

THE
SUBSTANCE
OF A
JUDGMENT,
DELIVERED IN THE
COURT OF VICE-ADMIRALTY,

AT
HALIFAX IN NOVA SCOTIA,
ON THE TWENTY-FOURTH DAY OF AUGUST, 1818;

In the Case of the
SCHOONER NABBY, THOMAS STANDLEY MASTER;

BY
CROFTON UNIACKE, ESQ.

JUDGE OF THAT COURT.

“Every deviation from this system, whether voluntary or from irresistible necessity, every licence to admit *foreign vessels into British ports*, is a nail driven into the coffin of the British empire.”

SIR ALEXANDER CROKE.

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HALIFAX:

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SUBSTANCE OF A

J U D G M E N T,

DELIVERED AT HALIFAX.

THIS vessel was seized by His Majesty's ship *Saracen*, John Gore, Esq. Commander, and has been brought into this Court for adjudication. An allegation has been filed, on behalf of His Majesty, containing several charges, and a claim has been made by Thomas Standley the master, a citizen of the United States of America, on behalf of himself, Joseph Standley, and Samuel Hadlock, also citizens of the United States, as the owners of this vessel.

IN considering the case which is submitted to the Court in this allegation and claim, it will be found to rest upon two grounds, which have been brought forward and supported, with great learning and ability, on the part of the prosecution.

FIRST,—It is contended, that this vessel, having been taken while engaged in the fishery on the Coasts of Nova-Scotia, has violated the territorial rights of Great-Britain, and should, therefore, be condemned: and secondly,—that having entered one of the harbours of this Province without any justifiable cause, she has infringed the laws of trade and navigation, which prohibit foreigners from trading with the Colonies, and has, therefore, incurred the penalties of those laws,

THE Court is called upon in this case, during a period of profound peace, to enter into the consideration of a subject which involves the interests of a foreign nation, and to apply, in their utmost strictness, those general principles of abstract and universal law, which are appealed to in questions between contending nations. It is presented to the Court in its most grand and imposing aspect, not as a collateral point growing out of private interests, and arising out of considerations of municipal law, but as a direct and solemn question, in which the high and important rights of one nation are to be defined and supported, and the claims and privileges of another to be confirmed or annihilated. The violated rights of Great-Britain are represented as seeking, in the dignity of insulted greatness, the protection of its sacred tribunals, and as claiming, in the time of peace, from public justice, that defence which they have ever found in war beneath the arms of their brave defenders. Certain acts of the citizens of the United States are held up to the Court as the infringement of territorial rights, made under the pretext of privileges become obsolete and now unacknowledged; and the confiscation of property is demanded as the just and unavoidable penalty of the offence.

In this view of the subject it becomes one of the highest importance, and it will require the most serious attention on the part of the Court, neither to shrink from its duties from an apprehension of consequences, nor to exert its authority beyond its proper limits, from the influence of feelings which the subject may be supposed to excite. As it is the clear duty of the Court to take cognizance of all questions legally within its jurisdiction, and to administer the law to contending parties, so it is highly improper in it to entertain and determine those which belong to other tribunals, or which are not within the settled limits of its own authority.

THE jurisdiction of the Court of Admiralty in former times was a subject of much controversy, and many very violent and unbecoming contentions have at different periods existed, as to the nature of the subjects to which its authority extended. Those discussions, which have so repeatedly laid open the subject to the investigation of the most able lawyers, have removed many of the errors which once prevailed, and little doubt can now be entertained as to the subjects of its ordinary jurisdiction. It will be necessary, however, for the satisfaction of those who have urged the Court to take cognizance of this subject, and to proceed to adjudication on the merits of this case, to consider, in the fullest

manner, whether the Court of Vice Admiralty has, within its ordinary jurisdiction, any power to proceed to the adjudication of foreign vessels, charged with the violation of territorial rights.

THE Court of Admiralty takes cognizance of matters arising either within its *civil* or its *prize*-jurisdiction. The Instance Court embraces all matters of a private nature, arising out of maritime affairs, but does not extend to subjects which grow out of a state of war, nor can it sustain questions in which the political interests of nations are involved. Without determining the precise boundaries of the Instance Court, which in many cases may, even at this day, be difficult to ascertain, as respects subjects of a private nature, it is sufficient in this case to shew, that the subject now submitted to it does not come within its jurisdiction. By the special provisions of an Act of Parliament the important interests of trade and navigation, are placed within its jurisdiction, and full power is given to confiscate the property of individuals found violating any of the positive regulations of British trade. Under those laws the interests of foreigners may be involved, and their property condemned, but all such cases are confined to private interests, and the offences, as well as the consequent penalties, are expressly settled and defined, by those very laws with the violation of which they may be charged. This vessel has been seized by one of His Majesty's ships, under an order from the Lords Commissioners of the Admiralty, for fishing within the territory of Great-Britain, and I am not informed of any municipal law which gives the Court cognizance of such a subject, or which could justify it in confiscating property so employed. It has been urged, that an order from the Lords Commissioners of the Admiralty having been given to the Commander in Chief of the North American Squadron, to seize and detain all vessels found fishing within the British territory, this Court is bound to give effect to it by condemning this vessel and her appurtenances: but, however high the authority may be, from which such order may have emanated, and however strictly bound the Commander in Chief may be to carry it into execution, this Court must wait until its powers, as to matters of prize, are called forth in the regular and legal manner. That those powers are inherent in its commission there can be no doubt, and it may be proper for me to state, in what manner they are brought into full operation. In the first place, a commission, under the great seal of the United Kingdom, goes directed to the Lords Commissioners of the Admiralty, authorizing the seizure and detention of the vessels of any country, sav-

