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Aug. 5.

NOVA SCOTIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF ;

AND

THE OWNERS OF THE SHIP }
"FREDERICK GERRING, JR." } DEFENDANTS.*Maritime law—Fishing within the three mile limit—Seine fishing.*

The crew of a fishing vessel owned in the United States had thrown her seine more than three miles off Gull Ledge in the Province of Nova Scotia, but before they had secured all the fish in the seine both it and the vessel had drifted within the three mile limit where the vessel was seized by a Canadian cruiser while her crew was in the act of bailing out the seine.

Held, that the vessel was guilty of illegal "fishing" within the meaning of the Treaty of 1818 and Imperial Act 59 Geo. III, c. 38, and also under the provisions of chapter 94 of *The Revised Statutes of Canada*.

ACTION for the condemnation and forfeiture of a United States vessel for illegal fishing in Canadian waters.

The facts of the case are stated in the reasons for judgment.

The substance of the Treaty of 1818, respecting the North American fisheries, is as follows:—

"A certain convention between his late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, and the United States of America was made and signed at London on the 20th day of October, 1818, and by the first article thereof after reciting that differences had arisen respecting the liberty claimed by the said United States for the inhabitants thereof to take, dry and cure fish on certain coasts, bays, harbours and creeks of his Britannic Majesty's Dominions in America, it was agreed between

the High contracting parties that the inhabitants of the said United States should 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 northern coasts of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen should also have liberty forever to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland above described and of the coast of Labrador, but that so soon as the same or any portion thereof should be settled, it should not be lawful for the said fishermen to dry and cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors and possessors of the ground. And the said United States thereby renounced forever any liberty theretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbours of his said Majesty's Dominions in America not included within the above mentioned limits; provided, however, that the American fishermen should be admitted to enter such *bays* or *harbours* for the purpose of shelter and of repairing damages therein or purchasing wood and of obtaining water, and for no other purpose whatever. But that they should be under such restrictions as might be necessary to prevent their taking, drying or

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curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them."

The Imperial statute 59 George III, c. 38, (1819)

was passed to authorize the enforcement of this treaty. Sections 2 and 3 of the Act are as follows:—

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

apply to the ships or subjects of any Prince, Power, or State in amity with his Majesty, who are entitled by treaty with his Majesty to any privilege of taking, drying, or curing fish on the coasts, bays, creeks or harbours, or within the limits in this Act described."

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

The Canadian legislation on the same subject is contained in chapter 94 of *The Revised Statutes of Canada*, entitled: "An Act respecting Fishing by Foreign Vessels." Sections 2 and 3 of that Act are as follows:

"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 the 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

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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, justice of the peace, or other person duly commissioned for that purpose, may go on board of any ship, vessel or boat within any harbour in Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks or harbours in Canada, and stay on board so long as she remains within such harbour or distance.”

“3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel or boat, being within any harbour in Canada, or hovering in British waters, within three marine miles of any of the coasts, bays, creeks or harbours 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 four hundred dollars; 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 harbours 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.”

The case was tried at Halifax before the Honourable James McDonald, C.J., Local Judge of the Nova Scotia Admiralty District, on June 29th, 1896.

*W. B. A. Ritchie*, Q.C., for plaintiff;

*W. F. MacCoy*, Q.C., for defendants.

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MCDONALD, C.J., Local Judge, now (August 5th, 1896) delivered judgment.

This is an action claiming the condemnation of the schooner *Frederick Gerring, Jr.*, a vessel owned in the United States of America, for a violation of the Fishery laws of Canada. The vessel was seized on the 25th day of May last past off Liscomb on the southern coast of Nova Scotia, by the Dominion cruiser *Aberdeen* where it is alleged, she was engaged in fishing within three miles of the coast, in violation of law. It is clearly proved that the defendant vessel when seized was engaged in fishing mackerel; but the defendants allege by way of defence, First, that when seized the vessel was not within three miles of the coast, and Secondly, that if at the time of seizure she was within the three mile limit, she had thrown her seine, in which the fish were taken, while beyond three miles from the coast, and when seized was engaged only in saving from the seine the fish there lawfully enclosed by the seine. The facts appear to be concisely as follows:—On the morning of the 25th of May aforesaid, the fishing cruiser *Vigilant*, Capt. McKenzie, commander, was cruising off Liscomb when he saw the defendant vessel with others, also fishing vessels, sailing along the coast. He first saw the *Frederick Gerring, Jr.* between four and half-past four p.m. fishing. The seine had been thrown and was then pursed up, and the schooner was going up to her boat which was attached to the seine, in which a quantity of fish was enclosed. Capt.

