses and provisions of the said Act shall be the rules and regulations respecting the fisheries on the coasts, bays, creeks or harbors of the Province of Nova Scotia: And whereas, His Majesty hath, by an Order in Council bearing date the 15th June, 1836, signified His Royal Assent to the aforesaid Act by specially confirming the same; And whereas, it is expedient that in pursuance of the said recited enactment, the rules, regulations and restrictions respecting the fisheries in the said Act mentioned should be confirmed, His Majesty was this day pleased, by and with the advice of His Privy Council, and in pursuance of the said Act, to declare, and it is accordingly hereby declared that the clauses and provisions of the aforesaid Act shall be the rules, regulations and restrictions respecting the fisheries on the coasts, bays, creeks or harbors of the Province of Nova Scotia; Whereof the Governor, Lieutenant Governor or Commander-in-Chief of His Majesty's Province of Nova Scotia, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) WM. L. BATHURST.

In Prince Edward Island, in 1843, a similar Act, containing a similar preamble, and a clause identical with Section 18 of the Nova Scotia Act, was passed. This Act will be found in the *Statutes of Prince Edward Island*, 6 *Vic.*, *chap.* 14, *vol.* 1, *page* 419. This Act received the "Royal allowance" on the 3rd day of September, 1844, and an order was, on the same day, made by Her Majesty in Council declaring that its clauses and provisions should be the rules, regulations and restrictions respecting the fisheries on the coasts, bays, creeks or harbors of the Island of Prince Edward, and notification of said Royal assent and of the said order was published in the *Royal Gazette* newspaper of the Island on the 8th day of October, 1844.—See note *Ibid*, p. 425.

In New Brunswick, in 1853, an Act of that Legislature was passed, which is entirely similar to the two provincial statutes just referred to. 16 Vic., chap. 69 (N.B.) In this way, under the terms of the Convention, and of the Imperial Act 59 Geo. III, chap. 38, regulations were made for all three provinces.

Upon the Confederation of the provinces in 1867, the Act 31 Vic., chap. 61, comprising the provincial Acts, was passed. Its administration was cast upon the Federal Government to be carried out by Dominion officials.

Amendments were passed from time to time by the Dominion Parliament, that is to say, 33 Vic., chap. 61 and 34 Vic., chap. 14. The original Act and the amendments referred to are set out in this memorandum.

The next amendment was passed in 1886. It was reserved by the Governor General on the 2nd June, 1886, for the signification of the Queen's pleasure thereon. Royal assent was given by Her Majesty in Council on the 26th November, 1886; proclamation thereof was made on the 24th December, 1886. It is in the following terms:—

(49 VICTORIA, CHAP. 114.)

AN ACT further to amend the Act respecting fishing by foreign vessels.

Whereas it is expedient for the more effectual protection of the inshore fisheries of Canada against intrusion by foreigners, to further amend the Act intituled "An Act respecting fishing by foreign vessels," passed in the thirty-first year of Her Majesty's reign, and chaptered 61:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The section substituted by the first section of the Act thirty-third Victoria, chapter 151, intituled: "An Act to amend the Act respecting fishing by foreign vessels," for the third section of the hereinbefore recited Act, is hereby repealed, and the following section substituted in lieu thereof:

"3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel, or boat, being within any harbor of Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks, or harbors in Canada, into port and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command does not truly answer the questions put to him in such examination, he shall incur a penalty of $400; and if such ship, vessel, or boat is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and (*a*) has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks, or harbors of Canada, not included within the above-mentioned limits, without a license, or after the expiration of the term named in the last license granted to such ship, vessel, or boat under the first section of this Act, or (*b*) *has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.*"

2. The Acts mentioned in the schedule hereto are hereby repealed.

3. This Act shall be construed as one with the said "*Act respecting fishing by foreign vessels*," and the amendments thereto.

SCHEDULE.

Acts of the Legislature of the Province of Nova Scotia.

Year, reign, and chapter.	Title of Act.	Extent of repeal.
Revised Statutes, 3rd series, c. 94.	Of the coast and deep-sea fisheries	The whole.
29 Vic. (1866), c. 35.....	An Act to amend chapter 94 of the Revised Statutes, "Of the coast and deep-sea fisheries."	The whole.