ing such exceptions as may afterwards be declared; and authorizing the same to be brought to judgment in any of the Courts of Admiralty within the dominions, which shall be duly commissioned; and the Lords Commissioners of the Admiralty are thereby authorized and enjoined, to will and require the high Court of Admiralty of England, and also the several Courts of Admiralty within the dominions, which shall be duly commissioned, to take cognizance of, and judicially proceed upon, all ships, vessels, and goods as shall be seized and detained, and to adjudge and condemn the same, saving such exceptions as may be, at any time, after declared. In consequence of this commission a warrant issues, under the seal of the office of Admiralty, with a copy of such commission usually annexed, requiring His Majesty's Vice Admiralty Court at Halifax, (or whatever place it may be) to take cognizance of and judicially to proceed upon all ships and goods, that are or shall be taken within the limits of said Court, and to hear and determine the same, and according to the course of Admiralty and law of nations to adjudge and condemn the same, saving always, such exceptions as His Majesty may, at any time, be pleased to declare.

Thus the Court of Admiralty becomes fully authorised to take cognizance of, and to proceed judicially upon, all vessels seized *jure belli*, or under any orders His Majesty's government may have deemed it expedient to issue. But, until the Court receives authority to act through the regular and legal channel, it cannot undertake to administer the law as applicable to prize, and to settle the conflicting interests of nations. This Court cannot penetrate into the secrets of the British cabinet to ascertain what the political views of His Majesty's government may be on this subject, but as no regular steps have been adopted, to give the Court a power to proceed to adjudication and to condemn these vessels, it might be inferred, that it was not the intention to confiscate them at present, but merely to detain them until further instructions should be given. It must be well known to those who administer the British government, advised as they are by the most learned civilians of the age, that the Court of Vice Admiralty has not power, in the exercise of its ordinary jurisdiction, to take cognizance of subjects of such a nature.—Uninfluenced, therefore, by any considerations, arising from the necessity or expediency of what has been proposed, and paying every respect to the order which has been produced, this Court will endeavour to perform its duty with firmness, within the proper limits prescribed to

its jurisdiction, but will not allow itself to be led, by any plausible view of the subject, into a vague, irregular, and unjustifiable exercise of its power.

THAT these opinions are not merely the result of my own unassisted deliberations, but that they are supported by the decisions of the most learned and able judges, both of the civil and common law Courts, I shall proceed, in the next place, to shew.

THE first case I shall notice on this subject is the *Curlew*, (*Stewarts Report* 312) in which Sir Alexr. Croke, in speaking of vessels detained in consequence of a declaration of war, but before any commission to condemn, uses these words " This then is property which has been seized and detained, in consequence of a declaration of war made by the United States against Great Britain, but before any orders have been given by His Majesty in Council for general reprisals, and before any commission had been issued to require this Court to *adjudge* and *condemn* such ships, vessels, and goods as shall belong to the United States. Again " Till the British government has declared the subjects of the United States to be enemies, by its order for general reprisals, and by a *warrant to condemn* their goods, this Court cannot consider them as enemies' property. Even an *order from the British Government to seize and detain* vessels would not have that effect. That might be only provisional and must depend upon subsequent explanation, having a retroactive power. Seizures made may be declared, to have been only on the footing of a temporary sequestration."

How much stronger was that case than the one before the Court. The actual declaration of war, by the government of the United States, was followed immediately, by all the violence of war; the treaty of peace between the two countries was violated and broken; the commerce of Great Britain was assailed and interrupted; and all those rights which are most valuable to a nation were infringed, in the true spirit of national hostility: yet, in that case, the Court could not condemn the property which was very properly seized by His Majesty's ships. In this case it is alleged that the citizens of the United States have violated the rights of Great Britain, by entering its territory and fishing therein, and that, therefore, the vessels so found should be condemned. But if they had made an actual attack upon our shores, if they had captured and destroyed the property of British subjects both by sea and land, this Court would not be authorized to condemn, until it should be commanded so to do by the Sovereign, in whom alone such power is reposed by the constitution of our country.

