

war, Sir Samuel Evans stated that he would make no pronouncement on the question as to whether the German Empire or its nationals had any right to invoke the benefits of any of the Hague Conventions but would confine himself to a review of the practice of nations in respect to the treatment of enemy fishing vessels. There was, he said, no reported case in England in which the immunity of such vessels had ever been recognized as a part of the law of nations, but, nevertheless, he was of the opinion that after the lapse of a century it had become "a sufficiently settled practice of the law of nations that fishing vessels, plying their industry near or about the coast (not necessarily in territorial waters) in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war, so long as they confine themselves to the peaceful work which the industry properly involves." This rule, he said, was that which had been formulated and stated by Westlake and the reason upon which it was founded had been explained by Hall,¹ namely, that coasting fishery being the sole means of livelihood of a very large number of inoffensive people, the seizure of their boats would inflict extreme hardship upon their owners without at the same time resulting in any important military advantage to the captor.

Having decided that the immunity of the class of fishing vessels referred to above existed as a settled doctrine of the law of nations, apart from conventional arrangements, the only question to be decided in this case was whether the *Berlin* came within this category. Sir Samuel relied mainly upon the opinion of Mr. Justice Gray in the case of the *Paquette Habana*—an opinion which he said was "full of research, learning and historical interest." While affirming that the immunity had become an established rule of international law which prize courts were bound to take judicial notice of and give effect to in the absence of treaties or municipal law, Mr. Justice Gray added that it did not of course apply to vessels engaged in the taking of whales or seals or cod or other fish which are not brought fresh to market,

¹ *Op. cit.*, p. 446. The foundation of the immunity is also stated by Mr. Justice Gray of the United States Supreme Court in the case of the *Paquette Habana* decided before there were any Conventional rules dealing with the subject. Affirming that the precedents and the authorities demonstrated that by the general consent of civilized nations, and independently of treaties, the immunity of fishing vessels subject to certain exceptions and conditions, had become "an established rule of international law"; that is, what was in the beginning merely a rule of comity had developed into a rule of law. Mr. Justice Gray added that the rule was "founded on considerations of humanity to a poor and industrious order of men."