Act of the Legislature of the Province of New Brunswick.

16 Vic. (1853), c. 69.....	An Act relating to the coast fisheries and for the prevention of illicit trade.	The whole.

All of the Acts of Canada relating to this subject are now consolidated, and comprise chapter 94 of the Revised Statutes of Canada.

The foregoing statutes have been subjected to much criticism in the United States. The Colonial authorities were blamed when the Provincial Acts were passed. It has always been assumed by the critics that they were mere Colonial Acts. These Statutes however, were also made regulations by the King in Council, strictly under the provisions of the Convention and of the Imperial Act 59 Geo. III, c. 38. They have the sanction of the King and his Imperial advisers. Their constitutionality and propriety have been guaranteed by the names of Westbury, Chelmsford, Cockburn, Kelly and Harding, who, when law officers of the Crown, were called upon to advise on them.

CONSTITUTIONALITY.

1. It has been contended that the Acts of Canada in respect to fishing by foreign vessels are *ultra vires* of the Dominion Parliament. These statutes and their Provincial predecessors have been in operation so long, and so many condemnations have taken place under them, that it would be late to disturb them now. Under "The British North America Act, 1867," section 91, the power is given to the Parliament of Canada to legislate in respect to navigation and shipping, sea, coast and inland fisheries; and the very clause which gives the Parliament of Canada that jurisdiction gives it jurisdiction over all subjects that are not exclusively reserved to the Local Legislatures. It is quite obvious that the British Parliament, in passing the British North America Act, gave the Dominion Parliament power to legislate on this subject. Section 132 of that Act does not, in any way, interfere with this jurisdiction. It is as follows :—

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

It will not be denied that the Dominion Parliament has, at least, powers as great as those possessed by the Provincial Legislature previously to the British North America Act, in regard to this subject. The statute of Nova Scotia (1836), which is similar to the Act of Canada (1868), c. 61, was once attacked in the Court of Vice-Admiralty at Halifax, on the ground that the Provincial legislature had no power to make provisions in respect to United States fishing vessels coming within the territorial waters of the Province. That was in the case of the "Creole," a vessel formerly belonging to American citizens, which, —whether to evade the fishery laws or not—in 1813 had been transferred to a person claiming to be a British subject, resident in the United States. She came within territorial waters and violated the provisions of the Nova Scotia statute.—(See correspondence, *Nova Scotia Journals, House of Assembly*, 1853, *appendix* 4, *page* 153.)

It appears that on a question concerning the nationality, the judge of the Vice-Admiralty Court decreed that the vessel should be released. The Attorney General of Nova Scotia, Mr. Uniacke, was not satisfied

with the decision and consulted the law officers of the Crown in England. Their opinion will be found in *Forsythe's Constitutional Law*, *p.* 404.

DOCTOR'S COMMONS, 6th August, 1853.

MY LORD DUKE,—We are honored with Your Grace's commands, signified in Mr. Merivale's letter of the 20th of April last, stating that he was directed to transmit to us a copy of a despatch, with its enclosures, received from the Lieutenant Governor of Nova Scotia, and to request that we would jointly report to Your Grace whether we agree in the view of the law taken by the judge of the Admiralty Court at Halifax, in the case of the "Creole," and if not, in what respect we differ from it?

Whether, also, it appears to us that such amendments of the law, as suggested by the judge in his letter of the 31st March, are called for or advisable?

We are also honoured with Mr. Merivale's letter of the 4th of June, stating that, with reference to the Queen's Advocate's letter of the 23rd of April, he was directed by Your Grace to transmit to us the copy of a further despatch from the Lieutenant Governor of Nova Scotia, supplying the documents and other information required to enable us to report our opinion upon the case of the "Creole," seized for the infraction of the fishery regulations.

In obedience to Your Grace's commands, we have taken the papers into consideration, and have the honor to report—

That we do not agree with the view of the law taken by the judge of the Admiralty Court at Halifax, in the case of the "Creole"; and we are of opinion that, inasmuch as the "Creole," although originally a British ship, yet had fallen into the hands of foreigners, and been altered so as not to correspond with her original certificate, and not re-registered, and inasmuch as she was not navigated according to the British navigation laws, she had lost her nationality and become a foreign ship. We are further of opinion that the colonial statute on the subject is valid, for reasons hereafter given by us in our answer to the questions, and that the "Creole" was, on these grounds, liable to condemnation and forfeiture.

