

THE SHIP "FREDERICK GER- RING JR." (DEFENDANT).....	} APPELLANT;	1896
		*Nov. 2.
AND		
HER MAJESTY THE QUEEN (PLAINTIFF).....	} RESPONDENT.	1897
		*May 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA,
ADMIRALTY DISTRICT OF NOVA SCOTIA.

*Constitutional law—Convention of 1818—Treaty, construction of—Statute,
construction of—Fisheries—Three mile limit—Foreign fishing vessels—
"Fishing"—59 Geo. III., c. 38, (Imp.)—R. S. C. c. 94 & c. 95.*

Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of baling the fish out of the seine.

Held, (the Chief Justice and Gwynne J. dissenting) affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., ch. 38, and the Revised Statutes of Canada, ch. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the decision of the Exchequer Court of Canada, Admiralty District of Nova Scotia (1), which decreed that the ship, her cargo, &c., should be forfeited with costs.

The action was brought against the American fishing schooner "Frederick Gerring Jr.," her cargo, tackle, rigging, apparel, furniture and stores for the condemnation and forfeiture of the same, the ship having been arrested for the violation of the treaty or convention of 1818 between Great Britain and the United States of America, and of the statutes 59 Geo. III. (Imp.) ch. 38, intituled "An Act to enable His Majesty to make regulations with respect to the taking and curing of fish on certain parts of the coast of Newfoundland, Labrador, and His Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America;" and R. S. C. ch. 94, intituled "An Act respecting Fishing by Foreign Vessels, and the Acts in amendment thereof"; upon the hearing before the local judge of the Admiralty District of Nova Scotia a decree was made declaring the forfeiture with costs, and from this decree the owners have taken the present appeal.

The substance of the treaty and of the above mentioned Acts are set out in the report of the decision of the Exchequer Court.

The vessel was seen fishing off Gull Ledge and Liscomb Light on the coast of Nova Scotia on the 25th May, 1896, about half a mile outside of the prohibited line by the captain of the Canadian Fisheries cruiser "Vigilant," her seine had been thrown and was then pursed up and she was going up to her boat which was attached to the seine in which a quantity of fish was enclosed. The "Vigilant" passed on without

disturbing her operations as her captain had decided from the bearing he then took that the "Gerring" was beyond the three mile limit. A couple of hours afterwards the "Gerring" was seized by the Canadian steam cruiser "Aberdeen" at a point within three marine miles of the Nova Scotia coast for the offence of fishing within the proscribed limits. At the time of the seizure the crew of the "Gerring" were engaged in baling fish out of the seine and claimed that these fish had been caught when the seine was cast outside of the prohibited line, and that if they were at the time of seizure within the three mile limit, (which they denied), they had drifted across the line after the fish had been taken in the seine, and further, that even if they were within the three mile zone, it was no offence against the treaty or the statutes to continue to bale the fish from the seine into the vessel after she had thus drifted across the prohibited boundary, for the "fishing" and "catching of the fish" had been completed when the seine was successfully thrown, outside.

The trial judge found that the bearing taken showed that the vessel was within the prohibited line when seized, and that the operation of "fishing" or "taking fish" was then still being carried on, the process being incomplete until the fish had been baled into the vessel and saved from the sea, thus being reduced into useful possession.

MacCoy Q.C. for the appellant.

Newcombe Q.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons given by Mr. Justice Gwynne I am of opinion that this appeal should be allowed.

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GWYNNE J.—This appeal must, in my opinion, be allowed with costs. The evidence is conclusive, and indeed it is not disputed, that the ship “ Frederick Gerring, jr.,” on the day upon which she was seized, had laid her seine for the purpose of catching fish in the sea well outside of the line constituting the limit of three marine miles from the coast of Nova Scotia, and that while outside of such limit she had caught a quantity of fish in the seine, and had secured them there by hauling up the seine and tying the ends so as to enclose the fish, pursing the net as it is called, and attaching it with the fish so secured in it to the vessel. All this was done outside of the three mile limit, and while inside of it the persons in charge of the vessel proceeded to bale the fish out of the seine into the hold of the vessel. While engaged in this operation she was seized. There was a question raised as to whether the place where she was seized was in point of fact inside of the three mile limit, but assuming it to have been, there was no doubt that the vessel had drifted to that position while the persons in charge of her were engaged in baling the fish out of the seine into the hold, and unless the being engaged in that operation constitutes “ fishing or taking fish within the three marine miles of the coast of Nova Scotia ” there is not a particle of evidence that the vessel had been, or was then, “ fishing for fish ” in Canadian waters within the three marine miles of the coast, or that she was then preparing to fish in such waters. To construe the act of baling fish out of a seine in which they had been caught and secured outside of the three 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 inside of the three 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.

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The case of *Young v. Hichens* (1) has no bearing upon the present case. The plaintiff there complained in trespass for that the defendant had seized and disturbed a fishing seine and net of the plaintiff thrown into the sea for fish, wherein, as alleged in the declaration, the plaintiff had taken and enclosed, and then held enclosed in his own possession, a large number of fish, and the defendant threw another fishing seine and net within and upon plaintiff's seine, and prevented plaintiff from taking the fish so taken and enclosed out of his seine, as he otherwise could have done. It appeared in evidence that the plaintiff had only thrown his net partially round the fish in question, leaving a space of about seven fathoms open which the plaintiff was about to close up when the disturbance complained of took place. Until this open space should be closed the fish round which the net was only partially drawn were at large in the sea, and so could not be held to have been taken and enclosed and then held enclosed in the plaintiff's possession, as averred in the declaration. As to the fish, therefore, it was held that the plaintiff had them not in his possession, and could not therefore maintain trespass as regarded them, but for the trespass to the seine he recovered twenty shillings.

Now in that case it was not held that if the fish had been *secured* in the seine the action of trespass would

(1) 6 Q. B. 606.