THE next case I shall produce in support of my opinion, is that of the *Huldah* (3*d* *Rob. Rep.* p. 235). That ship was carried into St. Domingo and proceeded against in the Court of Admiralty. The Court there was properly constituted as a *civil* Court of Admiralty, and His Majesty's instructions were addressed to it as a Prize Court, but by a mistake no *warrant* had been issued to give it a prize jurisdiction against *France* and *Holland*, although there had been a prize warrant against *Spain*. Sir W. Scott.—“In this case there is no imputation of misconduct; the captors went to a Court which was sitting at St. Domingo, apparently with competent authority; in that Court he obtained a sentence of condemnation, and distribution has taken place in consequence of it: But that Court having no authority, those proceedings are null and of no legal effect whatsoever.” Now at the time the Court of Admiralty at St. Domingo was exercising a prize jurisdiction over the ships and goods of two nations, it could not extend that power to property belonging to another nation, although actual hostilities existed, and the vessels and goods of that nation were confiscated in other Courts duly authorised. The Court of Admiralty is not to look at the state of things between Great Britain and another nation, and to infer from the existence of hostilities, or from the orders issued to the Naval Commanders, that its powers are called forth, and are to be exercised to their utmost extent. It does not sit to deliberate on the political relations of states, but to administer the law whenever it shall be so required. That the persons who have presided in the Courts of Vice Admiralty have often ventured beyond the limits of their jurisdiction, and assumed the exercise of powers with which they were not invested it is well known; but this Court will select higher examples for its imitation, and will not easily be led into those gross errors, which often prove injurious to the interests of individuals, and always lessen the respect due to the tribunals of justice.

I SHALL mention one more case, on this point, which was determined by that eminent judge Lord Mansfield, a case in which the jurisdiction of the Court of Admiralty was very fully considered. In the case of *Lindo vs. Rodney*, Lord Mansfield, speaking of the distinction of the civil and prize jurisdiction of the Admiralty, says:—“The Court of Admiralty is called the Instance Court, the other the Prize Court. The manner of proceeding is totally different. The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself: it is no more like the Court of Admiralty than it is to any Court in Westminster Hall.”

It is quite unnecessary to go farther into this subject. Here are the decisions of the most learned and eminent judges, and they fully support the general position which I must assume, that the Court of Admiralty cannot, in the exercise of its ordinary jurisdiction, entertain any question which bears the character of prize. The first ground in this case is clearly of that nature. It is that this vessel has been captured by one of His Majesty's ships of war, for the violation of the rights of Great Britain, and that such seizure was made under orders from the Admiralty. The whole question arises out of a proceeding of a *military* and not of a *civil* nature. And this it is that makes the distinction.

BUT it may be asked, whether the orders thus issued to the Naval Commander in Chief are to be rendered nugatory, and whether this determination is to operate to counteract the evident wishes and intentions of His Majesty's Government. To this the answer is plain. The Court has the power to take the custody of the vessel, and to preserve it in the usual manner, until the final determination of government shall be made known, although it cannot proceed to adjudication upon this question. It can neither condemn nor restore. It is true no positive instructions have been sent to this Court to detain vessels of this description, but sufficient has appeared to it, to authorize the regular exercise of its ordinary care in the preservation of the property. That I am correct in this opinion I shall shew by an authority directly to the point. Upon the declaration of war by the United States of America, His Majesty's ships captured American vessels and brought them into the custody of this Court. At that time *no order* had been made to seize American property, nor had any instructions whatever been sent to the Court of Admiralty in this Province. Sir Alexr. Croke (*Case of the Dart, Stewari's Report* 501), under such circumstances, said "They may possibly be declared to be enemies in future, but their present situation is *ambiguous*. "Whilst this uncertainty continues the Court cannot *reject* the claim of the parties or *condemn* their property. Neither in this state of semi-hostilities with the United States would it think itself justified in restoring goods." In the present case the Court is bound to take notice of the orders which have been issued to the Commander in Chief, and to give them an operation to a certain extent. They have been communicated to the Court, and feeling itself influenced by the high respect it will ever have for the distinguished officers, to whom His Majesty may confide the command of his fleets, it cannot hesitate to hold the custody of

such vessels as may be brought within its care. In another case Sir Alexr. Croke recognized the orders which had been issued to detain vessels, and gave them the effect that I am willing to allow those to have which have been communicated to me. In the case of the *Zodiac* (*Stewart's Report*, 333), he said "If this was merely a claim as for American property, this Court would certainly not proceed to adjudicate upon it, because in the hostile or at least ambiguous state of the two countries, under His Royal Highness the Prince Regent's order in Council to detain, and bring into port all vessels belonging to the citizens of the United States, without giving any authority to condemn them, no property of that description could either be *condemned or restored*."

I HAVE given to this subject the most serious attention, and have considered fully the ingenious arguments which have been pressed upon the Court by His Majesty's Advocate General; and I am perfectly satisfied, that I should not be justified in exercising the powers which it has been contended this Court possesses. Did the cause rest, therefore, entirely upon this ground, it would be my duty to direct it to stand over until farther instructions should be given by His Majesty's Government; but another point has been submitted to my consideration which may render such delay unnecessary, and I shall proceed to state the reasons which I deem sufficient to support the judgment about to be pronounced.

THE point now presented to the Court arises under the laws of trade and navigation, and it is contended, that this vessel, her appurtenances, and every thing laden on board of her are liable to confiscation, for having illegally imported goods, wares, and merchandize into a port of this Province, she being a vessel not owned and navigated as vessels are required to be, to entitle them to the privilege of trading with the Colonies.