With respect to the several questions on the case of the "Creole," framed by Mr. Attorney General Uniacke, appended to his letter to Sir G. Le Marchant sent with the papers, we are of opinion—

1. That, with respect to forfeiture, under 59 Geo. III, c. 38, although both cases are equally within the mischief which the Act was intended to guard against, yet, as the language of the Act is ambiguous, and as the Act is of a highly penal nature, we are of opinion that it will not be advisable to forfeit under it any but foreign vessels.

2. *Even if the Imperial Act, 59 Geo. III, c. 38, should be insufficient to give Her Majesty power to impose all or any of the rules and regulations in question (a question which we need not now consider), the authority of the Local Legislature appears to us to be sufficient to make them valid in effect, by its express legislative enactment of them. The authority of the Local Legislature extends (like that of the Imperial Parliament) over the space of the three miles upon the high seas next the coast, which is, by the comity of nations, part of the country to which it is adjacent; and we are of opinion that, upon this general principle, and irrespective of the convention, the Imperial Statute, or the regulations of the Sovereign in Council, the Colonial Legislature was legally entitled to legislate as it has done relative to the fisheries, and that its enactments are valid and binding.*

3. We are of opinion that such a vessel is, under the circumstances stated, liable to forfeiture under the express provisions of the Colonial Statute already referred to.

4. We are of opinion that the effect of 8 and 9 Victoria, c. 89, is controlled by 12 and 13 Vic., c. 29, s. 17, and that it is no longer necessary that the owner of a vessel shall be resident within the Queen's dominions in order to satisfy the requirements of the British navigation laws.

5. The master in all cases, and, besides the master, either three-fourths of the crew, or one seaman to every twenty tons, by the 12 and 13 Vic., c. 29, s. 27, must be British subjects.

6. A foreign fishing vessel duly registered and manned as a British vessel, may legally prosecute the fishery, as suggested, by virtue of 12 and 13 Vic., c. 29.

7. Such a ship will be liable to forfeiture and condemnation, if deficient in any requirement absolutely necessary to her nationality—as, for instance, if she be not registered or navigated as a British ship; but she will not be liable to forfeiture for deficiencies in other points of mere regulation, which involve only specific penalties—as, for instance, if she has not her tonnage carved on her beam, or her name painted on her stern.

J. D. HARDING,
A. E. COCKBURN,
RICHARD BETHELL.

His Grace the Duke of Newcastle,
&c., &c., &c.

If it is admitted that the Provincial Legislature had the power to pass such enactments in reference to the territorial rights of the Province then that power was subsequently given to the Canadian Parliament, and the same Act passed by it is binding. United States' vessels coming within the three-mile limit are liable to its penalties if they infringe its provisions.

In the case of "*The Annapolis–The Johanna Stoll*," 1*st Lushington's Admiralty Reports* 29, the Right Hon. Dr. Lushington held that "within "British jurisdiction, namely, within British territory, and at sea within "three miles from the coast, and within all British rivers, *inter fauces*, and "over foreigners in British ships, I apprehend that the British Parliament

"has an undoubted right to legislate. I am further of opinion that Par-
"liament has a perfect right to say to foreign ships that they shall not,
"without complying with British law, enter into British ports, and that
"if they do enter they shall be subject to penalties."

When the British Parliament delegated to Canada the power to pass laws on all subjects which were not expressly assigned to the Provincial Legislatures it gave the power to pass the Act now under consideration.

These Acts do not take away the rights which American citizens possessed under the Convention and are not in conflict with its terms. They regulate procedure in a certain class of actions arising out of violation of the statute. That procedure may militate against the interests of American fishermen, because it prevents them to some extent from violating the provisions of the convention with impunity. The provision for forfeiture is against their interests, but without such a provision the convention would be ineffectual.

