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Dec. 16

NOVA SCOTIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING.....PLAINTIFF;

v.

THE SCHOONER "JOHN J. FALLON."..DEFENDANT.

International law—Fisheries—Boundaries—3 mile limit—Coast—Island.

The term "coast" in the treaty of 1818, by which the United States renounced the right to fish within 3 marine miles from the coast of any British territory, is not confined to the coast of the mainland, and a United States vessel is therefore liable to seizure for illegal fishing or setting out to fish in violation of the Canada Customs and Fisheries Protection Act (R. S. C. 1906, c. 47, as amended in 1913, c. 14) within 3 marine miles from the shore of an island of the Dominion of Canada situated 15 miles from the mainland. St. Paul's Island forms part of the coast of Nova Scotia for the purpose of the 3 mile limit defined in the Act and the treaty bearing thereon.

ACTION for the condemnation and forfeiture of an American vessel for violating the Customs and Fisheries' Protection Act (R.S.C. 1906, c. 47, Acts 1913, c. 14).

J. A. Macdonald, for plaintiff, contended: The proceedings in this case are taken under ch. 14, of the Dominion Act 1913, which repeals ch. 47, of the Revised Statutes of Canada 1906, which reads as follows:—

"Every fishing vessel or boat which is foreign not navigated according to the laws of the United Kingdom or of Canada which,—

"*a.* Not being thereto permitted by any treaty or con-"vention or by any law of the United Kingdom or of "Canada for the time being in force has been found fishing "or preparing to fish, or to have been fishing in British "waters within three miles (marine) of any of the coasts, "bays, creeks or harbors of Canada, or in or upon the "inland waters of Canada; or,

"*b.* has entered such waters for any purpose not per-"mitted by treaty or convention or by any law of the "United Kingdom or of Canada for the time being in force, "or

"*c.* having entered such waters for a purpose permitted "by treaty or convention or by any law of the United "Kingdom or of Canada for the time being in force, and "not being thereto permitted by such treaty, convention or "law, fishes or prepares to fish, purchases or contains bait, "ice, seines, lines or any other supplies or outfit or tran- "ships any supplies, outfit or catch or ships or discharges "any officer, seaman, fisherman or other part of her crew, "or ships or lands any passengers, shall together with the "tackle, rigging, apparel, furniture, stores and cargo "thereof, be forfeited."

The vessel was seized on July 13, by captain of the C.G.S. "Canada", a Dominion Patrol boat, for fishing within 3 miles of St. Paul's Island. The captain practically admitted, but excused himself by saying that the weather was foggy and that he drifted in.

The evidence of Captain Oliver, master of the "Fallon" proved the following facts:

"*a*, That he is an American citizen.

"*b.* That the vessel is owned by Gorton Pew, of Gloucester.

"*c.* That the vessel is registered in Boston.

"*d.* That she is engaged in prosecuting the fisheries.

"*e.* That he took no precaution whatever to ascertain his position before setting his trawls.

He left Gloucester on June 26, with 18 of a crew and sailed for Bathe, Maine, for ice and bait, and after getting supplies, fished in the Gulf of St. Lawrence. On July 11 went to Miscou Island, near the Bay Chaleur and then to the Quero Banks, and on the 12th, arrived near St. Paul's Island, where he drifted and jogged along, between Cape North and St. Paul's Island, that afternoon and night. About 3.30 a.m., he called to his crew to set the trawls for fish. He says, he thought he was about 4 or 5 miles from St. Paul's Island. To show that he was not deliberately doing wrong with knowledge of where he was he says that he saw government boats or patrol the day before, and that he knew they were around and for that reason would not fish within the 3 mile limit. He did not appear to do anything to find out how far he was from the island until the officers came on board.

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On cross-examination, he admitted that with the compass or instruments he had on board, he could have known how near he was to the land.

He took no precautions whatever to ascertain his position. His only excuse was that he drifted in. The officers after taking observations found that some of his trawls were within a mile to a mile and a quarter from the land and the furthest away from it was only $2\frac{1}{2}$ miles from the island.