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not have lain; much less can that case be an authority for holding that the fish taken in the seine set by the "Gerring," which with the fish secured in it was hauled up and pursed, as it is called, and attached to the vessel, were not so in possession of the owners of the "Gerring" as to give them an action of trespass against any one who should bring a vessel alongside of the seine and either put the fish therein into such vessel, or cut the seine and let the fish fall into the sea. But the question with which we have to deal is whether or not the officers of the Dominion Government had any right to seize the "Gerring," with or without the fish so secured in the net so hauled up and pursed and attached to the vessel as aforesaid. And this they had no right to do unless the fact of a vessel which had been engaged in fishing in the open sea, and in the seine laid by which in the open sea fish had been caught, which fish while the vessel was still in the open sea were secured by the net being hauled up, the ends tied so as to secure the fish, and so pursed as it is called, had been attached to the vessel, which afterwards by force of the winds or currents was driven or drifted into Canadian waters within the three mile limits, can by the terms of the laws of the Dominion of Canada be held to have subjected the vessel to seizure as a vessel then engaged in fishing for fish in Canadian waters, and in my opinion the laws of the Dominion are open to no such construction.

SEDGEWICK J.—There can be no question as to whether the vessel, at the moment she was seized by the S.S. "Aberdeen," was within three marine miles of the coast of Nova Scotia. The learned Local Judge in Admiralty for the Nova Scotia Admiralty District, before whom the case was tried, and who had before him a number of witnesses as well for the Crown as

for the defence, came to that conclusion, and we must not disturb his finding unless it is manifest that he is wrong. In my view it is manifest that he is right. The direct evidence, the evidence of every witness who made any examination, and who was in a position to testify as to the result of his own actual observation, was in favour of the Crown. The three officers of the seized steamer testified that the "Gerring," when seized, was within the three mile limit. None of the witnesses who formed part of the crew of the seized vessel ventured to assert, except as a matter of opinion unsupported by actual observation, anything to the contrary. Expert evidence, however, was called on behalf of the defence for the purpose of showing that if at three o'clock in the afternoon the seized vessel was outside the three mile limit, it would be impossible for her to be within that limit at the time of the seizure. This evidence was based upon a number of hypotheses which may or may not have been accurate, but its legal effect or tendency was, in my view, to prove, not that the "Gerring" was outside the three mile limit at the time of the seizure, but that she was continuously within it from the time the seine was set down to the time that the seizure was made, and that Captain Mackenzie was mistaken in his opinion as to the exact position, both of his ship and the "Gerring" in the early part of the day. We must, however, take for granted that at the time when the seine was set out the "Gerring" was outside the three mile limit, and for the purpose of this opinion I will assume that to have been the fact.

The main question, therefore, is: Assuming the seine to have been set out and the mackerel encompassed by it outside the territorial limit, and that the vessel with the seine subsequently drifted, or came, no matter how, to a point within the three mile limit, and

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that at such point her crew were found baling the fish from the seine into the vessel, was the "Gerring," or those controlling her, doing an act which would justify her seizure and condemnation?

By the convention of 1818 the United States renounced forever

any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His said (Britannic) Majesty's Dominions in America.

By the Imperial statute (1) it was enacted that if any foreign vessel should be found fishing, or to have been fishing, or preparing to fish, within three marine miles of such coasts, bays, creeks or harbours, she should be forfeited, etc. And by our own Act (2) it is enacted that if a foreign ship (unlicensed) has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles, etc., she shall be forfeited. The question, therefore, is not strictly whether under the treaty the "Gerring," at the time of the seizure, was "taking" fish, but whether under the Imperial as well as the Canadian statute, she was "fishing." In my view there is not, and it never was intended that there should be, any difference between the two, but strictly speaking it is the statute which governs; and the vital question, therefore, is: Was she "fishing" at the time of the seizure, or was she *not*?

It is, I think, desirable that we should have a clear understanding as to what the crew of the vessel were actually doing at the time of the seizure. It is, I suppose, a matter of common knowledge what constitutes purse seine fishing, but a brief description of it, as I understand it, may not be out of place.

(1) 59 Geo. III., ch. 38.

(2) R. S. C. ch. 94, sec. 3.

As to the kind of seine used in this case the evidence is not clear, but it would probably be from 150 to 175 fathoms in length and from 10 to 12 fathoms in depth. It is rectangular in shape. When a school of mackerel has been descried the captain, accompanied by most of the crew, proceeds as quickly as possible in the seine-boat to encircle the school with the seine, while the cook is left to look after the vessel. The seine is paid out by two of the men in the seine-boat. As soon as the first end of it has been thrown overboard two of the crew, who did not get into the seine-boat, row up to the spot in a dory, and seize the buoy attached to the cork-line at the end, which they hold until the seine-boat has made a circle. The seine is kept in proper position by means of sinkers attached to the bottom and of floats attached to the top. When the two ends of the seine are come together it is more or less cylindrical in shape, the fish being surrounded by the cylinder. At the bottom, and running all round it, is a rope, called the purse line, both ends of which are secured by the men in the seine-boat. After both ends of the seine have been brought together, one end of this line is taken by one portion of the crew in the boat and the other end by the remainder. By pulling this rope in opposite directions, the net, which until now is cylindrical in shape, is closed at the bottom, such closing constituting what is known as the "pursing" of the seine, the result being to make it assume the form of a bag or purse, while the school of mackerel, or such portion of it as has been entrapped, are enclosed within it. The fishing vessel is then brought alongside the seine, and the latter still floating in the water, with the fish therein enclosed, is attached to the vessel fore and aft. The area of the enclosure is circumscribed as may be necessary by gathering in the ends of the seine, and thus

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confining the fish to a more limited space in order to render easier the operation of baling them out. In nautical language this process of circumscribing the area of the enclosure is known as "drying up" the seine. The fish are then baled out of the seine on board the vessel. The operation of setting the seine and of pursing it up is over in about ten or twelve minutes. Hours, in the present case at least two, are occupied in the operation of taking the fish from the seine, the time being dependent upon various causes, but mainly, I suppose, upon the quantity of fish in the seine. At no time during any of these operations is the vessel or seine at anchor; the vessel lays to, and the whole drifts at will with the tide or current.