If the provisions as to procedure are invalid, then it can with equal reason, and on the same grounds, be held that the provisions of the statute with regard to forfeiture are equally invalid. Such a contention would be manifestly absurd. These sections may be inconvenient for persons violating the statute, but they are provisions which we have adopted in our revenue laws with respect to our own citizens, and which the United States have to some extent adopted in their revenue laws. They prevailed in Great Britain and in the United States when the Provincial Acts were made, and as the parties to the convention must have foreseen that some procedure should be enacted to make the treaty effective, they no doubt contemplated a procedure used in a class of cases most closely resembling cases to arise for an infraction of the convention—a procedure applicable to seizures and proceedings *in rem*.

This matter of procedure in our own courts is one in respect to which American citizens have no more right to complain than they have in respect to any procedure. They might as well say that we have no right to have any procedure at all, or that we cannot regulate our procedure in any way whatever, as to cases in which foreigners are parties. Admit that we may create courts and that these courts may entertain jurisdiction in cases of violation of the Convention, and the right to a procedure must be admitted, It is not for the citizens of the United States to complain. They have carried the law respecting attachments, proceedings *in rem*, and constructive service far beyond the bounds of anything in British or British Colonial legislation.

There is no doubt a misapprehension as to the true position of the dependencies of Great Britain, involved in the contention made by some, that Great Britain, being the power with whom the treaty was made, has no right to delegate any powers of legislation which remained to her for the purpose of regulating the fisheries or restricting the abuse of the privileges reserved to the American fishermen, and that the creation of Colonial Legislatures with authority to deal with such matters was a mere delegation of powers. The Sovereign is and always has been vested with the executive government of each colony as well as of the parent country. The public officers of the colony are Her officers,

appointed by Her representative, by virtue of Her prerogative, or of Statutes in that behalf, and are commissioned in Her name. The laws for the United Kingdom are made by Her Majesty "by and with the advice and consent of the Lords Spiritual and Temporal and Commons"; the laws for Canada are made by Her Majesty "by and with the advice and consent of the Senate and House of Commons of Canada."

CRITICISMS OF THE STATUTES.

2. The Statutes have also been criticized as "harsh and unjust."

Three of the provisions of the Canadian Act have been particularly complained of by the United States, viz. :—

(1.) That which throws the burden of proof on the claimant of the vessel, where the legality of the seizure is in dispute.

(2.) That which prevents an action for damages being brought where there has been an illegal seizure, until one month after notice in writing has been served on the seizing officer of an intention to sue.

(3.) That which limits the bringing of an action for an illegal seizure to the period of three months.

The Canadian Act of 1868, section 10, chapter 61, casts the burden of proof upon the claimant. What takes place in these and all revenue cases is this : The law provides that if the master or crew of a vessel do certain things, the vessel shall be forfeited. A seizure is made and the claimant makes his claim ; then the legality of the seizure is to be tried. Of course the forms may be similar to those in an ordinary action between plaintiff and defendant, but the question to be decided is the legality of that seizure. Was it a case in which the officer was authorized to make the seizure, &c ? In all such cases the burden is placed upon the claimant of proving such illegality.

A similar section, with a proviso annexed, will be found in the Revised Statutes of the United States, 172, section 909 :

In suits or information brought where any seizure is made pursuant to any Act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant ; provided that probable cause is shown for such prosecution to be adjudged of by the court.

By English decisions, under a section similar to our own, it has been held that notwithstanding its provisions, a *primâ facie* case must be made out by the prosecutor, so that the terms of the Canadian section are more favorable to the claimant than if the proviso were added, which is contained in the United States provision. See "*The Beaver*," 1 *Dodson*, 152.

Section 909, Revised Statutes of United States, p. 172, has existed since 2nd March, 1799, and upon it numerous decisions have been given.

The first case is *Locke vs. the United States*, 7 *Cranch* 339, when a seizure under circumstances which warranted suspicions was upheld. Pinkney, who appeared for the United States, said :

The claimant has sufficient notice that the United States mean to rely on the general ground of suspicion and on the shifting of the *onus probandi* and must come prepared to remove the suspicion. Of what use is the provision respecting the *onus probandi* if the law was so before ? It is perfectly nugatory if probable cause means *primâ facie* evidence. It must mean something less than evidence—it means reasonable grounds of suspicion.