Lieutenant H. C. MacGuirk, of the "Hochelaga" says: On July 13, was on the north side of St. Paul's Island on patrol duty. Saw the "Fallon" about 8 a.m. on the north side of St. Paul's Island, wind blowing slightly from the south. Saw some boats off St. Paul's Island about $1\frac{1}{4}$ to $1\frac{1}{2}$ miles from the Island, did not know to who they belonged, saw the schooner put out 8 dories to go to the buoys about 9 o'clock. I went alongside of the buoys and took a bearing of each dory as one went along and took sextant altitude of St. Paul's Island, to confirm the distance off. I found the dories to be distant of about $1\frac{1}{4}$ to $1\frac{3}{4}$ miles from shore. Plan A.R.M.L. was made from my observation and shows the position of the dories. The schooner and trawls were being taken into the dories at that time, B.R.M.L. is in my own handwriting and was made at the time the observations were made. I took bearings from captain Oliver's schooner, from his own compass and in his presence and showed him that by these bearings he was only $2\frac{1}{4}$ miles from shore. The captain admitted that he had not taken precaution that he usually judged by his eyesight. The "Hochelaga" towed the "Fallon" to North Sydney and delivered her to the Customs there.

I arose at 6.20 on July 13. We were patrolling the Cabot Straits, the night of July 12, The evidence of Captains Stewart and Webb confirms the evidence of MacGuirk. A copy of the observations made by MacGuirk are herewith annexed together with a plotting or plans of the position of the patrol boats, schooner, dories and trawls.

These opinions of the captain and crew of the schooner cannot be put against the evidence of the officers of the patrol boats.

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Patrol boats use the most modern instruments for measuring distances at sea. See case of *"Kitty D"*[1] Even if the schooner did drift in, that would be no excuse as they were taking fish within the 3 mile limit. See *The Frederick Gerring, Jr.*[2] The responsibility was upon the captain or officers to ascertain their position and if through error, want of care or inability to ascertain their true position, they drifted within the prohibited zone and fished there, they committed a breach of the act. See *The "Beatrice."*[3]

It is the captain's duty to know the exact position of his ship before he attempts to fish. If he is found contravening the Act, it is no excuse to say that he could not ascertain his position by reason of the unfavorable weather conditions. See *The "Ainoko."*[4]

In the case of the *"Frederick Gerring"* the fish were caught outside the 3 mile limit, but seines drifted within. It was held a violation of the Act.

The Queen v. Henry L. Philips,[5] The burden of proving a license to fish is on the defendant ship.

Rex v. "Francis Cutting,"[6] *King v. Carlotta T. Cox,*[7] *The King v. The "Somoset":*[8] Taking fish without a license in the territorial waters of Canada constitutes the offence. *The "Annandale,"*[9] *The "Ainoko,"*[10] *The Beatrice,"*[11] *The "Grace."*[12]

An American vessel without a license upon the Canadian side of the boundary line in one of the great lakes is subject to seizure and condemnation under the provisions of ch. 47, of the Revised Statutes of Canada.[13]

[1] 34 Can. S.C.R. 673; 22 T.L.R. 191.
[2] 5 Can. Ex. 164, 27 Can. S.C.R. 271.
[3] 5 Can. Ex. 378; 5 B.C.R. 171.
[4] 5 Can. Ex. 366; 5 B.C.R. 168.
[5] 4 Can. Ex. 419, 25 Can. S.C.R. 691.
[6] 9 W. L. R. 402.
[7] 11 Can. Ex. 312.
[8] 9 Can. Ex. 348.
[9] L. R. 2 P. D. 179.
[10] 4 Ex. Can. 195;
[11] 5 Can. Ex. 9.
[12] 4 Can. Ex. 283.

[13] The "Wampatuck" Youngs Adm. (N.S.R.) 75; The "A.H. Wanson," Young's Adm. (N.S.R.) 83; The "A. J. Franklin," Young's Adm. (N.S.R.) 89; The "J. H. Nickerson," Young's Adm. (N.S.R.) 96; Thé "Samuel Gilbert", 2 Stuart Adm. (Queb.) 167; The "Franklin S. Schenck," 2 Stuart Adm. (Queb.) 169; Mowatt v. McPhee, 5 Can. S.C.R. 66; The King v. "Kitty D." 34 Can. S.C.R. 673; 22 T.L.R. 191; The "North," 37 Can. S.C.R. 385; The "E. B. Marvin," 4 Can. Ex. 453; The "Aurora," 5 Can. Ex. 372; The "Viva," 5 Can. Ex. 360; The "Minnie" 4 Can. Ex. 151; The "Shelby," 5 Can. Ex. 1.