As I understand the argument of the appellant, it is contended that, the fish having been surrounded by the seine, and enclosed therein outside the three mile limit, the act of "fishing" was then complete, and that anything done by the crew of the vessel after the pursing up process could not be called "taking fish," or "fishing" within the meaning of the convention or of the statutes referred to. I do not think it necessary to refer at length to the canons of construction which govern in a case like the present. Penal statutes, of course, must be construed strictly. When one is accused of having violated a statute it is clear that he must unmistakeably be brought within its provisions; there must be no doubt about it. But we must not do violence to ordinary language; we must not take from plain words their ordinary and universal meaning for this purpose. The question is whether this vessel was "fishing," when, for two hours or more, her crew were baling, or scooping out, by means of a dip-net, from the area of water surrounded by the seine, the one hundred and thirty barrels (more or less) of mackerel which they finally secured. The act of fish-

ing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what "fishing," according to the ordinary acceptance of the word, means, and that, I think, is the meaning which we must give to the word in the statutes and treaty. There is here, as I conceive, no need for interpretation, and the fundamental canon is: "Do not interpret where there is no need of interpretation." If when the S.S. "Aberdeen," moving eastward saw the "Gerring," a mile and three-quarters from shore, engaged as I have described, some of her crew baling fish from the water, others assisting to confine the fish into smaller and smaller compass, so as to be more easily secured: others driving the fish within the ambit of the dip-net by splashing with their oars in the water; others sorting and dressing and otherwise treating the fish, the question were asked: "What is the vessel doing?" Would not the inevitable answer be: "She is fishing?" and if any one on board could be found bold enough to affirm that she was not "fishing," that that operation was completed hours before, when the seine was pursed up and the mackerel therein enclosed, would he not be set down as either ignorant of language or as bereft of reason?

Even if the question depended upon the "taking" of the fish, I do not understand that fish are "taken" when they are enclosed in a seine, or encompassed about by it. They are still alive in their native ele-

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ment, possibly with few but still with some chances of escape. As I understand, they are never *all* taken; numbers escape. There is the contingency of the seine breaking, or the fish falling from the dip-net between the seine and the vessel, or of a storm arising and the vessel breaking away from the seine altogether. And there are, doubtless, many other chances of escape. The "fishing" is not over—although there may be a moral certainty that the fish will eventually be secured—until *as a fact they are secured*. If the other view is the sound one, then the hardy fishermen along our multitudinous coast waters and tidal rivers are "fishing" when at even-tide they set their nets, but they are *not* "fishing" when in the morning, with nets full to overflowing, the fish not only enmeshed but dead, they bring them on board and stow away their fare. I *am* "fishing" while I am whipping the water with my line, "fishing" also when the salmon rises and takes the fly, but, having hooked him, I am *not* "fishing" when for minutes, or perhaps hours, I play him in the water, weaken him before the final tragedy, and at last land him dead upon the sward. The Negro boys referred to by Froude in his "English in the West Indies" (p. 137), were "fishing" when they were placing the net in the water and surrounding the fish with their improvised contrivance, but when the cord was drawn and the net closed, they were *not* "fishing" while they were hoisting them into the boat and carrying them ashore. And when more than eighteen and a half centuries ago seven men stood out in their little craft from the shores, on the waters of the Gallilean Sea, they went a fishing. They were "fishing," though all night they caught nothing; "fishing" too, when in the morning at the behest of their Master they cast their net at the right side of the ship; but they were *not* "fishing" when with help

from friends they dragged their net all unbroken ashore, filled with a "multitude of fishes."

Neither in my view, as I have already suggested, can it be said that these fish were "taken," if anything depended upon that, until they were actually on board the ship. True, they were encompassed by the net; true, there was, I admit, almost a certainty that they would ultimately be secured, but they were not yet "taken." A city may be besieged, even beleaguered, by an invincible host, there may be a strong probability, nay, even an absolute certainty that the siege will be successful, but the city is not yet "taken." Storm and stratagem may yet be necessary before the final overthrow, and not until that catastrophe is the "taking" consummated. It was only after Troy had been besieged for ten weary years that the Greeks succeeded, and then by wile, in taking her. It was only then that "Ilium fuit" became an historic fact.

The treaty itself affords, I think, strong evidence against the position contended for. The United States thereby renounced the liberty to "take, dry or cure" within Canadian waters. The framers of the treaty at least seemed to have thought that taking and drying, or taking and curing, were consecutive acts embracing all the natural operations of the fishing avocation. Were there a number of acts after the taking, and before the curing or the drying—intercalary or intermediate processes, acts that were not "fishing" but that had a relation to fishing, such as the acts of baling, etc., to which I have referred—that might legally be done in domestic waters? They evidently intended (whether or not that intention has been sufficiently expressed) to prohibit in British waters the doing of anything in connection with fish that would make it an article of commerce, while the word "taking" was intended to include all operations between the throwing of the line

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or the casting of the net, and the processes directly necessary to prepare or preserve the fish for human food.

The question as to whether this vessel was "fishing" at the time of the seizure must, I submit, be determined altogether irrespective of the position of the vessel at the time of the seizure; for, wherever she was, she was "fishing" or she was *not* "fishing" within the meaning of the statute. The quality of the act cannot be determined by any consideration of position or location. She was "fishing" or *not* "fishing" in that spot, whether it was three or three hundred miles from land, its relative position *quoad* the shore being immaterial.

Nor is the question to be determined upon any consideration as to legal property or legal possession. It is not necessary to determine at what particular point of time, or at the conclusion of what particular operation, did the fish become the property of the catchers. I may have an exclusive right of fishery, a property right to the fish of a particular stream, but whether I am or am not "fishing" does not and cannot depend upon any question as to my ownership. The statute has no regard to ownership or possession; it is the act of fishing without reference to the ownership of the thing fished for that it prohibits.

Nor does the fact that the master and crew of the "Gerring" may have been ignorant of their whereabouts, may have had no desire or intention of trespassing upon Canadian territory or of violating Canadian law, affect the *legal* question. We are not dealing here with the master or crew. Neither the treaty nor the statute purports to punish them for violating the treaty's provisions. In the eye of the statute the vessel itself is the offender. The statute gives to it a moral consciousness – a personality—a capacity to act

within or without the law, and imposes upon it the liability of forfeiture in the event of transgression. In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence. If I bring dutiable goods into Canada without paying duty, I am liable to penalty although ignorant of the tariff. The goods themselves, endowed by law as they are with faculty and right of speech, cannot plead my ignorance either of law or fact as a bar to forfeiture.

According to my understanding of my own language, according to my idea as to what is the universal meaning of the term "fishing," no one, it seems to me, would describe the acts being done by the "Gerring" at the time of seizure by any other term than that of "fishing;" nor do I feel called upon out of deference to any supposed canon of strict construction—a rule as often honoured in the breach as the observance—to emasculate language, to filch from that word—a word which, with recognized variations, appears to be common to all the Aryan races—all but a fraction of its meaning, confining it to a petty segment of that wide circumference of idea that has belonged to it for centuries.