The Court on giving judgment said :

The circumstances on which the suspicion is founded, that they have been landed without a permit, are: (1st) That the whole cargo, in fact, belongs to the claimant, and yet was shipped in Boston in the names of 13 different persons, no one of whom had any interest in

it, or was consulted respecting it, and several of whom have no real existence. (2nd) That no evidence exists of a legal importation into Boston, the port from which they were shipped, to Baltimore, where they were seized. (3rd) That the original marks are removed and others substituted in their place.

Those were the grounds of suspicion; then the judge continues:—

These combined circumstances furnish, in the opinion of the court, just cause to suspect that the goods, wares and merchandise against which the information in this case was filed, have incurred the penalties of the law, but the counsel for the claimant contends that this is not enough to justify the court in requiring exculpatory evidence from his clients. "Guilt," he says, "must be proved before the presumption of innocence can be removed." The court does not so understand the Act of Congress. The words of the 71st section of the Collection Law which apply to the case are these.

Then follows the clause which is now Section 909, Revised Statutes, United States:—

It is contended that probable cause means *primâ facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof to justify condemnation. This argument has been very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion. In this its legal sense the court must understand the term to have been used by Congress.

The next case is the "*Luminary*" reported in 8 *Wheaton*, 407. In that case a mere suppression was held to make out a *primâ facie* case and to justify the court in giving judgment of condemnation. The headnote is as follows:—

Under the 27th section of the Registry Act of 31st December, 1792, circumstances of suspicion sufficient in the judgment of the court to call for an explanation being shown, and the claimant having it in his power, by the production of documents, to make a clear case either for the Government or himself, and refusing to produce these documents, the vessel was condemned.

Mr. Justice Story, in the judgment in that case said:—

The suppression, therefore, justifies the court in saying that the United States have made out a *primâ facie* case and that the burden of proof to rebut it rests with the claimant.

In *Chas. Clifton vs. the United States*, 4 *Howard* 252, the defendant was obliged to bring, in support of his defence, the best evidence in his possession.

Then there is the case of "*Cliquot's Champagne*," 3 *Wallace* 114, where the judge recognized the "rule of *onus probandi* as a *permanent feature* of the revenue system." He says:—

By the legislation of the United States it is established that in revenue cases where the Government has shown probable cause, the *onus probandi* or burden of proof is on the part of the claimant to prove the facts necessary to be shown in his defence. Under that rule of law, or rather provision of the statute, I am bound to say that in my opinion, the United States have proved probable cause, and it is for you to say whether the claimants themselves have made out their defences.

"The *John Griffin*," 15 Wallace 29, was a decision of the Supreme Court of the United States, and the section with which the Court was dealing was section 71 of the Act, 1799:

That in actions, suits or informations to be brought where any seizure shall be made pursuant to this Act, if the property be claimed by any person, in every such case the *onus probandi* shall be upon the claimant.

In that case there was a conflict of testimony. It was a case of seizure of cigars, and the captain testified:

That the cigars were not on board with his knowledge or consent, and he believed that they were not there at all. He admitted an interview with Albern, in Havana, or somewhere else, in regard to a trunk and barrel package. He equivocated about the authorship of the letter produced by Albern, saying that he could not say that it was written by him; that it might have been written by him, that it looked like his writing. He nowhere denied that he wrote it. He attempted to explain it by saying that it might possibly have referred to his having sent these things on board of another vessel, not his, as a service to Albern, to let him know that they were there, but with no knowledge that they were to be landed without paying duty. But he did not speak of this with certainty, nor did he give the name of the other vessel on which he might have sent the cigars. The receipt of the money from Albern he wholly denied.

Mr. Justice Miller, in giving the decision in that case, speaks of a *prima facie* case having been made out.

The case of *Ten Hogsheads of Rum*, 1 *Gallison's Reports*, *p.* 191, decided by Mr. Justice Story, was a remarkable decision. The rum had been imported from the British West Indies into the United States, but had been seized because it was of the "growth, produce or manufacture" of a colony of Great Britain.