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There are statutes showing that St. Paul's Island forms part of Victoria County.[1]

G. A. R. Rowlings, for defendant, contended: It is not shown that St. Paul's Island is within the 3-mile limit, or where it is situated with regard to the adjacent coast.

The disposition of the courts is to strictly construe such a penal statute as this and to require undoubted proof of an offence: The *A. J. Franklin*;[2] *Hardcastle's Statute Law*.[3]

"In the case of any real doubt the decision must be "against the subjection of a ship to a territorial sovereignty. "The hull of the ship presents at once to the mind the "notion of the subjection of that ship to the law of her "flag. We cannot regard that subjection as removed "unless some sensible and unmistakable cause for its "removal has intervened. Any other determination of "the question would involve legal relations in uncertainty "and confusion."[4]

Sir W. Scott in *Twee Gebroeders*:[5] "An exact measurement "cannot be easily obtained, but in a case of this nature, "in which a Court would not willingly act with an un- "favorable minuteness towards a neutral state, it will be "disposed to calculate the distance very liberally. At p. 338 he says, the facts on which the right to forfeit "depends must be *completely established*. Approved by "U.S. Courts in *Soult v. L'Africaine*.[6]

One of the grounds I took on behalf of the defendants in this action at the argument of this case at Halifax was:

(*a*) that St. Paul's Island referred to in the evidence was not shown to be Canadian territory and

(*b*) that St. Paul's Island was not shown to be within British territorial waters, known as the 3 mile limit. Leave was granted the Crown to put in evidence to meet these contentions if possible

(*a*) As to (*a*) the Crown must, of course, prove that St. Paul's is Canadian territory.

[1] Nova Scotia Acts, 1852, c. 17; R.S.N.S., 3d. series, c. 23; Statutes of Canada, 1868, c 59; R.S.N.S., 5th series, appendix, c. 23, p. 9.

[2] Young's Adm. (N.S.R.) 89 at 95-96;

[3] (3d. ed.) p. 454.

[4] Bar's Private Int. Law (2d. ed.) pp. 1067-8.

[5] 3 Rob. Adm. 162 at 163.

[6] "Bee's Adm. Rep. 204."

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(*b*) Now, assuming for the sake of argument only, that it can be shown that St. Paul's Island is an island under British Dominion it cannot, as a matter of international law, be shown that, under the true interpretation of the treaty of 1818, the waters around this island are "territorial waters of Canada." To show that it is under the municipal jurisdiction of the laws of Nova Scotia or Canada is not sufficient, as there are hundreds of rocks such as St. Paul's found in the Atlantic Ocean the waters around which are not to be regarded in any sense as territorial waters, either under the accepted principles of international law or under the terms of the treaty of 1818.

Charts and gazetteers and official documents and admissions show that the facts regarding St. Paul's Island are as follows:

(*a*) It is a barren rock or islet situated 15 miles from the nearest mainland in the open sea.

(*b*) It has no inhabitants or settlers other than the men who are employed to look after the lights there and who are attached to the government service. No buildings or dwellings are owned or erected by any private owners or settlers. It is not a habitable place or one capable of being settled.

(*c*) It has "no bays, harbours or creeks" of any description, and supplies have to be landed from ships lying out at sea.

(*d*) It is completely isolated and does not form one of any group of islands.

It has been established clearly in international law that "territorial waters" so called extend merely 3 miles seaward from the mainland at low water, and the bays, harbours and gulfs thereof; and where there are groups of islands (not barren rocks) adjacent to or sensibly connected with the mainland in some continuity, the limit of territorial waters probably runs 3 miles seaward from such islands. To take a single, unsettled or isolated rock, 15 miles from the mainland in the open sea, and run the 3 mile limit along the mainland to a point opposite such an island and then project it out 15 miles into the open sea around the rocks, and back again to the mainland is absurd. If such a device were adopted for all the scattered rocks along the

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Nova Scotia coast, the 3 mile limit would be a complicated affair. It would be even more absurd to attempt to surround each of these rocks or barren islets with a 3 mile limit of its own. Such a course would be contrary to the well defined principles of international law, which now establish that this line must follow the *general* coast line of the mainland including bays and harbours and other indents in the coast, without regard to the many rocks and islets lying off in the open sea. Of course, it is clear that a group of islands of some significance and size having settlers or at least capable of settlement by private owners lying more or less connected with and adjacent to the mainland, such as Brier Island, Long Island and others on the north side of St. Mary's Bay in Digby County, would fall within the territorial limits referred to, and probably also within the words of the treaty of 1818; but a barren rock or islet like St. Paul's, without harbour, bay or creek is not to be regarded as in any sense falling within those principles or the words of the treaty.