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McKenzie passed within two hundred yards of the schooner and seine, but did not disturb her operations, as having taken his bearings, and that of the schooner, he decided that she was at least a half a mile outside of the prohibited line. The *Vigilant* then proceeded to the westward cruising slowly along the coast, when about an hour and a half afterwards he observed the Canadian steam cruiser *Aberdeen* coming up from the west and south, and about half an hour afterwards saw her alongside the *Frederick Gerring, Jr.* The *Vigilant* was at this time some distance to the westward of the *Frederick Gerring, Jr.* On approaching the *Frederick Gerring, Jr.* and finding her engaged in fishing, Captain Knowlton of the *Aberdeen* took the bearings of his own ship and that of the *Frederick Gerring, Jr.* and found that according to those bearings she was within two miles of the coast; and after communicating with the master of the *Frederick Gerring, Jr.* arrested her for the offence of fishing within the prescribed limits. The evidence of Capt. Knowlton and his officers as to the exact locality in which he found the *Frederick Gerring, Jr.* when the *Aberdeen* came up to her, appears to be very definite and precise. The cross bearings by which he determined that locality appeared to be very carefully taken by himself and verified by his officers, all very intelligent and seemingly capable men; and it was admitted by Mr. MacCoy, the learned counsel for the defence, that if these bearings were correct, and no error accidental or intentional occurred in taking them, it could not be disputed that the defendant vessel was more than a mile inside of the prohibited line when seized. The master of the *Frederick Gerring, Jr.* took no bearings and could give no idea of his position other than an impression he entertained that he could not in the time which had intervened since he threw his seine, have drifted so far inwards from the place

where Capt. McKenzie had at that time located him. This in fact is the only argument on which the defendants rest this point of their case, that is to say, if Capt. McKenzie was right in the position assigned to the schooner when he left her about half-past four o'clock p.m., it was improbable if not impossible she could have in the intervening time drifted inshore so far as the spot where Capt. Knowlton alleges he found her; and several respectable seafaring persons were examined who stated their opinion as experts that taking into consideration the state of the weather, wind, tide and currents then prevailing at this particular locality, they did not think it likely or possible that the change of position of schooner and seine involved in the contention of Capt. Knowlton could have taken place. Apart from the recognized uncertainty of expert evidence of this character, it is in evidence that the master of the *Frederick Gerring, Jr.* at the time the *Vigilant* was in his neighbourhood was himself uncertain as to his position, and was guided in his decision to throw his seine by the statement of Capt. McKenzie that it was safe to do so, and his subsequent declaration that he could not on his oath state on which side of the line he was when he threw his seine, indicates the same uncertainty as to his position. But the expert testimony to which I have referred, is very much weakened by the evidence of Capt. McKenzie of the *Vigilant*, a man fully as capable, experienced and intelligent as those persons called by the defence, and perhaps from the nature of his recent employment, more likely to be familiar with the movements of the tides and currents in the locality referred to, than most of those expert witnesses. He says that while sailing westerly after leaving the *Frederick Gerring, Jr.* his own schooner was carried by the currents or tides inside the three mile limit at the time he observed the approach of the *Aberdeen*. Capt. McKenzie was asked:

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Was there any wind at the time you passed the "Gerring"? A. There was just enough for the "Gerring" to get alongside of her net.

Q. With her sails balanced and half a mile away, and the net in the sea, would she be half a mile in the course of an hour? A. Yes, with the swell and the current.

Q. Further than that I suppose? A. It may be.

Q. What is your judgment about that? A. That day according to the way I was carried in myself, she would.

Q. How far did you drift in that day? A. I can hardly say, but I got inside the three miles.

Capt. McKenzie also states the very important fact that when he saw the *Aberdeen* approaching the *Frederick Gerring, Jr.*, he observed that the latter had got within the three mile limit. When in addition to all this evidence, we consider that of Capt. Spain, the commander of the Canadian Fishery Fleet and his officers, I cannot help feeling that the allegation of the Crown, as to the position of the *Frederick Gerring, Jr.* when seized, is strongly supported. Capt. Spain visited the locality in his own ship, and with his chief officers, verified by actual measurements the statement of Capt. Knowlton, and unless we are to assume that the latter officer and his subordinates on board the *Aberdeen* were guilty of the most gross and criminal negligence in noting the courses on which their bearings and cross bearings were based, the point of intersection fixed by Capt. Knowlton and verified by Capt. Spain, must be correct. There is not a particle of evidence to justify suspicion of such error; and assuming, as I do, the correctness of the courses given by Capt. Knowlton, Capt. Spain has shown, by the cross bearings taken by himself from these courses and the measurements made by entirely reliable instruments, that the locality of the *Frederick Gerring, Jr.* at the time of seizure was correctly indicated by Capt. Knowlton. That being so, it is immaterial to inquire how the vessel reached that position. She

was there found, and found fishing, and the legal consequence must result.