The section in question (s. 909) was apparently not applicable. The court said:

It has been supposed that the *onus probandi* is not thrown upon the claimant in proceedings *in rem*, unless in cases within the purview of the 71st section of the collection of Acts of 2nd March, 1799, chap. 128 (now sec. 909, Revised Statutes). But I incline to the opinion that the *provision alluded to is but an extension of the rules of the common law.* Be this as it may, whenever the United States makes out a case *primâ facie*, or by probable evidence, the presumption arising from it will prevail unless the claimant completely relieve the case from difficulty. In the present case I think the United States have *primâ facie* maintained the allegations of the information. The burden of proof of the contrary, therefore, rests upon the claimant. He and he only knows the origin of the goods. If he does not attempt it, but relies upon the mere absence of conclusive, irrefragible proof, admitting of no possible doubt, he claims a shelter for defence which the laws of the country have not hitherto been supposed to acknowledge.

In respect to the other two provisions, contained in the Canadian statutes, which are complained of, it is hardly necessary to explain that they are borrowed from similar provisions in the former revenue laws of the Provinces, and subsequently of Canada.

The following provisions in the law of the United States seem to be quite as "harsh and unjust" as those complained of, viz.: Revised Statutes, sections 923, 938, 942, 969, 970, 971, 975, 3214. Under these laws it would appear,—

(1.) In cases of seizures under the revenue laws, if any person appears and claims the property seized, he must give a bond to defend the prosecution thereof, and to refund the cost in case he shall not support his claim.

(2). In order to obtain a release of the property an appraisement is made, and a bond with one or more sureties for the payment of a sum equal to the appraised value must be given.

(3.) In all suits for pecuniary penalties, except where imprisonment for debt is abolished, the party may be held to bail.

(4.) A claimant, if successful, cannot recover costs, or maintain an action for damages against the person who wrongfully made the seizure, nor against the prosecutor, if the court certifies there was probable cause for the seizure.

(5.) If he does bring an action for damages against the seizer, or person assisting, and is non-suited, or has judgment rendered against him, he must pay double costs.

(6.) If judgment for a penalty or forfeiture be given against a defendant he pays costs; but

(7.) If he succeeds in the suit, and the informer is an officer of the United States, authorized to prosecute, he does not recover costs, if the court certifies there was probable cause for the prosecution.

It is unnecessary to vindicate such laws after an existence on the statute books of both countries for so many years. The necessity for such provisions, to prevent infractions of the revenue laws and to secure their proper administration, has long been established. Difficulties of detecting frauds, of procuring proof, of protecting officers in the *bonâ fide* administration of the laws, of compelling the injured person to move

promptly, while the proofs may be obtained, have compelled the Legislature to adopt such deviations from the ordinary procedure. And if such provisions are justifiable in the administration of laws to prevent smuggling and other infringements of the Customs laws, why should they not be applied to seizures for violation of the municipal regulations of the country in respect to its fisheries? The law is administered in much the same way. The difficulty of detecting infringements and the necessity of protecting officers in the discharge of their duty are quite as great in the one case as in the other.

The power to make restrictions to prevent the abuse of the privileges reserved by the Convention must have been reserved for the purpose of making the Convention effective. A statute must have been contemplated, for without a statute it was clearly a dead letter. Procedure must have been contemplated, for without procedure the courts would be helpless to enforce its provisions. This must have been clear to the minds of the framers of that Convention, who were well versed in the laws of England.

The amendments adopted by the Parliament of Canada, which have invoked most criticism on the part of those interested in the United States side of the question are principally these :

(1.) The Act of 1870, 32 Victoria, chapter 15, which dispensed with the necessity of giving to the suspected vesssel, twenty-four hours, notice to depart, previously to examination and seizure.

(2.) The Act of 1886, which added to the section providing for forfeiture, in cases of vessels "found fishing, or preparing to fish or to have been fishing" in prohibited waters, an express cause of forfeiture in cases in which the vessels entered such waters for any purpose forbidden by a treaty or convention or by any statute.