The Dominion statute under which the seizure in this case is sought to be legalized, must be confined in its application to the terms of the said treaty made between the United States and Great Britain in October 1818.

It cannot contravene that treaty in any respect. That must be admitted at the outset.

Before pursuing this argument further I wish to refer to the treaty relations outstanding between Great Britain and the United States at the time this Dominion statute was passed and at the present time, and by way of making clear these treaties, so far as fishing is concerned, I shall make some reference to the negotiations leading up to them.

In the negotiations preceding the treaty of 1783 the proposal of the British plenipotentiaries re fishing was as follows:—

"Article III. The citizens of the United States shall have "the liberty of taking fish of every kind on all the banks of "Newfoundland, and also in the Gulf of St. Lawrence; and "also to dry and cure their fish on the shores of the Isle of "Sables and on the shores of any of the unsettled bays,

"harbours and creeks of the Magdalen islands, in the "Gulf of St. Lawrence, so long as such bays, harbours and "creeks shall continue and remain unsettled; on condition "that the citizens of the United States do not exercise the "fishery, but at the distance of 3 leagues from all the coast "belonging to Great Britain, as well those of the continent "as those of the *islands* situated in the Gulf of St. Lawrence. "And as to what relates to the fishery of the coast of the "Island of Cape Breton out of the said Gulf, the citizens "of the United States shall not be permitted to exercise the "said fishery, but at the distance of fifteen leagues from the "coasts of the Island of Cape Breton."

This article drafted as above, was emphatically rejected by the American Commissioners, and then abandoned by the British.

The article finally accepted was 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 on all the other banks of "Newfoundland; also in the Gulf of St. Lawrence, and 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 Britannic 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 as 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 ground."

The restriction as to the islands at first proposed which would necessarily include fishing on the high seas, was abandoned, and the Americans were allowed by the treaty (1783) to fish to the very shores of the British mainland.

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By the treaty of 1818 the Americans renounced certain of these rights. What were they? Only such as were expressly mentioned.

Article 1 of the treaty of 1818 reads as follows:—

"Whereas the 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 "and harbours 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 have forever, in common with the "subjects of His Britannic Majesty's the liberty to take "fish of every kind on that part of the southern coast of "Newfoundland which extends from Cape Bay to the "Rameau Islands, on the western and northern coast of "Newfoundland, from the said Cape Bay 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 Bellisle 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 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 "hereabove described, and of the Coast of Labrador; but "as 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, pro- "prietors 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 thr-e marine miles of any of "the coasts, bays, creeks or harbours 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 harbours for the purpose of shelter and of repairing "damage therein, or 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."

For the true construction of this article we have some light in the proposed Article 3 of the treaty of 1783. By this proposed article the British sought to exclude the Americans from fishing in the territorial waters of the Gulf of St. Lawrence and also at the islands therein (St. Paul's being one of these islands). It is to be noted therefore that mention of the waters of the Gulf of St. Lawrence alone was not deemed sufficient in the proposed article of the treaty of 1783 to exclude the Americans from fishing at the islands in that Gulf. It was deemed necessary by the British to express the word "islands" also. In the final draft of this article the whole restriction was abandoned and these words do not appear at all. But the first draft referred to, and which appears in the official report of the proceedings shows what was the view of this matter in the minds of the negotiators.

As stated above certain of these fishing privileges or rights were renounced in 1818. In the latter treaty, the right to fish within 3 miles of the "British coasts, bays, harbours and creeks" was renounced by the Americans—nothing more. If the *islands* outside of this 3 mile limit, in the Gulf of St. Lawrence (or elsewhere) especially those not having bays, harbours or creeks (like St. Paul s) were to be included by the terms of this treaty was it not to be deemed equally necessary to have them expressly mentioned as was done in 1783, in order to exclude Americans from fishing to-day at such islands, or in the waters adjoining these islands. It is only reasonable to suppose so.