An additional consideration is not without weight. In order to the success of the appellant, a modified, secondary or circumscribed meaning must be given to that word "fishing." To excuse, much more to justify, a deviation from its primary meaning, there must be overwhelming and absolutely conclusive considerations. But no considerations at all—not even unwar-

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rantable ones—are forthcoming. Why do violence to the mother tongue and shock the intelligence of the ordinary English student, why give aid and comfort to those profane babblers who reiterate the fiction that judicial tribunals are accustomed deliberately to defeat the legislative intent by constructive canons of their own devising, in order to give immunity to a vessel engaged in a business that, according to present light and present scientific knowledge, may be characterized as nefarious, a business, the tendency of which is to annihilate for all time the fish-food supply of this continent, a business, too, which, so far as Canadian waters are concerned has been prohibited and criminalized (1). We Canadians are in a sense the world's trustees. The North American fisheries have been committed to our guardianship, not for ourselves alone, but for posterity, not for Canada alone, but for humanity. They are the most prolific in the world. One can only imagine, he cannot measure, their potentiality of blessing to mankind, and the Canadian Parliament has recognized its obligation to conserve them for the benefit of future generations. That is the declared policy of the Canadian people, and that too is the desire and the proposed policy (so far as I am informed) of the United States Government. Purse seining is inimical to that policy. It means, not a reasonable use of, or participation in, the deep sea fisheries or their natural annual increment, not their preservation, but their annihilation, their absolute destruction for all time; in familiar words, "the killing of the goose that lays the golden egg." The history of the United States fisheries on the Atlantic seaboard proves this, and it was the conviction of it that induced our Parliament, as a partial remedy, to pass the Act of 1891, above referred to. To allow this

(1) See "Fisheries Amendment Act, 1891," 54 & 55 Vict. ch. 43.

vessel to escape would be to that extent to defeat the beneficent preservative policy of the Canadian Parliament as evidenced by the statute, as well as to point out a way by which in many cases its penal consequences might be avoided. Nothing but overmastering considerations would justify that.

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There is another ground upon which the judgment appealed from may be supported. Neither the Imperial statute, nor the Canadian statutes up to 1886 appear to cover by way of penalty all the acts prohibited by the convention of 1818. Although they penalize other acts with a view to its enforcement they appear to have dealt only with "fishing" or "preparing to fish." The treaty forbade the drying or curing of fish, and contained a proviso that an American fishing vessel might enter bays and harbours for the purpose of shelter and repairing damages, of purchasing wood and of obtaining water, *but for no other purpose whatever*. The question had arisen as to whether the purchase of bait was a "preparing to fish" within the meaning of the statutes. It had been decided in the affirmative in Nova Scotia in the case of the "J. H. Nickerson," and in the negative in New Brunswick in the case of the "White Fawn," the first decision having been subsequently followed in the Nova Scotia case of the "David J. Adams." In order to set at rest this question the statute law in force in that year was changed by the Act 49 Vict. ch. 114, (1886,) which expressly provided in addition that if a foreign vessel (unlicensed) has entered within three marine miles of any of the coasts, bays, creeks or harbours of Canada for any purpose not provided by treaty or convention, or of any law of the United Kingdom, or of Canada for the time being in force, such vessel should be forfeited. It is worth noting that this statute is in a special sense an enactment of Her Majesty, carrying

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with it all the dignity and prestige of Imperial law. It was an Act, not assented to by the Governor General, but reserved for the signification of Her Majesty's pleasure, and it was subsequently, by Imperial order in council, solemnly and after due consideration approved by Her Majesty.

If, therefore, the "Gerring," at the time of the seizure, was "unlawfully" where she was, she became liable to forfeiture. The Canadian Act, it will be noted, does not in this relation apply to bays and harbours only, but to coasts as well. The convention specifies the circumstances and all the circumstances under which a foreign fishing vessel may enter into our territorial waters, viz., for wood, water, shelter or repairs, *and for no other purpose whatever*. For what purpose was the "Gerring" where she was when seized? Certainly for none of these purposes, but for the sole purpose of securing the fish inclosed by her seine. She was there, therefore, clearly in contravention of the terms of the convention. Is there any law either in the United Kingdom or in Canada which authorized her presence there? There is certainly no Canadian statute law on the subject, and there is now no commercial treaty, other than the convention of 1818, between Great Britain and the United States which gives to American vessels the right to enter Canadian territorial waters for any purpose whatever. According to international usage the only purpose for which the ships of one nation may enter the territorial waters of another nation, at all events during war, is for refuge or asylum. If there is any right beyond this it must be a right secured either by statute or treaty. Up to 1830 the United States had no commercial, as distinguished from fishing, privileges for any of its vessels in the ports of the British North American possessions. In a letter from Mr. Daniel

Manning, the Secretary of the Treasury of the United States, to the Hon. Perry Belmont, dated February 5th, he says :

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I am advised and concede that up to President Jackson's proclamation of October 5th, 1830, set forth on page 817 of the 4th volume of the United States Statutes at large, this Government *had not even commercial privileges for its vessels in Canadian ports*. We had such privileges as colonists, we lost them as colonists, we regained them in 1830 by an arrangement of legislation finally concerted with Great Britain, which was the result of an international understanding that was in effect a treaty, although not technically a treaty negotiated by the President, ratified by the Senate, signed by the parties, and the ratification formally exchanged by them (1).

He says in the same letter :

The treaty of 1818 secured to our fishermen what, up to that time, they did not have as a treaty right, which was, admission to Canadian bays or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood and of obtaining water, "*and for no other purpose whatever*." As colonists we had those rights, but as colonists we lost them by just rebellion (2).

By reference to the provisions of the treaties of 1794 and 1815, it will appear that while the subject of commercial intercourse between the United States and the British possessions in Europe is expressly dealt with, the British possessions in America are not provided for. The treaty of 1794, as to commercial privileges, provided that it should

not extend to the admission of vessels of the United States into the seaports, harbours, bays or creeks of His Majesty's said territories in America.

When the convention of 1818 was framed an attempt was made to place the commercial intercourse between the two countries upon a permanent basis, but that attempt proved abortive. It was not until 1830 that the negotiations carried on by President Jackson, through Mr. McLane on the part of the

(1) 49th Congress, 2nd Sess. (2) Ib. p. 19.
no. 4087, p. 20.

1897 United States, and Lord Aberdeen on the part of Great Britain, resulted in an arrangement which, up to the present, governs the commercial intercourse between the United States and His Majesty's British North American possessions. This is embodied in a proclamation of the President, and in an order in council of the British Government.