The first mentioned amendment was obviously necessary. Vessels do not now, as they formerly did, make long voyages to the fisheries, remaining about the coasts for months. They do not now, as they formerly did, tediously wait in the vicinity of mackerel, catching them with baited hooks. The introduction of the seine has changed the quantity of the catch, and the speed with which it is taken. The fleet of fishing vessels has greatly increased and their speed is greater. To attempt to comply with the former rule, as to the twenty-four hours' notice, before examination, would be simply futile ; the vessel would procure her cargo and be beyond the three mile limit before she could be overtaken, if indeed she had not gone to another locality in the prohibited waters. It would be impossible for any marine police, which the Government of Canada could afford, to watch the territorial waters, extending for so many thousands of miles about our shores and enforce a due observance of the Fishery Acts, if they were obliged to wait for twenty-four hours before they put those Acts in force. The original section, it seems, was borrowed from the Revenue Laws of England, in which country the coast line is not extensive in comparison with that of Canada and is well guarded. It was applicable to trading vessels bound elsewhere, which kept hovering about with the apparent design of smuggling. It was inapplicable at any time to the protection of fishery limits. It rendered

it necessary for a cutter to confine her attention to one vessel while hundreds might be trespassing in another locality. It was simply impossible to administer the law as it stood, and Parliament changed it.

In respect to the amendment made by the Act of 1886, there were never better grounds in any case for the intervention of the Legislature. If the convention prevented vessels from entering the bays and harbors within the area therein mentioned, the Legislature had the absolute right to make the provision effective. That amendment did make it effective; and it did so in the only feasible way. It is true a penalty against the master was provided for in the English Act, although not in the Canadian Act; but such a remedy was entirely insufficient Judgment was recovered in the Supreme Court of Nova Scotia against Alden Kinney, the master of the *David J. Adams*," for the penalties in the Imperial Act, but he has never since visited our shores to pay it. The procuring and serving of process upon the master, with a fast ship at sea, is out of the question; and the fruit of a judgment against a fisherman would not, perhaps be abundant. Service was effected in Kinney's case, only in consequence of his vessel being first detained. Canada has so far avoided enacting laws for arresting and imprisoning for such a penalty, or making a breach of fishery laws a criminal offence and for throwing into prison helpless seamen who may be doing their master's bidding. Imprisonment is a remedy more "harsh" and "unjust" than a proceeding *in rem* against the offending ship, trespassing for the benefit of the owner as well as for those on board. Canada, at least, has not adopted both of these modes of concurrent remedies for enforcing the laws relating to territorial waters.

But a stronger ground for the intervention of the Canadian Parliament was afforded. The expression, "preparing to fish," in the statute, had caused debate. Whether purchasing bait in the harbors of Nova Scotia, involving a violation of the convention by an entry into the prohibited waters, was itself a violation or not, evoked discussion. This happened in consequence of conflicting decisions. The decision of the Admiralty Judge, Sir William Young, the Chief Justice of Nova Scotia in the case of the *J. H. Nickerson*, has been already referred to. It was there held that procuring bait was a violation of the statutes, and a cause of forfeiture. Judge Hazen, a judge of the County Court in St. John, also sitting as a Vice-Admiralty Judge, had previously held that it was not a cause of forfeiture, under the statute, to purchase bait, unless it was purchased with the intention of catching fish with it in the prohibited waters. The decision of that Judge in the case of the "White Fawn" is here given.

In the Court of Vice Admiralty.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It may be well to note that this decision has no bearing whatever upon the construction of the *Convention*. It was not strictly necessary for the Judge to refer to that, and he left it unmentioned. He did not take the course pursued by Sir William Young, as he could have done,—try to obtain the clue to the construction of the statute from the obvious terms of the convention which the statute was passed to make effective. The Convention, and the object which the Legislature had in view in making the enactment, were not improper subjects for judicial consideration.

The judge was mistaken in assuming that the term "preparing to fish" only included arranging nets, lines and fishing tackle for fishing, though not actually applied to fishing. Such acts clearly come within the other expression in the statute "found fishing," and effect must be given to every word. At least, if the Legislature had intended to be so minute it would have used the expression "attempting to fish," which would aptly express the acts mentioned by the judge, not the term "preparing to fish."

In a case reported in 14 California Reports, p. 140, the Supreme Court of California, presided over by Chief Justice Field, now of the Supreme Court of the United States, held that:—

The preparation consists in devising or arranging the means necessary for the commission of the offence; while the attempt is the direct movement towards the commission of the offence after the preparations are made.