The right to fish at and around these islands in the sea off Nova Scotia was expressly reserved to the fishermen of the United States as well as the right to fish up to the mainland or coasts by the treaty of 1783. The latter right was expressly renounced by the treaty of 1818, but not the former.

More light is thrown on this same matter, as showing the views of these able and capable negotiators and experts, by the treaty made between Great Britain and France and

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Spain in 1763 relating to fishing. It is clear, from a perusal of that treaty that in order to exclude the French and Spanish fishermen from fishing in the waters adjoining the islands separated by some distance from the mainland it was necessary to expressly mention islands as such.

Article 5 of that treaty reads as follows:—

"And His Britannic Majesty consents to leave to the "subjects of the Most Christian King the Liberty of "fishing in the Gulf of St. Lawrence, on condition that the "subjects of France do not exercise the said fishery but that "the distance of three leagues from all the coasts belonging "to Great Britain, as well as those of the continent *as those* "*of the islands* situated in the said Gulf of St. Lawrence. "And as to what relates to the fishery on the coasts of the "Island of Cape Breton, out of the said Gulf, the subjects of "the Most Christian King shall not be permitted to exercise "the said fishery but at the distance of 15 leagues from the "coasts of the Island of Cape Breton; and the fishery on the "coasts of Nova Scotia or Acadia, and everywhere else out "of the said Gulf, shall remain on the foot of former treaties."

In further elaboration of the point that it was never contemplated by jurists, treaty makers or legislators to dignify an isolated rock or islet 15 miles off the coast with a 3-mile limit of its own, I submit that the law writers and authorities in discussing territorial jurisdiction or sovereignty by states over the sea have clearly indicated the accepted extent of such sovereignty.

For certain purposes under municipal law such jurisdiction may extend to the remotest and most insignificant bits of land wheresoever situate; but the jurisdiction of the state under civil or municipal or admiralty law is no criterion or parallel for the applieation of the principles of international law (so called) or treaty provisions. Perhaps if a crime were committed on a British ship, by a British subject within 3 miles of St. Paul's or any other of the hundreds of isolated rocks off the coast regardless of distance from the coast the state would have jurisdiction to punish the offender. That would be by virtue of the civil or admiralty jurisdiction of the state owning such islands; but the consideration of the 3 mile zone as expressed in treaties is international in character and depends on different principles

altogether. Sovereignty gives a state control over its own citizens within a 3 mile zone of any kind of land over which such sovereignty is exercised, but control over the rights of others may be regulated in an entirely different way by international precepts or law or by the terms of treaties. The treaty of 1818 referred to above contains the expression "coasts, bays, harbours or creeks." What does the expression actually mean in the light of international law?

It is generally admitted that the word "coast" refers to a shore of some magnitude or significance. The word "coast" in the general acceptation of the term, practically and usually includes bays, harbours, creeks, etc. Moreover, being associated with the words "bays, harbours and creeks" in this treaty, it is evident that the word "coast" means only such a coast as actually comprises "bays, harbours and creeks." At. St. Paul's Island there is no semblance of a bay, harbour or creek, there is merely the iron bound isolated and barren rock. It is not and cannot be used by man for settlement or for any industry whatever. The expression, "coasts, bays, harbours or creeks" means the general configuration of the mainland or such portions (islands) as are contiguous or sensibly connected or industrially used therewith. It is exclusive of rocks, ledges or islets. Give every rock off Nova Scotia a circumscribed 3 mile zone and chart them on a map, and you would have a labyrinth of circles which would make a marvellous design. Such an interpretation of the treaty would be extravagant, unreasonable and pretentious and was never in the mind of any jurist or plenipotentiary.

Ferguson in his Manual of International Law[1] says:—

"This distance (territorial sea) is presumed to be the range of the coast defences, but on the maxim that *terrae dominum finitur ubi finitur armorum vis*, it should be stated to extend to any point on the sea to which the cannon of actual *coast defences* on shore can carry a projectile. But as the carrying power of any given cannon is such a vague measure, the 3 mile radius is generally adopted."

The 3 mile limit is therefore based on the range of actual coast defences that is, defences as were actually erected on

[1] (1884) Vol. 1, p. 399.

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the mainland of such islands as were conceived to be large enough to have a coast; not an insignificant islet like St. Paul's, without coast, bays, harbours or creeks and more than 3 miles from the mainland.