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The proclamation, after recital, directs that :

British vessels and their cargoes are admitted to an entry in the ports of the United States, from the islands, provinces and colonies of Great Britain, on or near the North American continent, and north or east of the United States (1).

The order in council is in the following terms :

And His Majesty doth further, by the advice aforesaid, and in the pursuance of the powers aforesaid, declare that the ships of and belonging to the United States of America may import from the United States aforesaid, into the British possessions abroad, goods, the produce of these states, *and may export goods from the British possessions abroad, to be carried to any foreign country whatever* (2).

This latter order in council of 1830 was passed under the authority of the Imperial Act of 1825, ch. 114, but a perusal of that Act, as well as of the order in council, will show, I think, without doubt, that there was no intention on the part of Parliament in passing the Act, or of His Majesty in making the order in council, to in any way repeal or modify the treaty of 1818, or the Imperial Act providing for the enforcement of its provisions, and the Imperial Act last referred to, and the order in council above quoted, is the only basis upon which any claim of right on the part of the "Gerring" to do what she did in the territorial waters of Canada can stand. The "Gerring," therefore, was found in British waters for a purpose not authorized by law, and consequently, under the ex-

(1) Congressional Debates, 1830, (2) Ibid, p. xciii).
p. xci).

press provisions of our own statute became liable to forfeiture.

There is another ground, already incidentally referred to, justifying the forfeiture of this vessel, though not of her cargo, and as this is *par excellence* a case of purse seining, it is just as well to deal with and settle the question now. Section 1 of the statute of 1891, above referred to, is as follows :

1. Section fourteen of "The Fisheries Act" is hereby amended by adding thereto the following subsection :

15. The use of purse seines for the catching of fish in any of the waters of Canada is prohibited, under a penalty for each offence of not less than fifty dollars, and not exceeding five hundred dollars, together with the confiscation of the vessel, boat and apparatus used in connection with such catching.

Of course the same controversy may arise as to the meaning of the word "catching" here as has arisen in respect to the words "fishing" and "taking fish," but if I am right as to these latter words, it follows that "catching" includes "baling," and that as this "baling" was done within the territorial waters by the use of the seine the case is within the statute. But the words "in any of the waters of Canada" qualify, according to proper grammatical construction, not the word "catching," but the word "use," and it is the *using* in Canadian waters of a purse seine that is prohibited. There was such a "user" here, and forfeiture is the consequence.

In my judgment the appeal should be dismissed with costs.

KING J.—This is an appeal from a judgment in the Admiralty Court condemning the American fishing schooner "Frederick Gerring, Jr.," for violation of the fishery laws.

According to the testimony of the seizing officer the vessel when seized was about a mile and a half out-

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side of Gull Ledge, on the coast of Nova Scotia. Her crew at the time were engaged in taking mackerel from a purse or bag seine made fast to the vessel.

A couple of hours previously she had been observed by Capt. Mackenzie, of the fishery protection cruiser "Vigilant," in the act of going up to her seine boat after the seine had been thrown and drawn together, or pursed. The vessel and her seine boat were then, in Capt. Mackenzie's opinion, about a half mile outside of the three mile limit. The interval appears to have been wholly spent in taking the fish from the seine. In this operation the sheets are eased off, and headway taken off the vessel to prevent her fouling the seine, or destroying it by too rapid movement through the water; and it was contended for the appellant that it was not possible, in the existing conditions of wind and current, that the vessel could have got inside the limit. This contention assumed the correctness of Capt. Mackenzie's observation respecting the position of the "Gerring" when he saw her, as already stated, and was supported by a substantial body of expert evidence as to the effects of currents, etc. There was, however, evidence of like character the other way, and (what was more material) direct testimony as to cross bearings taken on board the seizing vessel just before the seizure, of certain objects on the land, which, if correct, would show the "Gerring" to have been then, within the limits. It appears, also, that the commander of the "Aberdeen," the seizing vessel, took the reasonable course of endeavouring to show to the master of the "Gerring" the position of his vessel upon his own chart, by bearings taken with his own compass. It is admitted that the seizing officer asked for the compass and chart in order to take the bearings of certain points and indicate them on the chart. There is, however, a difference between the parties as

to what took place when the chart was produced. The commander of the "Aberdeen" says that it was in a condition that rendered it useless for the purpose. The master of the "Gerring" took no bearings, and his opinion as to his vessel's position rests entirely upon the general appearance of the coast to the eye. Capt. Mackenzie's testimony is important, as he places the vessel outside the limits when the seine was thrown. He was not concerned in the seizure, and his observation of the subsequent position of the "Gerring" is entitled to much consideration. During the two hours his vessel appears to have drifted considerably inshore, and he observed the "Aberdeen" steaming up to the "Gerring," and, at that time, noticed that the latter vessel was then inside the three miles limit. It further appears that there is an indraught amongst the islands along the coast, and we all know that amongst things not fully understood is the cause of the variation in strength of coast currents at different seasons.

The direct testimony in the case was quite sufficient to warrant the conclusions of the learned judge as to the position of the vessel.

The remaining question is whether what the vessel did within the three miles limit was a violation of any of the provisions of the fishery laws. It is to be taken as the fact that when she entered Canadian waters the purse seine had been drawn together inclosing the fish in it. The appellant's contention is that, upon this, the act of fishing or taking fish was completed, and that the "Gerring" was afterwards merely taking on board her own property.

Upon this point MacDonald C. J., says:

I must not omit to notice the contention of Mr. MacCoy, that, admitting the seine to have been thrown, and the fish inclosed in it, outside of the three mile limit, it is not an offence against the Act to con-

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tinue to bale 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," are completed when the seine is 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.

The evidence is somewhat meagre respecting the operation of taking fish by purse seines. It appears that the seine is about twenty-eight fathoms in depth, and, when drawn together, about twelve or fourteen fathoms. It is set from a boat rowed rapidly around the school of fish, and then drawn together from below in such a way as to enclose the fish in a kind of bag, the mouth of which is then made fast to the vessel forward and aft, and drawn above the level of the water, and the live fish taken from it by baling. The setting and drawing of the seine is the work of a short time, but the proper handling of the seine afterwards and getting the fish from it is an operation taking considerable time, in this case two hours.