QUESTIONS arising under the laws made for the regulation of trade and navigation are not only clearly within the jurisdiction of this Court, but require its utmost attention and care, lest the ignorance or the arts of commercial speculators should interrupt the operation of a system framed for the greatest national purposes; and which has been found to realize the best hopes of those enlightened minds by which it was conceived and matured. It would seem unnecessary for me in considering a question, confined within the narrow bounds of a few clauses of an act of parliament, to take an extensive view of the whole system; but as the Court is under the necessity of seeking the rules which are to govern it, in the construction of this particular act, from an ex-

larged conception of the general spirit of the whole system, it must take a comprehensive view of the great designs for which it was wisely contrived.

THOSE laws took their rise in the profound and enlightened views, which experience had offered to the acute and reflecting mind, of the true basis on which might be erected the fabric of a great nation. And however that system may have been extended and improved, by the various alterations and additions, which grew out of new relations and more complicated public interests, the same spirit which is manifest in the provisions of the earliest laws may be traced through every succeeding regulation. They rise to the contemplation of the human mind with a regularity at once clear and complicated; and may be considered as a beautiful specimen of positive law, in which the profound, and comprehensive speculations of political economy, are admirably blended with the useful and practical regulations of mercantile experience. The wisdom of the policy which projected, and of the care which was constantly taken to render this system more perfect, was very soon discovered in the beneficial consequences which resulted to the nation. It was soon found that those admirable regulations were adapted, to strengthen and enrich the mother country, while they gave a permanency of character to her distant possessions, which must have been entirely lost in the confusion of a loose and unrestrained commerce. As this system advanced to that perfection in which we now find it, those nations whose interests seem to have been neglected in the promotion of our own, did not fail to discover, what they affected to consider a narrow and illiberal feeling, inconsistent with those dignified and generous sentiments which should always govern the policy of nations. But while Great-Britain increased in national greatness, and commercial prosperity, she viewed the envy and jealousy of other nations merely as a powerful confirmation of the wisdom of her plans.

THOSE laws form a code which it is the duty of this Court to guard from the slightest violation; their importance cannot be fully estimated, and they, whose minds are too limited to trace the progress of our national prosperity in the rigid execution of them, might be awakened to a sense of their value by the rapid decline of our greatness, which would be the consequence of their relaxation. In viewing the subject in this light the first object that strikes the mind, is the great design of confining to British subjects, as far as it could possibly be effected, the commerce of the British colonies. For this purpose no goods, wares or merchan-

dise can be imported into, or exported from the colonies, unless in British built vessels owned by British subjects, and navigated by the master and three-fourths of the crew subjects of Great Britain, under pain of forfeiture of ship and goods. This part of the law is as clear as the plainest terms can make it, but were the Court to adopt a construction, which should be restrained to the very precise meaning of the words, the spirit of this law as well as of the whole system would be violated. If it should be said that the word *imported* means the actual landing of goods, wares or merchandise, and that no penalty could be inflicted except in a case where that fact was positively proved; or, that if the owner could make out by the evidence of himself and crew, that no articles were landed from the vessel, she ought necessarily to be restored; it would follow, that a foreign vessel might enter the harbours of a colony or plantation without permission, and remain there until a suitable occasion should offer to land her cargo. But this construction would be evidently in opposition to the true spirit and meaning of this clause, and would render useless and unavailing every provision of the laws of trade and navigation, which are clearly founded in the design, to reserve the privileges of trade to British subjects, and to *exclude* foreigners from participating therein. I cannot conceive two ideas more inconsistent with each other, than a law positively declaring that foreigners shall not trade with the colonies, and at the same time a loose permission to enter the harbours of those colonies, and to continue there while it may suit their own convenience or favour their own views.

It has been contended that the presumption, which arises from a vessel's entering an interdicted harbour, namely, that she came there with an intention to trade, may be overcome by shewing circumstances which prove that no such intention existed; and that if, for instance, it were made out to the satisfaction of the Court, that the vessel was merely *in ballast*, the presumption of her importing goods, wares and merchandise would be completely destroyed, and she ought to be acquitted. But it should be remembered that the laws which prohibit the importation of goods make the *exportation* equally penal; and if vessels were allowed to enter the harbours of a colony *in ballast*, what protection could be given to the lawful trade of British subjects? Would not such permission throw open the ports and harbours of this country to the free trade of every American vessel? Under such a vague and preposterous construction of this wholesome and rigid system of laws, it would only be necessary for a foreign vessel to lie at an-

onor in our harbours, until an opportunity offered to ship goods for exportation, which might be done without fear of interruption, in almost every harbour of this Province. To prevent the certain consequences of such a construction, it would require every inhabitant of this Province to be a custom-house officer, and to be employed day and night, in preserving the trade of the country from the monopoly of the enterprising adventurers of the neighbouring country. It is well known, that even the most rigid execution of the laws of trade is not sufficient to deter the eager speculator from engaging in the commerce of these colonies. The contiguity of the harbours of the two countries makes it almost impossible, under every restraint that human laws can impose, to prevent a system of smuggling, destructive of the interests of the honest British merchant, and productive of the most pernicious consequences;—in weakening the sense of the moral obligation of the laws, and in tempting the inhabitants of this colony, to blend their interests with those of the depraved and lawless adventurer, rather than to strive by an honest and grateful allegiance to uphold the nation which protects them. Shall this Court then declare, by its solemn decisions, that the laws allow such an entry into the harbors of this Province? Shall it say it is prohibited that you should import and export goods, but you may come as harmless and quiet people, to view the beauties of the surrounding scenery, and to pass your time in inoffensive indolence.

