

TORONTO ADMIRALTY DISTRICT.

1894

Dec. 20.

"THE GRACE."

International law—Boundary line—Three-mile limit in relation to inland waters—Fishing by foreign vessel—R.S.C. c. 94—Forfeiture.

On the 21st April, 1894, the American steamer *Grace* was seized on Lake Erie by a Canadian government cruiser for an alleged infraction of chapter 94 of *The Revised Statutes of Canada*, entitled, *An Act respecting Fishing by Foreign Vessels*. Upon an action for condemnation it was found by the court that the vessel, when seized, was more than three marine miles from the shore, but clearly north of the international boundary line between Canada and the United States of America.

Held, that the three-mile limit to the maritime territory of a State, as fixed by the rules of International law, does not apply to the waters of the Great Lakes between Canada and the United States, and the territorial limits of both countries are determined by the International boundary line.

2. An American vessel fishing without a license upon the Canadian side of the boundary line on one of the Great Lakes is subject to seizure and condemnation under the provisions of chapter 94 of *The Revised Statutes of Canada*.

THIS was an action for the condemnation of the steamer *Grace*, an American vessel, seized for infraction of chapter 94, *The Revised Statutes of Canada*.

The facts of the case and arguments of counsel are fully set out in the reasons for judgment.

The case was tried before His Honour Judge McDougall, Local Judge of the Toronto Admiralty District, at St. Catharines, on the 28th September, A.D. 1894.

J. C. Eccles for the Crown.

W. M. German for the owners and claimants of the ship.

1894 McDougall, L. J. now (December 20th, 1894) delivered judgment:—

THE GRACE.

Reasons
for
Judgment.

This is an action by the Crown for the condemnation of the ship *Grace*, a foreign fishing vessel, her tackle, rigging, apparel, furniture, nets, stores, and cargo, as forfeited to Her Majesty for violation of the provisions of the Act, R. S. C. c. 94.

According to the statement of claim, the *Grace* is a steam fishing tug of seven tons burden, registered at the Port of Dunkirk, in the State of New York, one of the United States of America. It is owned by Frederick Helwig, Willoughby Meisner and David Waltus, of the City of Dunkirk, in the State of New York.

It appears that on the 21st April, 1894, the *Grace* was seized by the Government cruiser the *Dolphin*, John B. Peterson, commander, for an alleged infraction of the said Act. The *Dolphin* at the time was cruising on Lake Erie, and was owned by the Government of Canada, and employed in the service of protecting the fisheries of Canada on the said lake. The acts which constituted the alleged infraction of the law were as follows:—

The *Grace*, being an American vessel, was found fishing in British waters within the Province of Ontario, on Lake Erie, one of the inland waters of Canada, between eight and nine miles in a south-westerly direction from Port Colborne on the Canadian shore, without a license of the Governor-General of Canada to fish in the said waters. It is alleged that the *Grace* entered the waters in question, which were to the north of the international boundary line, for the purpose of fishing, and with intent to violate the provisions of the said Act.

The waters of Lake Erie are not included within the limits specified and described in the first convention between His Majesty King George III., and the

United States of America, and signed at London on the 20th October, 1818.

1894
 THE GRACE.
 ———
 Reasons
 for
 Judgment.
 ———

The boat was seized for this alleged breach of the law, by Captain Peterson, as a fishery officer, on the said 21st day of April, 1894, and detained with her nets, tackle, furniture, &c., as subject to forfeiture, and duly brought by him into Port Colborne, and handed by him to Duncan McFarlane, the officer of Her Majesty's Customs at Port Colborne.

The defence set up by the owners of the *Grace*, who have intervened, is an absolute denial of the commission of any acts which should be construed as a breach of the provisions of the Fisheries Act, c. 94 of *The Revised Statutes of Canada*.

At the trial the evidence was very fully gone into and at the conclusion of the case for the Crown, Mr. German, counsel for the owners, took the objection that even upon the testimony of the witnesses called by the Crown there was no liability to forfeiture, because it clearly appeared that the *Grace* was fishing more than three marine miles from the Canadian coast, and that being established, even if the point where she was fishing should be found to be on the Canadian side of the international boundary line, the offence, if it was an offence at all, was not one punishable under the provisions of the said Act. He contended that it was only when the alleged fishing took place within three marine miles (even in inland waters) that any breach of the Act was committed. I overruled his contention at the trial, for the purpose of hearing all the evidence for the defence upon the facts, stating that I would reserve my judgment on the whole case, and consider more carefully what, if any, weight should be given to his objection after all the evidence was in.