I must not omit to notice the contention of Mr. MacCoy, that admitting the seine to have been thrown and the fish enclosed in it outside of the three mile limit, it is not an offence against the Act to continue to bail the fish from the seine into the vessel after permitting her to drift across the prohibited boundary. I cannot accept his contention that the "fishing" and the "catching" of the fish was complete when the seine was successfully thrown. Further labour is required to save the fish from the sea, and reduce the property to useful possession, and until that be completed the act of fishing and "catching" fish is not in my opinion completed; and in the case before us the crew were in the act of bailing the fish from the seine into the vessel when the seizure was made. It would, I apprehend, be difficult, if not impossible, to enforce these Fishery laws, to which our people attach supreme importance, if those American subjects who so eagerly seek to compete with our people along our shores in this industry, and who are not, I fear, over-scrupulous in the observance of laws of which they have ample notice, should be permitted to plead accident or ignorance to a charge of infraction of such laws. Such a plea, however effective it may be to the executive authority of the country, cannot avail in this court.

There will be a decree condemning the vessel and cargo with costs.

The following is the decree as settled by the Registrar of the Nova Scotia Admiralty District :—

[STYLE OF CAUSE.]

"On the 5th day of August, 1896, before the Honourable JAMES McDONALD, Local Judge in Admiralty for the Admiralty District of Nova Scotia."

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“The judge having heard this cause, and the witnesses and evidence adduced, and having heard counsel on behalf of the plaintiff and of Edward Morris owner of the above named schooner, her cargo, tackle, rigging, apparel, furniture and stores, pronounced that the said schooner *Frederick Gerring, Jr.*, being a foreign ship or vessel, not navigated according to the laws of the United Kingdom of Great Britain and Ireland, or of Canada, but being a ship of the United States of America, owned by foreigners, did on the 25th day of May, 1896, off Gull Ledge in the Province of Nova Scotia, within three marine miles of the coast of Canada, fish for mackerel and other fish, and was found so fishing, and that the place where the said schooner *Frederick Gerring, Jr.* was so fishing and was so found fishing, was in a portion of the Dominion in America, formerly of His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, and not lying and included in that part of the southern coast of Newfoundland which extends from Cape Race to the Rameau Islands, nor on the western or northern coast of Newfoundland from said Cape Race to the Quirpon Islands, nor on the shores of the Magdalen Islands, nor on the coasts, bays, harbours and creeks, from Mount Joly on the southern coast to Labrador, to and through the Straits of Belle Isle and thence northerly along the coast.”

“And that said ship or vessel *Frederick Gerring, Jr.*, was so fishing contrary to the provisions of the convention made between His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, of the one part, and the United States of America of the other part, made on the 20th day of October, 1818, and contrary to the provisions of the Acts of the Parliament of Great Britain and Ireland, made and passed in the fifty-ninth year of the reign of

His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, being chapter 58 of the Acts of the said last named Parliament, made and passed in said year."

"And that said ship or vessel *Frederick Gerring, Jr.*, was found so fishing, and to have been fishing in British waters, within three marine miles of the coast 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."

"And that said ship or vessel *Frederick Gerring, Jr.*, was so found fishing, and to have been fishing, by a fishery officer of Canada on board of a vessel in the service of the Government of Canada, and employed in the service of protecting the fisheries."

"And that said ship or vessel *Frederick Gerring, Jr.*, being so found fishing, and to have been fishing, by said fishery officer was by him brought into the port of Halifax, in the Province of Nova Scotia, in Canada."

"And that said ship or vessel *Frederick Gerring, Jr.*, was so fishing, and found fishing, and to have been fishing contrary to the provisions of *The Revised Statutes of Canada*, Chapter 94, made and passed by the Parliament of the Dominion of Canada. And the judge condemned the said ship or vessel *Frederick Gerring, Jr.*, her cargo, tackle, rigging, apparel, furniture and stores, together with the fish, seine, fishing gear, supplies and other property on board said ship or vessel *Frederick Gerring, Jr.*, at the time of her seizure by said fishery officer as forfeited to Her Majesty."

"The judge further ordered and it is hereby ordered, adjudged and decreed, that said Edward Morris, who

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resides at Gloucester, in the State of Massachusetts, in the United States of America, do pay to the plaintiff in this action, Her Majesty Queen Victoria, Queen of Great Britain and Ireland, the plaintiff's costs of this action to be taxed, including costs of the commission ordered to issue herein and application therefor."

Dated at Halifax, in the Province of Nova Scotia, in the Dominion of Canada, this 28th day of August, A.D. 1896.

(Sgd.) L. W. DESBARRES,

District Registrar.

Solicitor for plaintiff: *W. B. A. Ritchie.*

Solicitor for defendant: *W. F. MacCoy.*