It is a recognized principle of maritime and international law that every nation has jurisdiction over the waters adjacent to its shores to the distance of a marine league. There is, however, in every other nation, the right to navigate such waters for harmless purposes subject to such supervision as may be deemed necessary to prevent abuse. "It seems to me," says the present Master of the Rolls, in *The Queen v. Keyn* (1) that this is in reality a fair representation of the accord or agreement of substantially all the foreign writers on international law, and that they all agree in asserting that, by the consent of all nations, each which is bounded by the open sea has a right over such adjacent sea as a territorial sea, that is to say, as a part of its territory, and that they all mean thereby to assert that it follows, as a consequence of such sea being part of its territory, that each such nation has in general the same right to legislate and enforce its legislation over that part of the sea as it has over

(1) 2 Ex. D. 63 at p. 135.

its land territory. With its own consent, given to all other nations in the same way as they have consented to its right of territory, consent from which neither it nor they can rightly depart without the consent of all, there is for all nations a free right of way to pass over such sea with harmless intent, but such a right does not derogate from the exercise of all its sovereign rights in other respects.

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This, it is true, is from a dissentient opinion, but by a declaratory Act 41 & 42 Vic. ch. 73, the territorial rights thus asserted were declared to have always existed. See also *The Queen v. Dudley* (1).

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Upon the close of the war of 1812, and in consequence of a difference of opinion between the governments of Great Britain and the United States as to the effect of the war upon the continuance of former treaty rights of American fishermen in the waters of His Majesty's Dominion in British North America, the convention of 1818 was concluded, whereby it was (*inter alia*) agreed that within certain limits (chiefly in and about Newfoundland, Labrador, Magdalen Islands, etc.), the inhabitants of the United States were to have for ever in common with the subjects of His Majesty the liberty to take fish of every kind, and also the limited right to dry and cure fish in certain bays, harbours and creeks. It was then agreed by the United States as follows:

And the United States hereby renounces for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of His said Majesty's Dominions in America, not included within the above mentioned limits, provided, however, that the American fisherman shall be admitted to enter such bays or harbours for the purpose of shelter or of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent them taking, drying or curing fish therein or in any other manner whatever abusing the privileges hereby reserved to them.

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Then, as to domestic legislation. The Imperial Act, 59 Geo. 3, c. 58, declared it to be unlawful for any person other than a natural born subject of His Majesty in any foreign ship, etc., to fish for, or to take, dry, or cure any fish of any kind whatsoever 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 such convention, and it is enacted that, if any such foreign ship, etc., or any person on board thereof should be found fishing or to have been fishing or preparing to fish within such prohibited limits, such vessels, etc., should be forfeited, etc., provided, however, (as in terms of the treaty) that it should be lawful for any fishermen of the United States to enter into any such bays or harbours for the purpose of shelter and repairing damages therein, and of purchasing wood or obtaining water and for no other purpose whatever.

The subject has also been dealt with by the Parliament of Canada, and it is enacted by ch. 94 R. S. C. that any fishery officer concerned in the protection of the fishery (amongst other officers) "may go on board of any vessel within any harbour of Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks or harbours in Canada, and may bring such vessel into port * * * And if such vessel is foreign, and (a) has been found fishing or preparing to fish, or to have been fishing in British waters within the 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 (b), has entered such waters for any purpose not permitted by treaty, or convention, or by any law of the United Kingdom or Canada for the time being in force, such ship, etc., shall be forfeited."

The convention of 1818 deals not merely with the catching of fish, but with the entire subject of the rights of American fishermen to the use of territorial waters and adjacent coasts in the prosecution of their enterprise.

The rights and privileges of American fishermen therein are stated affirmatively and negatively. There is the right to take fish in common with British subjects in certain waters, and to dry and cure fish (wheresoever taken) on certain coasts; and, with regard to the remaining waters and coasts, a renunciation of all claim or liberty to take, dry or cure fish; but, along with this, a certain saving, viz.: to enter bays and harbours for the specified purpose of shelter, repairs, purchasing wood and obtaining water, but for no other purpose whatever.

This seems not only not to permit, but, by necessary implication to exclude, the using of territorial waters (other than those in which the right of fishing is recognized) for a purpose so material to and connected with the actual taking of the fish, as that of making good and effectual the capture of fish brought under certain dominion and control outside of such waters; that is to say, of acquiring absolute property in that which previously may have been the subject of a qualified property, liable to be defeated in various contingencies as, for instance, by the state of the weather, or by the fouling of the seine, or the breaking of it with the weight and pressure of the fish, or by a variety of causes. To enter territorial waters for such a purpose is a substantial use of them for a purpose directly connected with the taking of fish, and not being permitted by treaty or by any statute, Imperial or Canadian, is within the terms of clause (b) of ch. 94 Revised Statutes of Canada. It is immaterial, so far as the question of right is concerned, that the vessel may

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have drifted within the limit, for, if appellant's contention is correct, it avails equally where the act is deliberate. The remedy for cases of hardship lies in the pardoning power of the Crown.

Further, as to the meaning of the words "taking fish" and "fishing," in the treaty and statutes; "to fish" is defined in Webster's dictionary as "to be employed in taking fish as by angling or drawing a net." It covers the attempt although the fish may not be present in the waters, and *a fortiori*, it covers all that is involved in the continuous act of acquiring complete and absolute dominion over fish, subject to certain possession and control. It may well be that the "Gerring" people had sufficient control and dominion to have acquired a qualified property in the fish; *Young v. Hichens* (1); Pollock & Wright on Possession 37; 2 Kent's Com. 348; but 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. The whole is a continuous act requiring for its successful carrying out that the fish should without delay be taken from the water, and the whole operation may properly have applied to it the terms "fishing" and "taking fish."

I have not arrived at this conclusion without hesitation and doubt, enhanced by the knowledge that the learned Chief Justice and Mr. Justice Gwynne are of a different opinion.

The result, according to my view, is that the appeal should be dismissed.

GIROUARD J.—It is not claimed by the appellants that foreign vessels have the right to fish within the territorial jurisdiction of Canada. They admit that both by the principles of international law and the articles of the Fishery Convention of 1818, American vessels have no right to fish or take fish within the three mile limit of the coasts of Nova Scotia. Their main contention, at the hearing before us, was that when the “Gerring” was seized, the *fishing or taking fish* had been completed in the open sea, and that the mere baling of fish after they had been caught, and lifting them on the deck of the vessel, is not fishing and was no offence.