It has also been advanced, as a doctrine, to this Court, that although these principles may be applicable to vessels, ostensibly equipped for trade, and which are constantly engaged in commerce; yet they ought not to be carried into rigid effect against vessels of a distinct character. And an exception has been made in favor of vessels, manifestly fitted out for the fishery and which could not be supposed to have commercial objects in contemplation. But so far from considering vessels of this description as entitled to any particular favor, or to which a relaxation of the laws might be made without any dangerous consequences, they are to be viewed with more caution by this Court, and to be watched with more jealousy, by officers of the customs, than those whose character is more open and unequivocal. These vessels it is said leave their own ports without a cargo, ostensibly bound to their fishing stations, and as such cannot be considered as objects of suspicion: but under the sanction of such impolitic liberality, they would no doubt avail themselves of the opportunity afforded to them, of landing goods in such ports as they may be allowed

to enter. A vessel avowedly engaged in trade, necessarily becomes an object of immediate attention to those who are entrusted with the execution of the laws; but a little, and apparently an insignificant vessel may, from the very character she assumes, be the most dangerous enemy to the system which this Court is bound to protect. To give full efficacy to every regulation, which the laws have prescribed for the trade of this Colony, is one of its highest duties, and it is essential to the great objects thus entrusted to it, that every barrier, which the words and spirit of the laws will permit, should be raised around them, and that a narrow verbal construction should not operate to defeat the evident intention of them. In extending the penalty of those laws to vessels entering the harbours of this Province, without a justifiable cause, I find myself supported by the very highest authority; and I shall proceed, in the first place, to consider the various cases in which, I think, this doctrine may be found; and then, I shall take a view of the circumstances of the case before me, and of the grounds upon which the claimant has attempted to justify the entry into a harbour of this Province.

The first case I shall notice, under this head, is that of the *Eleanor*, Hall master (*1st Edward's Reports* 135.) That vessel was condemned in this Court, while Sir Alexander Croke presided in it, and the case went before Sir William Scott by appeal. The principal ground of condemnation, and upon which, likewise the sentence was confirmed by the High Court of Admiralty, was, that the vessel, having a *foreign character*, entered the port of Halifax in distress. Sir William Scott—"It is I presume an universal rule that the mere act of coming into the port, though without breaking bulk, is *prima facie* evidence of an importation. At the same time this presumption may be rebutted, but it lies on the party to assign the other cause, and if the cause as assigned turns out to be false, the first presumption necessarily takes place, and the fraudulent imputation is fastened down upon him." The second case is that of the *Dart*, Ramage master, (*Stewart's Reports* page 301.) She was an American vessel, seized by the Collector of this port for an importation into this Province, contrary to law. Sir Alexander Croke—"Nothing short of a necessity can justify his entering the port of Halifax: it was his own voluntary act. The original voyage might have been completed, which was to Philadelphia; it was matter of choice, of mere prudence to fly from the embargo to Halifax. Entering the port *prima facie* is an importation unless it can be justified. It cannot be explain-

ed away by any *illegal* design. *To take in provisions not from necessity is an exportation and contrary to law.*" The third case I shall mention is that of the *Patty*, a vessel condemned in this port for having entered it without a justifiable cause. (*Stewart's Reports* 299.) Sir Alexander Croke thus expresses himself—
 "A necessity to justify the breach of a law must be an immediate natural necessity, not a mere remote moral necessity. It must be an imminent danger of perishing." Besides these cases which are as clear and as much to the point as it is possible, it is well known, that by the statute law of Great Britain *foreign vessels* are not allowed even to hover about the shores of these colonies; and that if found within a specified distance after a warning to depart they are liable to confiscation. So far, therefore, from any loose permission to enter the harbors of this Province, *with or without a cargo*, being consistent with the words or spirit of this general system of laws, foreign vessels are not allowed to approach within two leagues of the shores. The hovering act, as it is called, was made to establish a greater degree of strictness in the execution of the laws regulating the plantation trade than had been observed, and strengthens the position which I think it necessary to take in this case.