It must be borne in mind that the defences contemplated were such as would likely be erected at the end of the 18th century when cannon defences were first devised.

Calvo, "Le Droit International," citing from the French edition of 1896, sect. 356:—

"From these general principles it is easy to draw the conclusion that territorial waters should include only the space capable of being defended from the mainland."

In the edition of 1767,[1] Bynkershoek stated:—

"My opinion is that the territorial sea should extend only as far as it can be considered subject to the mainland."

This would exclude a "territorial limit" around small islands or rocks in the sea, more than 3 miles from the mainland. Sir Travers Twiss in the Law of Nations.[2]

"That distance (territorial domain), by consent, is now taken to be a maritime league seawards along all the coasts of a nation. It would tend to greater clearness, if jurists were to confine the use of the term Maritime Territory to the actual coasts of a nation."

It is submitted that the very fact that the treaty of 1818 uses the words "coasts," "bays," "harbours" and "creeks" together, indicates, by all the rules of construction, that the land contemplated as that from which the 3 mile limit extends is such land as has coasts, bays, harbours and creeks, that is the mainland and such islands as have these characteristics.

On September 7th, 1910, the permanent Court of Arbitration at the Hague (under the provisions of the general treaty of arbitration of April 4th, 1908, and the special agreement of Jan. 27th, 1909, between the United States of America and Great Britain) decided the North Atlantic Fisheries Case, and in that decision laid down the following award:—

"In case of bays, the 3 marine miles are to be measured from a straight line drawn across the body of water at the

[1] Book 2, ch. 2, p. 127.

[2] Part 1, pp. 249–250.

place where it ceases to have the configuration and characteristics of a bay. At all other places 3 marine miles are to be measured following the sinuosities of the coast."

St. Paul's Island is not in any bay under this rule and is more than 3 miles from the nearest point on the sinuosity of the coast.

In addition to the points already taken, it is contended for the defendants that the national character of the schooner "John J. Fallon" has not been proved.

According to the principles of maritime law, a vessel's national character must be proved by the production of the ship's papers. That is the only proper evidence. The papers of this schooner were in the custody of the seizing officers and government authorities, but were never produced in evidence. The vessel's national character is not proved. It is not shown that the schooner "J. J. Fallon" is an American or foreign vessel.

If a 3 mile territorial limit is to be drawn around St. Paul's Island and if from the evidence it is concluded that the schooner "Fallon" and her trawls were seized within that limit then it is clear from the statement of the Crown's witnesses, that the trawls of the schooner "Fallon" had been set well outside of the limit on the morning of July 13, and that they had drifted inside that limit at the time of seizure.

In this respect this case would resemble, to some extent, the case of the "*Frederick Gerring*[1] tried in the Admiralty Court at Halifax on August 28, 1896, and appealed on September 1, 1896, to the Supreme Court of Canada, with this material difference, namely, that in the Geering case the fish caught were enmeshed in a "purse seine," and being alive, were not completely caught, while in this case the fish were caught, if at all, on trawls outside the limit and were dead, thus completing the act of fishing outside the 3 mile limit.

The judgment of the trial Judge in the *Gerring* case was affirmed in May, 1897, by a divided Court at Ottawa, three of the justices concurring in the decision, and two, one of whom was Chief Justice Strong, dissenting.

[1] 5 Can. Ex. 146; 27 Can. S.C.R. 271.

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Gwynne, J. (in whose opinion the Chief Justice concurred) said:—

"To construe the act of bailing fish out of seine in which they had been caught and secured outside of the 3 mile limit, into the hold of a vessel, which after the fish had been so caught, and while the parties employed on her were so securing the fish by transferring from the seine to the hold of the vessel, had drifted by force of currents outside of the 3 mile limit, as a violation of the treaty rights of the citizens of the United States, or of the Acts of Parliament passed in relation thereto, would be altogether too hypercritical a construction to put upon the treaty securing such rights and the said Acts of Parliament, and can not, in my opinion, have the sanction of this Court, and is not warranted by any of the cases referred to on the argument.

One of the majority judges—King, J.—stated that he affirmed the trial decision with "hesitation and doubt". It also appears from Judge King's judgment that as the fish were still alive in the seine, in his opinion, the "fishing" was not completed; for he says: "An operation at sea of taking several hundred, or one hundred barrels (as here) of loose and live fish from a bag net, is attended with such obvious chances of some of them at least regaining their natural liberty, that the act of fishing cannot be said to be entirely at an end in a useful sense until the fish are reduced into actual possession."