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They quote no authority in support of this proposition, except Webster's definition of the word *fishing*: “An attempt to catch fish, to be employed in taking fish by any means.” I have before me the latest edition of Webster, the “International” of 1896, where the word “fishing” is perhaps more definitely defined: “The act, practice, or art, of one who fishes.” But neither this nor the other definition decides the point at issue. Was the act of baling the fish out of the seine into the vessel an operation of fishing or taking fish? That is the question which must be decided according to the principles of law. And to do so, we are brought to examine this other question: Is the fish inclosed in the seine the property and in the possession of the fishermen before it is actually transferred to the vessel? Chief Justice Macdonald, who tried this case in the court below, answered this question in the negative. He said:

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 bale 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 com-

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plete 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 baling the fish from the seine into the vessel when the seizure was made (1).

After a careful research in the text books and digests, both English and American, I have been able to find only one English case in point, but it fully supports the views of the learned Chief Justice. I refer to the case of *Young v. Hichens* (2), decided in 1844 by the Court of Queen's Bench. The facts are thus summarized in the report of the case:

On the day in question a very large shoal of mackerel came into the bay of St. Ives. The plaintiff's boat, the "Wesley," put out, and shot her seine, not conducting herself at that time, as the defendant alleged, according to the regulations of the fishery. The seine, nearly 140 fathoms long, was drawn in a semicircle completely round the shoal with the exception of a space of seven fathoms according to the plaintiff's witnesses, ten fathoms according to the defendant's, which was not filled up by it. In this opening, according to the plaintiff's witnesses, the fishermen in the plaintiff's boat were splashing with their oars and disturbing the water in such a manner that, as they affirmed, the mackerel within would have been effectually prevented from escaping. At this conjuncture, before the plaintiff could draw his net closer, the "Ellen," the defendant's boat, rowed in through the opening thus made, shot her seine, enclosed the fish, and captured the whole of them.

It was held that the first person could not maintain trespass for taking his fish, his possession not having been complete. Lord Denman C. J. said:

It certainly results from the evidence in this case, that the fish were reduced to a condition in which it was in the highest degree probable that the plaintiff would become possessed of them. But it is equally certain that he had not become possessed. Whether the necessary possession be rightly described by the word "custodia" or "occupatio," I think it is not attained until the plaintiff has brought the animals into his actual power. It may be indeed that the defendant has committed a tortious act in preventing the plaintiff from completing his possession.

(1) 5 Can. Ex. R. 173.

(2) 1 D. & M. 592; 6 Q. B. 106.

Patterson J.:

I do not see how we can say this action is maintainable, unless by holding that a person on the point of taking possession of a thing is actually in possession of it.

It is said that this decision does not apply to the present case, as the seine was pursed up, but it cannot be pretended that a seine can be so closed up that no escape is possible for the fish; an open space must be left for the dip-net used in the baling out of the fish. The whole process of pursing and baling is thus described by the owner of the "Gerring."

Q. Have you had experience in pursing seines? A. Yes, for 7 or 8 years.

Q. Describe how it is done? A. You take the seine and set it out of the boat, and when you get a shoal of fish you go alongside the seine with the vessel and make it fast to the vessel forward and aft. You make the jibs fast and guy out the booms and bale out the fish with a long handled dip-net right on the deck of the vessel. * * *

Q. Is it usual for a fishing vessel to lie with her sheets off and her jibs down, when she is taking fish out of the net? A. Yes, that is the way they have to do.

Q. What is the object of it? A. It is on account of the seine. If the jibs were kept up it would tear the seine all to pieces.

Q. Why do you let the sheets off? A. They have to do it. If the sheets were kept in she would go stern foremost if the jibs were down.

Q. The object is to keep her in about the same position? A. Yes.

It is not difficult to understand that owing to various causes—mismanagement, mishaps or mere accidents—the fish may and do in fact escape from the seine after it is pursed up. The seine may break, the fastenings at either end of the vessel may give way, the jibs and sheets may become unmanageable, the fish may jump into the sea over the floating sides of the seine, or from the dip-net, and many other things may happen which would prevent the fishermen from capturing the fish enclosed in the seine. In the eyes of the law, the possibility of such accidents, mishaps and mismanagement renders the property and possession of the fish not complete till it is in the vessel.

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But admitting that the fish enclosed in a seine pursed up is in the possession of the fisherman, upon what ground can it be pretended that the baling of the fish is not an operation of fishing? As remarked by Chief Justice Macdonald, the baling was necessary to reduce the property to useful possession.

The soundness of the decision in *Young v. Hichens* (1) has never been questioned either in England or in the United States; it is quoted with approbation in American text books and digests, and more particularly in the American and English Encyclopaedia of Law, v° "Fish and Fisheries," p. 27; Addison on Torts (2); Gould on Waters (3).

Angell, Tide Waters (4), observes :

As the right of fishing in the sea, and in all inland and navigable waters, is *primâ facie* common to all, it follows that an actual appropriation or manucaption must be made of the fish to complete the right of property ; and that when the fish are taken they become the exclusive property of the taker, unless voluntarily restored to their native element. Bracton and Fleta both lay it down as the common law that fishes are *animalia quæ in mari nascuntur quæ cum capiuntur captoria fiunt*. But the possession of the fish must be complete.

The learned writer then quotes *Young v. Hichens* (1).

I have no hesitation in following the decision in *Young v. Hichens* (1), as I find it based upon the Roman law, which everywhere is considered as written reason, and in the absence of other regulations has been accepted as law by all modern civilized nations. The Institutes of Justinian *de rerum divisione* (5), (translation of Sandars) say :

12. Wild beasts, birds, fish, that is, all animals which live either in the sea, the air or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of the captor for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of

(1) 6 Q. B. 606.

(3) Ed. 1891, sec. 1.

(2) Am. ed 1891, vol. 2, p. 689.

(4) Ed. 1847, p. 137.

(5) Lib. 2, t. 1, LL. 12 and 13.

course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your keeping, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it. It is considered to have recovered its natural liberty if it has either escaped out of your sight, or if, although not out of sight, it yet could not be pursued without great difficulty.

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13. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and that it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion because many accidents may happen to prevent your capturing it. D. xli., tit. 1.

Gaius in this passage of the Digest informs us that the former opinion was that of Trebatius.

It cannot be denied that these Roman rules never prevailed in England or on the continent of Europe to their full extent, at least as to wild animals taken or caught on private grounds by a trespasser or a wrongdoer. As Lord Chelmsford, referring to the passage from the Institutes, points out in *Blades v. Higgs* in 1865 (1).