If we look to the decisions, which have been made in cases of blockade, we shall find the principles which are applicable to vessels entering an interdicted port, much more rigid than any this Court has yet advanced for the protection of the colonial trade. The mere circumstance of the vessel's sailing towards the blockaded port with an *intention* to enter it will work the forfeiture; neither is she permitted to enter such port *in ballast* or for the supply of water. In the case of the *exchange* (1 *vol of Edw. Reports*, page 42), Sir William Scott says, "If it were once admitted, that a ship may enter an interdicted port to supply herself with *water*, or on any other pretence, a door would be open to all sorts of frauds, without the possibility of preventing them." In the case of the *Comet* (1 *Edward's Reports*, 32), the same great man observes "It has not been contended that a ship may enter a blockaded port *even in ballast*; that is a point upon which this Court has already decided, if wrongly the decision must be corrected elsewhere." Now I consider the ports of this Colony as interdicted, and that according to the true spirit and meaning of the whole system of laws foreigners cannot *enter* the same without some reason that may be held sufficient to relax their strictness. **It is notorious that the harbours and ports of this Province afford**

the greatest facility to smugglers; the small number of their inhabitants, and the want of officers of the customs are circumstances, which render more caution necessary in this country than might be found requisite in Great-Britain. I shall therefore consider myself bound to adopt those principles which are applied to cases of this nature, in their utmost rigour, and shall now proceed to consider the facts of this particular case, and to examine whether the causes assigned for entering a harbor in this Province are sufficient for her justification.

IT is admitted by the claimant that this vessel entered Pope's Harbour in the Province of Nova-Scotia, and it will be necessary to consider the facts of the case under two heads; first, as to the cause of her entering that port, and secondly, whether any thing was landed or taken on board while she remained there.

THE master of this vessel has given his testimony to both points, to the first he says, "They went into Pope's Harbour, the weather was thick, and when they made the land they found themselves nearer than they expected; and being scant of water, they went into that port for the purpose of getting some, and with no other intention whatever." and yet to the very next question almost he answers, "They had abundance of provisions, stores, bait, wood, and water for the voyage, at the time they left their own port, and were not apprehensive of any deficiency whatever of any of those articles." This account, as respects the cause of her entering the harbour, is confirmed by another witness with the addition that there was a deficiency of wood.

To the next point as to what was landed or taken on board the Master declares—"They did not land or put on shore a single article of any kind except the water casks which they filled; They did not receive on board any articles whatever except two dollars' worth of bread, which he bought of one of the inhabitants of Pope's Harbor;" again, neither himself or any person on board either bought or sold, bartered or exchanged, any article or articles of any kind or description whatever, except the two dollars' worth of bread he has already spoken of." Another person belonging to the vessel says to this point, That a quantity of wood was taken on board in their own boat. James Whidden, a midshipman of His Majesty's ship Saracen, who has released all his interest in the event of this cause, and comes before the Court both as a competent witness, and as one to whom the highest credit is due, has given his testimony in these words, "That he understood from the crew that they had procured some wood, and that if they

should stand in need of it they expected to supply themselves with wood and water from this coast. " They informed him they had been in at Pope's harbour and sold some boots, for which they had not got payment." How such contradictions are to be reconciled I shall not stop to inquire; sufficient appears to the Court to shew, that this vessel entered a harbour of this Province, and took certain articles on board, and that if it were essential to the prosecution in this cause, a traffic, to a certain degree, was actually carried on. It remains to consider the defence which the claimant has thought proper to set up to justify such proceedings.

A CLAIM has been filed, to which is annexed an answer to the allegation under the oath of the master. In this answer two grounds of defence are taken quite inconsistent with each other. In the first place it is said, that actual distress, arising from the want of water obliged them to enter the harbour; and that they did not claim a right to approach the coast, or to enter the harbours, bays, rivers, or creeks of this Province, under pretence of fishing, or for any purpose connected with the fishery. In the second place it is boldly asserted, that, as citizens of the United States, they have a right to engage in the fisheries on the coasts and in the harbours of this Province.

THE liberality which was always extended, by the eminent Judge who so long presided in this Court, to parties whose interests were committed to its care; and the indulgencies which he granted to practitioners as to the forms of legal proceeding, will not allow me on this occasion to restrict the claimant in making his defence as he may be advised. But I wish it to be understood, that the proceedings must not assume a character, which can only tend to perplex the Court, and to prevent the only object which parties can be permitted to seek in Courts of Law, the administration of justice through the medium of unperverted truth. And I must confess, that this defence presents to the Court a confused picture, in which the interesting colours of distress are awkwardly thrown over the obscure and almost faded outline of rights, once clear and acknowledged. Such as it is, however, I shall consider it, and this foreigner shall not be permitted to say that he was refused to be heard by a British Court on every point he pleased to assume, and in every way in which he thought justice might be attained.