1894
 THE GRACE,
 Reasons
 for
 Judgment.

By the Treaty of Paris (1783) the boundaries between the United States and the English provinces were expressly defined; and article 2, which purports to define these boundaries, after describing the boundaries relating to the eastern provinces, then proceeds as follows:—

From thence [a point in the 45th degree of north latitude, where a line drawn through the middle of the Connecticut river would intersect the 45th parallel of latitude] by a line due west on said latitude until it strikes the River Iroquois, or Cataraqui (St. Lawrence); thence along the middle of the said river into Lake Ontario; through the middle of the said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie; through the middle of said lake until it arrives at the water communication between that lake and Lake Huron, etc., etc.

The boundaries of Canada, then with reference to that part of the province of Ontario which borders on Lake Erie extend to the centre of said Lake Erie.

In Bar on International Law, 1067, the author says:—

In land-locked lakes surrounded by several States, the same principles as regulate the application of territorial law on dry land must rule, in so far as there are distinct boundary lines recognized. The well-known rule for fixing these is that the centre of the lake determines, just as in the case of rivers.

Hall on International Law, 100, says:—

The territorial property of a State consists in the territory occupied by the State community, and subjected to its sovereignty; and it comprises the whole area, whether of land or water, included within definite boundaries, as ascertained by occupation, prescription, or treaty.

National territory, therefore, consists of water as well as land, and it can be assumed without doubt that British territory extends from the shore line of Lake Erie south to the international boundary line fixed by treaty between Great Britain and the United States, as being a conventional line drawn through the middle of the lake.

In the case of *The People v. Tyler* (1), Martin C.J., in his oral judgment, thus expresses the character of the territorial rights existing on the great lakes and rivers lying between Canada and the United States:—

1894

THE GRACE.

Reasons
for
Judgment.

By the Treaty of 1783, the boundary line between Great Britain and the United States ran through the centre [of the lakes]. They can, therefore, in no sense, be denominated "high seas" within the meaning of the constitution. Nor are their waters which are within the boundaries of the United States without the jurisdiction of any particular State. Each State lying upon their borders is bounded by the national boundary line; beyond such line, the waters are within an acknowledged foreign jurisdiction, and, so far as I can ascertain, ***** within the body of foreign countries.

See *The Revised Statutes of Ontario*, 1887, cap. 5, sec. 7, whereby the limits of all townships lying on Lake Ontario, Lake Erie, etc., are extended to the boundary of the province in such lake.

Judge Christiancy in the case last cited, speaking of the Great Lakes, and after quoting from the Treaty of 1783, settling the boundaries of the two countries, says, p. 230:—

Thus Great Britain and the United States appropriated to themselves, as part of their territorial domains, the lakes and water communication on their respective sides of the boundary line, as fully and unreservedly as the lands on either side. No distinction was made.

Speaking of the effect of subsequent treaties as altering or changing any of these alleged territorial rights, he says, p. 233:—

It is too clear to admit of any serious doubt, that there is nothing in any of these treaties depriving the British Government of that complete and exclusive jurisdiction over that part of the lakes and rivers on her side of the line which any nation may exercise upon land within her acknowledged territorial limits. Under all these treaties it must, I think, be very clear, that while the citizens or subjects of either nation should be within the territorial limits of the other, they would be bound to conform to, and would be protected by, the laws of the nation or State to which the territory belonged, according to the settled principles of the law of nations. *Vattel* Bk. 2, c. 8, par. 101, 102.

(1) 7 Mich. at p. 164.

1894
 THE GRACE.
 Reasons
 for
 Judgment.

Now, it is also an axiom of International law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects (1), and therefore the Act respecting fishing by foreign vessels (2) is strictly within the powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights.

Section 1 of the Act authorizes the Governor in Council to grant to any foreign ship, for a term not exceeding a year, a license to fish in British waters within three marine miles of any of the coasts, creeks or harbours of Canada, not included within the limits specified and described in Article 1 of the Treaty of 1818.

Section 3 authorizes various officials, including a fishery officer, to

bring any ship, vessel, &c., being within any harbour in Canada, or hovering within British waters within three marine miles of any of the coasts, &c., &c.,

and if such vessel is foreign and has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, &c., &c., without a license,

such vessel, her tackle, rigging, cargo, &c., shall be forfeited.

The remaining sections of the Act describe the procedure for establishing the forfeiture and the limit of time within which action is to be taken.

Section 20 reads :—

This Act shall apply to every foreign ship, vessel or boat in or upon the inland waters of Canada, &c., &c.