Chief Justice Field says:—

The attempt must be manifested by an act which would end in the commission of the particular offence but for the intervention of circumstances independent of the will of the party. A purchase of a gun with the intention to shoot is an illustration of preparation as distinguished from attempt.

If then such a necessary proceeding as obtaining bait is "preparing to fish," and the Legislature did intend to prevent entering the prohibited waters for that purpose under pain of forfeiture, it is clear that the judge was wrong in the chief ground of his reasoning, viz., the distinction made between bait for fishing in prohibited waters, and bait for fishing outside.

Entering the fishing limits for any purpose other than for one of the four specified, was, for obvious reasons, the thing to be prevented, and what difference would it make in what waters the bait was to be used?

After the termination of the Washington Treaty, when it again became necessary to administer the statutes which had been debated in the foregoing cases—pending immediately before it was framed—it was proper to create a remedy for what was deemed a conflict of decisions in two courts of equal jurisdiction. A conflict of decisions, or even differences of opinion in a divided court, when the reasons of dissenting judges are weighty, have frequently called forth the intervention of the legislature. Not only is Parliament justified in such interference when it does not affect existing litigation, as this statute did not in any pending case, but it is its duty to remedy such an evil, and it does, as it apparently did in this case, adopt what it considered to be the more correct of the opposing contentions and by legislation establish what was its original intention although defectively expressed.

If there had been no decision but that of Judge Hazen, it was obvious, if he was correct, that there was a *casus omissus* and that there was a necessity for a statutory provision to make effective the negative terms of the convention and to impose, as had been contemplated by its framers, such restrictions as might be necessary to prevent any abuse of its provisions. Admit the necessity of protecting fishery limits when fleets of prohibited fishing vessels are near, and the necessity and wisdom of legislation is admitted.

The day after the convention was ratified, Parliament might, in ratifying and rendering it operative, have plainly said, as the Act of Canada now does, that vessels shall be forfeited for violating its provisions.

The statute does not conflict with the words or spirit of the convention. Such a provision had been suggested by the Law officers of the Crown, in their opinion given September 25, 1852. They had advised that there could be no forfeiture excepting for fishing or preparing to fish, that for other infractions of the convention there only existed the remedy by collecting the penalty provided by the Imperial Act, which it is clear was useless, and the remedy given by nature of warning fishermen off and compelling them to desist from fishing and to depart, by the exercise of whatever force was reasonably necessary for that purpose, which would indeed, in the words of Edmund Burke, be like "shearing wolves." The Law officers had advised, by way of remedy, that if it should be deemed expedient that a power should be conferred to seize vessels in other cases of infringement than those already covered by the statute. It might be done by Order in Council. Such an Act, before it received the royal approval, for which this one was specially reserved, must pass the scrutiny of Her Majesty's advisers. It seems not out of place to mention this, and on account of it a passing reference may be made to a despatch frequently cited by eminent United States authorities. The despatch referred to is that of Lord Kimberly, Colonial Secretary, to the Governor General of Canada, of February, 1871, in which the British Government of that day felt bound to state, that it seemed to them an extreme measure, inconsistent with the general policy of the Empire, to exclude American fishermen from Canadian ports except for one of the four purposes mentioned in the convention, and that they were disposed to concede this point to the United States Government, under such restrictions as might be necessary to prevent smuggling and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects. The answer to the despatch might well be, that no restrictions to prevent smuggling and to guard against the substantial invasion of the exclusive rights of fishing reserved to British subjects, could be adopted, other than that of the exclusion of the United States fishermen from the limits, for any other than the four specified purposes.

The despatch was a mere suggestion from Lord Kimberly. The suggestion was met by a remonstrance from the Canadian Government, and has not, in any way, been adopted as part of the policy of Her Majesty's Government.

The subjects of Her Majesty who live nearer to the fishing grounds than those immediately represented in the British Parliament, and who bear the burden of protecting them against encroachments, and depend upon them largely for their means of living, perhaps feel more keenly the necessity of insisting that citizens of the United States should abide by their national compact.