THE first ground then is, that this vessel came into a harbour of this Province in distress, and, without any pretence of right, sought that relief from the inhabitants of this Province, which the people of the U. States, in a recent instance, had most

generously and nobly extended to the inhabitants of a British Colony. And most assuredly if a case of real distress is made out there is an end forever of this question. It must be buried in those feelings which, I trust, will ever be dear to this Court, and in the exercise of which it would hope to derive more satisfaction, than can ever arise from the rigid execution of the laws. Real distress is a passport even through the savage land; it appeals at once to sentiments universally felt; at its approach the rigour of law is softened, and the violence of war becomes composed by the sacred influence of humanity. And where can unaffected calamity seek a refuge if it is denied it on a British shore? Intrepid in the defence of its rights, and lenient in the exercise of them, Great Britain requires not its harbours to be closed against the stranger, who seeks a shelter from the tempest, or who asks the supply of those deficiencies which unavoidable necessity may have created. The private contributions of that country have cheered the hearts of the afflicted in almost every land, and its public treasuries have been exhausted in yielding protection to every nation, whose people sought an asylum either in its bravery or its resources. As a British Judge, therefore, I receive with every disposition of kindness, this ground of defence; but let it not be a garb assumed by artifice to deceive and mislead. While I am ready to acknowledge the interesting features of distress, I am vigilant to detect the subtle contrivances of art. Now what is the truth of this case. That this vessel was in any serious distress can not be pretended. That she might have wanted a little water is very possible, but it must be made out to this Court that the deficiency did not arise, either from design, or from an unjustifiable neglect; and, let it have arisen from whatever cause it might, that it was such as to place the crew in imminent danger of perishing. The master says that they *found* themselves nearer to the land than *they expected*, which shews that his distress was not such as to have forced him to seek a harbour. He expresses his distress to arise from his water being scant, but he does not say that any inconvenience had been experienced, or that he could not have prosecuted his voyage. Besides vessels are bound to have a sufficient quantity of water and provisions on board for the voyage in which they are engaged, and it would be absurd to suppose, that a scarcity of water, arising out of neglect, or, what is more probable, design, can operate to supersede the laws, and throw open British ports to any adventurer who may wish to evade the regulations of British trade and navigation.

THE evidence on this and other points is extremely contradictory. One says that vessels could carry on a fishing voyage without going into any harbour, and another says it would be impossible without the privilege of putting into some of the British ports for wood and water ; and it is in evidence that they informed the Midshipman that they expected to supply themselves with wood and water from the British coasts. One of the witnesses expressly swears that they had a full supply for their voyage, but that *one* of the barrels of water proving bad they put into Pope's Harbour to get a fresh supply ; also, that a ten gallon cask of water was spoiled by being put into an old gin cask. Now it would be beneath the dignity of a Court to spend time in commenting on such evidence as this, brought forward to support a point which always requires to be made out in the most satisfactory manner, and in the proof of which such strictness has always been observed. Nothing could have induced me to give the attention I have done to it, but a great anxiety, that this subject, which has already excited much public interest, should be thoroughly investigated ; and that not only the principles of law, but the facts of the case should be presented to the world in the clearest point of view.

I SHALL conclude my observations, on this point of the case, with the words of a Judge, (*Sir W. Scott*) whose decisions are not only studied by the lawyer as the sources of profound instruction, but are read, with interest, by the enlightened and accomplished scholar as the finest exercises of the human intellect. " Where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself by putting on board an insufficient quantity of water or of provisions for such a voyage ; for there the distress is only a part of the mechanism of the fraud, and cannot be set in excuse for it ; and in the next place, the distress must be proved by the claimant in a clear and satisfactory manner. It is evidence which comes from himself, and from persons subject to his power, and probably involved in the fraud, if any fraud there be, and therefore it is liable to be rigidly examined."

THE last point which is to be considered by the Court, is a right which has been set up by the claimant to enter the ports and harbours of this Province, and there to cure the fish which he may have taken in the course of his fishing voyage. And certainly if such a right exists, the principles of law which I have laid down with so much care will not be applicable to this vessel, unless

proof shall have been made of an *actual trading*. Because it would not be consistent to permit foreign vessels to enter these harbours for a certain purpose, and then to make that entry a ground upon which to raise the presumption of illicit trade. This right is asserted to belong to the citizens of the United States, under the treaty of peace entered into between His Britannic Majesty and the government of that country, in the year 1783; and it is contended in the first place, that a right to take fish on our coasts, and in our harbours and bays; and to cure the same on the shores of this Province, was *absolutely acknowledged and given*, by the third article of that treaty: and in the second, that admitting the treaty granted only a *privilege* to do so, that such privilege still exists because the treaty itself has not been annulled. This question now presents itself in a way which obliges the Court to enter into the full consideration of the right here asserted. For although it has already determined that it cannot take cognizance of it as a direct charge against this vessel, having no authority so to do; yet as it becomes essential to the determination of the second point in this cause, as it arises incidentally out of the consideration of the municipal laws of the country, and as it must be entertained in order to do justice to the parties whose private interests are involved, it is its duty to sustain it, and to place it in such a point of view, as may put an end to those doubts which some have affected to indulge on this subject. It might be sufficient for me to say, on this point, that His Majesty's Government having determined, that the privileges granted to the citizens of the United States by the treaty of 1783, to carry on the fishery upon the coasts of this Province, and to cure fish in the harbours thereof had ceased; and that determination having been made known, it would not be necessary to consider this right as entitled to any attention. But as it will require but little reasoning to shew the weakness of such pretensions, I shall take a cursory view of the grounds upon which this extraordinary right seems to have been placed.