In a case like the "Fallon" where the fish were caught on hooks and were dead, they were reduced into actual possession, before the drifting took place. This differentiates the case materially from the *Gerring* case.

In July, 1897, the government of Great Britain notified the government of U.S. that in view of all the circumstances of the case, the Canadian Government had decided that the Gerring should be restored to her owner, on payment of a nominal fine, together with the costs incurred in her prosecution.

This fine was $1. (See minute of the Privy Council of Canada approved by His Excellency March 31, 1898.)

The owner of the Gerring rejected this compromise; and his claim for reparation was included in the schedule of

claims attached to the special agreement of August 18, 1910, creating the "American and British Claim's Arbitration", and was presented to this Arbitral Tribunal for determination.

The decision of this Board of Arbitrators was unanimously rendered in favor of the owner of the Gerring in 1912, (Sir Charles Fitzpatrick representing Canada on the Board), and is on file in the Department of Justice at Ottawa.

It is further to be noted that at the request of Lord Pauncefote made in July, 1899, the U.S. Government released 6 Canadian fishing boats which had been seized by an American cutter for fishing within the imaginary boundary line at Pt. Roberts opposite Vancouver Island. The fishermen stated that they had no light to guide them and the trespasses were unintentional. Vessels released and action dismissed August 25, 1899.

In 1891, the Canadian Government released 6 U.S. fishing boats seized in Passamaquoddy Bay, as they had drifted there in a fog and had unintentionally trespassed.

DRYSDALE, L. J. A. (December 16, 1916) delivered judgment.

This action seeks condemnation and forfeiture of the above-named fishing schooner on the ground that she violated ch. 47 of the Revised Statutes of Canada, "The Customs and Fisheries Protection Act" and amending Acts, particularly ch. 14 of the Acts of 1913.

The allegation is that the schooner named being a foreign ship or vessel was found fishing in British waters within 3 marine miles of the coast of Canada. It seems the schooner was fishing within 3 miles from the coast of the Island of St. Paul's, an island situate 15 miles from Cape North, Nova Scotia, in Cabot Straits. Although the schooner was found with her trawls and dories out and set for fishing within two miles of the shore of said island, the only answer made by the officers is that such officers thought they were further off shore and were not within 3 miles, and that it was not their intention to fish within the 3 mile limit.

1916

THE KING v. THE SCHOONER "JOHN J. FALLON."

Reasons for Judgment.

The vessel is a Gloucester fisherman registered in Boston and I do not think the intention of the officers of said vessel is a matter that requires consideration from me apart from their acts. I find as a fact that the schooner in question was on July 13, when arrested, in the act of fishing within 3 marine miles of the coast of St. Paul's Island, and that on that day she was fishing in British waters within 3 miles of such coast in a direction westerly from such Island.

The question remains for consideration, should I treat St. Paul's Island as part of the coast of Nova Scotia for the purpose of the 3 mile limit as defined in ch. 14 of the Act of 1913, and in the treaties bearing thereon. The prohibited line is within 3 marine miles of any of the "coasts, bays, creeks or harbours of Canada". I find that St. Paul's Island was, in very early times and long before confederation of the provinces now forming Canada, by express legislative enactment, made part of the County of Victoria, and by express legislation still remaining unrepealed, appearing as early as the 3d Series of the Nova Scotia Statutes, a declaration to the effect "that in all proceedings in any Court St. Paul's Island shall be held within the County of Victoria". It may be that some islands apart from statute from their character situation and formation may or may not be considered part of a coast line. Apart from long user and statutes I would be inclined not to consider St. Paul's Island as part of the coast line of Nova Scotia, but I think in view of its long occupation as part of Victoria County and the statute governing it, I am obliged to consider the island as part of the coast line.

I accordingly hold that the vessel was fishing when caught within 3 marine miles of the coast of Canada and contrary to the express provisions of ch. 14 of the Acts of 1913, and I feel obliged to condemn the said schooner with her tackle, rigging apparel, furniture, stores, and cargo as violating the said Act and to decree her forfeiture.

*Judgment for plaintiff.**

*Affirmed by the Supreme Court of Canada: 55 Can. S.C.R. 348, 37 D.L.R. 659.