With respect only to live animals in a wild and unreclaimed state, there seems to be no difference between the Roman and the common law.

Jurists agree that the word "occupation," "capture," or "custody," used in the Institutes, means bodily possession, *corpore et animo*, although it is contended by some that the fisherman who has secured fish in his seine, or the hunter who has wounded a wild animal, has acquired some qualified rights of ownership over the same, provided the fishing or hunting be continued, but if abandoned he loses every claim or

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right to the animal. In such cases, therefore, fishing or hunting is not terminated till the animal is actually captured.

The best interpreters of the Roman law hold that wild animals are not possessed till they are actually and beyond peradventure in our power.

Domat, says (1) :

Wild beasts, fowls, fishes, and everything that is taken, either in hunting, fowling or fishing, by those who have a right thereto, belong to them as their property by virtue of the seizure which they make of them.

The original text says more :

Les bêtes sauvages, les oiseaux, les poissons et tout ce que peuvent prendre, ou à la chasse ou à la pêche, ceux qui en ont le droit, leur sont acquis en propre par la *prise qui les met en leurs mains*.

Savigny, *Jus Possessionis*, says (2) :

Wild animals are only possessed so long as some special disposition (*custodia*) exists, which enables us actually to get them into our power. It is not every *custodia*, therefore, which is sufficient ; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents, whether he can actually catch them when he wishes ; consequently, possession is not here retained ; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment.

Puffendorf, says (3) :

With regard to things movable, every one agrees that, in order to appropriate the same by right of first occupation, the possession must be bodily, and that it is necessary that they should be removed from the place where they were found to the place of domicile of the finder, or the place where they are intended to be kept.

And he then explains that it is not essential that this possession should at first be manual :

That possession may also be acquired with instruments, such as snares, nets, traps, weirs, hooks and the like ; * * * provided that these instruments are entirely under our control * * and also that

(1) Liv. 3 tit. 7, 2 par. 7 (Strahan ed.)

(2) Perry's ed. p. 257.

(3) Lib. 4, cap. 6, s. 9.

the animal is so well caught that it cannot possibly escape, at least during the length of time required to put the hand on it.

Heinneccius (1), lays down the same rule, and so far both he and Puffendorf merely repeat what Grotius (2), says on the same subject. Puffendorf finally makes the distinction at sec. 10 :

That if I have mortally wounded or at least seriously disabled an animal, no one can lay any claim to it so long as I pursue it on grounds where I have the right to hunt ; but if the wound be not mortal, and the animal can well escape, it still goes to the first occupant.

Barbeyrac criticises Puffendorf, and holds that it is not always necessary that the animal should be wounded or removed from its natural element, and that its mere discovery and pursuit, with the intention to capture it, are sufficient. Pothier (3), observes that in France the latter opinion prevails in practice, *dans l'usage* ; but Laurent (4), says that the jurisprudence has been to the contrary. A decision of the Superior Court of Quebec holds that it is sufficient that the animal be wounded and pursued, and quotes the authority of Cujas. *Charlebois v. Raymond* (5).

For the purposes of this case, it may be asserted that all the authorities agree in holding that a wild animal caught in a net or trap is not in the full possession or the absolute property of its owner unless finally seized. This feat, therefore, cannot be accomplished till the hunting or fishing is successfully completed.

These principles were recognized in two American cases quoted with approbation by Chancellor Kent. In *Pierson v. Post* (6), the Supreme Court of the State of New York held in 1805 that :

Pursuit alone gives no right of property in animals *feræ naturæ* ; therefore an action will not lie against a man for killing and taking one pursued by, and in view of, the person who originally found,

(1) Sect. 342.

(2) Lib. 2, cap. 8, sect. 3 and 4.

(3) *Propriété*, n. 26.

(4) Vol. 8, n. 442.

(5) 12 L. C. Jur. 55.

(6) 3 Caine 175.

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started, chased it, and was on the point of seizing it. Occupancy in wild animals can be acquired only by possession, but such possession does not signify manucaption, though it must be of such a kind as by nets, snares or other means, to so circumvent the creature that he cannot escape.

Tompkins J., delivering the opinion of the court,
 Girouard J. said :

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes (1), and Fleta (2), adopt the principle, that pursuit alone vests no property or right in the huntsman ; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton (3).

Puffendorf (4) defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles; or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended, the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals ; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent,

(1) Lib. 2, tit. 1, s. 13.

(2) Lib. 3, c. 2 p. 175.

(3) Lib. 2, c. 1, p. 8.

(4) Lib. 4, c. 6, ss. 2 and 10.

and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view in his notes, the more accurate opinion of Grotius (1), with respect to occupancy. That celebrated author (2), speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quedam possessio ad dominium adipiscendum; atque ideo vulnerasse non sufficit.*" But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, ratibus, laqueis dum duo adsint; primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*" This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

Pierson v. Post (3) was reaffirmed in 1822 by the same court in *Buster v. NewKirk* (4).

Per Curiam. The principles decided in the case of *Pierson v. Post* (3) are applicable here. The authorities cited in that case establish the position that property can be acquired in animals *feræ naturæ*, by occupancy only; and that, in order to constitute such an occupancy, it is sufficient if the animal is deprived of his natural liberty, by wounding, or otherwise, so that he is brought within the power and control of the pursuer. In the present case, the deer, though wounded, ran

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(1) This is a mistake. Puffendorf reproduces in this respect the opinion of Grotius.

(2) Lib. 2, c. 8, s. 3, p. 309.

(3) 3 Caine 175.

(4) 20 Johns. 74.

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six miles ; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of N. He, therefore, cannot be said to have had a property in the animal, so as to maintain the action. The judgment must be reversed.

Having arrived at the conclusion that the baling of the fish is an operation of fishing, or taking fish, it is not necessary for me to express any opinion upon two important questions which were raised by the Crown, namely, whether the recent Dominion statute prohibiting purse seining, applies to this case, and whether the convention of 1818 prohibits American fishermen from entering within three miles of the *coasts* of the Dominion—others than bays and harbours—for any purpose not authorized by the convention, and particularly for the purpose of baling fish caught in the open sea, if such an act cannot be considered as fishing, or taking fish.

Finally, I am of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCoy, MacCoy & Grant.*

Solicitor for the respondent: *W. B. A. Ritchie.*