It will not be requisite for me, in this case, to enter into those general considerations of the rights of nations to a dominion of the sea, which have occupied the attention of the gentlemen of the bar. Very able writers on abstract law have differed, both as respects the right of dominion over particular parts of the sea, and also as to the distance from the shore over which a nation holding the land might exercise the rights of sovereignty. When these important points shall be submitted to the Court, in a way

which will render it incumbent on it to determine them, it will not shrink from so arduous a task, neither will it despair of placing them on grounds which may find their support in the sound principles of general and universal law; principles which flow from the reflections of enlightened reason, corrected and confirmed by the usages and customs of the civilized world. It will hope, that those contradictions, which may have been observed in the best writers are to be reconciled, by an attention to the characteristic circumstances of the different ages in which they thought and wrote; and by an allowance for the influence, which the fluctuating relations, the jarring interests, and the various modifications of the claims and pretensions of nations, cannot fail to produce even upon the most reflecting mind. Much of that difference found amongst writers of this description, may be traced to the prevailing public sentiment, to national prejudices, and even to the eccentricity of individual opinion. But whatever the difficulties are which those great questions might present, they do not meet the Court in this case. It is only necessary in order to see the simplicity of this point, to read the article of the treaty on which the claim is founded, and to determine whether that treaty exists at the present time. The words of the third article of the treaty are.

“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 on 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, harbours, 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 settlement without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.”

Now it is impossible to imagine words more clear than those. Two objects seem to have been in view, the first was the fishery on the Grand Bank, in the Gulf of St. Lawrence, and other

places in the sea; and the second was the *privilege* which was intended to be granted to the people of the United States, to take and cure fish on the coasts, and in the bays, creeks, and harbours of the British dominions in North America. It would seem that the intention of the British Government, at the time, was to acknowledge an *absolute right* in the people of America, to fish on the Grand Bank of Newfoundland, in the Gulf of St. Lawrence, and other places in the sea; but the Court is not called upon, in this case, to determine that point. As respects the latter part of this article, it would be confounding all ideas of common sense, and throwing obscurity over the ordinary perspicuity of language, to contend that the word *liberty*, here used, can be conceived to convey an *absolute unqualified* right. That it was received as a privilege at the time, and has been exercised as such until the late war cannot be doubted. By accepting such privilege that Government acknowledged the right to exist in Great-Britain, and the only question left for the slightest consideration is, whether that treaty is now in force or not?

It has been ingeniously argued on the part of the claimant in this cause, that the treaty of 1783 is now in force, because the late war being for a cause entirely new and distinct from the subjects of contention, which were terminated by that treaty, the declaration of war by the United States was not a violation of any of its articles. And the words of some eminent writers would seem to support such a doctrine: but a little attention to this subject will explain the grounds, upon which the true and sound doctrine firmly rests. Grotius book 3, cap. 20, section 27, has these words, "It is also a daily dispute when a peace may be said to be broken, which the Greeks call *Paraspondeus*: for it is not directly the same thing to give a new occasion of war and to break a peace. But there is a great difference between them as well in regard to the penalty which the breaker incurs, as with respect to the liberty of the injured party to disengage his word, in the other articles of the treaty." In a note however to these words the principles as received in modern times, and the reason upon which they are founded, are clearly laid down and explained. "When a new occasion of war is given in this manner the treaty of peace is thereby broken indirectly; and with regard to the effect, if satisfaction for the offence be refused. For then the offended having a right to take arms in order to do himself justice, and to treat the offender as an enemy, against whom every thing is lawful; he may also undoubtedly dispense with observing the

conditions of the peace, though the treaty has not been formally broken with regard to its tenor."—This distinction can scarce be of use in these days, because treaties of peace are conceived in such a manner, that they include an engagement to live in amity for the future in all respects, so that the least occasion of war how *new* soever it be, may be deemed an infringement of the most important articles of the treaty. It will be found that the treaty of 1783 contained an engagement that there should be a firm and *perpetual* peace between the two countries, and that such engagement was violated by the declaration of the late war no human being can be permitted to doubt. I am therefore bound to declare, that the treaty of 1783, and all the privileges depending thereon have ceased.

I HAVE now fully considered the grounds of defence in this case, and as I do not perceive either truth in the distress, or strength in the right, set up by the claimant, I feel myself compelled to pronounce this vessel, and the goods laden on board of her, to be liable to confiscation, for a violation of the laws of trade and navigation.

IN pronouncing this judgment, I derive a consolation from the reflection, that my errors may be corrected by an appeal to one of the most upright and learned Judges the world ever saw. From the decisions of that tribunal I have humbly endeavoured to draw the principles which should govern me; and, I trust, that when the solemn scrutiny to which this decree is open shall be made, it will be found, that while my labours were directed by a sacred regard to the interests of an obscure and indigent foreigner, I did not forget the rights and the claims of every British subject, nor relax, by a feeble construction, that noble system of laws, upon which the wisdom of ages had reared our national prosperity and greatness.

FINIS.