Now, it is contended that as to inland waters the three marine miles limit prevails equally as upon the

(1) *Bar's International Law*, p. 21. (2) R. S. C., c. 94.

ocean, at any rate in so far as any offence against the provisions of the Act is concerned. In other words, that the penalties of this particular Act do not apply to a foreign vessel fishing in inland waters if the fishing is done outside of the three-mile limit; but it is not said in the statute that the Act should apply to the inland waters of Canada. Had this been the form of expression there would have been much force in the contention that the three-mile limit was equally applicable to the coasts of inland waters as to the sea coasts. But what the section does say is that the Act shall apply to every foreign vessel in or upon the inland waters of Canada. In other words, wherever in Canada a foreign vessel is found fishing or preparing to fish, or to have been fishing on Canadian inland waters, without a license, that foreign vessel at once incurs the penalty of the Act, and is liable to seizure and forfeiture.

1894
 THE GRACE.
 Reasons
 for
 Judgment.

Upon the ocean the law of nations recognizes the limit of three marine miles from the shore as the only portion of the ocean in respect of which a state can claim to exercise territorial rights; but the same law of nations recognizes the authority of a state to claim the same territorial rights in respect to so much of all inland lakes as lie within the limits of its conventional boundaries. If a foreign vessel, therefore, is twenty miles from shore, and is fishing without a license a quarter of a mile north of the boundary line upon an inland lake, she is subject to seizure and condemnation under the provisions of the Act under consideration.

This being my view of the law, it next becomes important to determine the questions of fact raised in this case, namely: Where was the *Grace* fishing on the morning of the 21st day of April, and just before her seizure by the commander of the *Dolphin*? To deter-

1894 mine this it will be necessary to make a brief review
 THE GRACE, of the testimony given at the trial.

Reasons
 for
 Judgment.

First, the evidence of Captain Peterson, commander of the *Dolphin*, establishes by the chart the following distances, having relation to that part of Lake Erie opposite Port Colborne. If a line is drawn from Port Colborne, on the Canadian shore, to Dunkirk, on the American shore, the point at which it would cross the boundary line would be about thirteen miles distant from the Port Colborne light. If the line is drawn from Port Colborne shore to Silver Creek on the American shore it would intersect the boundary line at a distance of eleven miles from the Port Colborne light. Silver Creek is a little to the east of Port Colborne on the American shore, and Lake Erie is narrower between these points. Dunkirk lies to the west of Port Colborne on the American shore. Again drawing a line due south from Port Colborne to the American shore, the distance to the boundary line, Captain Peterson says, is eleven and three-quarter miles from the Port Colborne light. At a distance of 7.4 miles from the Port Colborne light, which is close to the shore, there was at the time of the seizure the wreck of a vessel called the *Benson*; two spars of this vessel were plainly visible standing out of the water. This distance to the wreck was carefully logged the day after the seizure of the *Grace* by Captain Dunn, the commander of the *Petrel*, another Canadian fishery cruiser; and he fixes accurately the distance from Port Colborne light to the wreck at 7.4 statutory miles. It was sworn by the engineer, Edwin T. Dunn, of the *Dolphin*, that the speed of that boat is eight miles an hour or a trifle less; this is corroborated in a measure by Captain Dunn, of the *Petrel*. It is admitted by the defendants that the *Grace* had been fishing, and had taken in her nets

just before the seizure, but it is denied that the fishing was done in British waters.

1894

THE GRACE.

Reasons
for
Judgment.

The evidence of the Crown, as given by the engineer, Edwin T. Dunn, and Captain Peterson, regarding the movements of the *Dolphin* on the day of the seizure, is that on the morning of April 21st the *Dolphin* left Port Colborne at 8.40 a.m., and steered a course south one-half east from Port Colborne, the wind blowing fresh from the south-west; passed the Colborne light at 9 a.m.; at 9.20 sighted a tug (the *Grace*); at 10 o'clock arrived at a fish buoy floating in the lake. Did not alter the course steered till reaching buoy. Left with the tug *Grace* at 10.30; abreast of Port Colborne light at 11.25; arrived at dock at 11.40 a.m.

Captain Peterson had made these entries at the time in the ship's log, which his instructions require him to keep. The engineer also keeps a log and his entries were:—Left dock at 8.50; passed Port Colborne light at 9; went about six miles out into the lake; lifted some American fishermen's nets; seized an American fish tug; arrived back at Port Colborne at 11.40 a.m.

Peterson, the commander; Neff, the deckhand; Hiscott, the cook; McLaren, the stoker; and Edwin T. Dunn, the engineer, all members of the crew of the *Dolphin*, agree in their evidence that the *Dolphin* came up to the fish buoy not more than half a mile to the south and west of the *Benson* spars, and the crew immediately commenced hauling in the nets attached to this buoy. These nets extended nearly due south towards the American shore. They say at the time they arrived at the fish buoy the *Grace* was lying to the south and west of them further up the lake, at a distance from the *Dolphin* variously estimated from 700 to 800 yards by Captain Peterson; about a mile by Neff, which in re-examination he reduces to half a mile at the outside; McLaren, one-quarter to three-quarters

1894
 THE GRACE.
 Reasons
 for
 Judgment.

of a mile; and Dunn, the engineer, half a mile. They all speak of the distance between the boats. Nearly all the witnesses state that the *Grace* was to the south and west of the *Dolphin* when she arrived at the fish buoy. This buoy is spoken of in the evidence as the *Puritan* fish buoy, because the floats of the nets attached had the name of *Puritan* stamped on them. The *Grace* at that time was engaged in hauling up her own nets, working up northwards to her northern fish buoy; and nearly all the Crown witnesses say that when she had taken up her nets as far as her buoy, she was only about a quarter of a mile from the *Dolphin*, which had also been engaged in hauling in the *Puritan* nets, working south. As soon as the *Grace* took up her nets she started over to the *Dolphin* to see what that vessel was doing, and almost immediately on her coming alongside the vessel was put under arrest, and ordered into Port Colborne. Captain Peterson, of the *Dolphin*, went aboard of her, as the *Grace* was the faster boat; and with Captain Peterson on board the *Grace* got into Port Colborne ahead of the *Dolphin*.

Captain Peterson says he took up about 1,500 to 1,700 yards of the *Puritan* nets altogether; he says that when the *Grace* came up he continued taking in the nets for a few minutes, and then cut them, buoying up the severed end, and started for Port Colborne with the captured tug.

The distance from Port Colborne light to the wreck of the *Benson*, we have seen, was 7.4 miles; from the *Benson* to the *Puritan* buoy, half a mile, 1,300 or 1,400 yards of the *Puritan* nets were hauled in at the time when the *Grace* came alongside; this makes the distance of the point of meeting of the two vessels from the Port Colborne light $7.4 + .5 + .88 = 7.78$ miles from Port Colborne light. Add to this as the result

of the evidence of the Crown witnesses that when the *Grace* finished hauling in her nets she was about a quarter of a mile off, would make the northern end of her nets to have been located in the lake at a distance not exceeding nine miles from Port Colborne light.

1894

THE GRACE.

Reasons
for
Judgment.

Mr. German, at the close of the case for the defence, stated the distance between Port Colborne light to Silver Creek to be twenty-four miles; and from Port Colborne light to Dunkirk light, in a straight line, twenty-seven miles. So that we have this fact unmistakably proved, if the Crown witnesses are to be believed, that the northern end of the *Grace's* nets was at least from three to four and a half miles north of the international boundary; about three miles, if the *Grace* was lying to the east of the *Dolphin* and on a line between Silver Creek and Port Colborne; and about four and a half miles if she was lying more to the west of the *Dolphin*, and on or near a point that would be intersected by a line drawn from Dunkirk light to Port Colborne light. The length of the nets of the *Grace*, as stated by her crew, was two miles.

Turning to the evidence tendered by the owners of the *Grace* we find a totally different account. In the first place, no log was kept on the *Grace*. The engineer states that he takes the time when he passes Dunkirk light; that he regulates the speed of the *Grace* to nine miles an hour; runs one hour and five minutes, which brought him to the southernmost buoy of his nets on a course northeast by north. That would bring the *Grace* nine and three-quarter miles from Dunkirk light (assuming the speed absolutely correct at nine miles) to her southernmost buoy; thence north two miles, for the length of her nets would make her northern buoy eleven and three-quarter miles from Dunkirk light, or from one and a quarter to one and a half miles south of the interna-

1894
 THE GRACE.
 Reasons
 for
 Judgment.

tional boundary line. The engineer and captain say that when they had finished taking up their nets they observed the *Dolphin* to the north of them, and they ran over to her, taking twenty-two minutes to make the run, and increasing the speed of the *Grace* to twelve miles an hour; this would make the distance between the boats, according to this evidence as to speed and time, about four and a half miles. The engineer says that the *Dolphin* when they came up to her was twelve or thirteen miles from Port Colborne. Now, let us see what the effect of adding these distances together will be:—

Distance to northernmost buoy, $11\frac{3}{4}$ miles; from buoy to *Dolphin*, $4\frac{1}{2}$ miles; from *Dolphin* to Port Colborne, 13 miles; total, $29\frac{1}{4}$ miles. Distance from Dunkirk light to Port Colborne light, or two and a quarter miles more than the chart shows the actual distance to be.

According to Captain Helwig's story, after the *Grace* was seized they ran towards Port Colborne for about five minutes, when as they were running away from the *Dolphin*, which was a much slower boat, Captain Peterson hailed them, and they stopped, and he (Peterson) came on board the *Grace*. They then ran for an hour and five minutes to Port Colborne; they say they ran the *Grace* at her utmost speed, which was about twelve miles an hour; in other words, that the *Grace* had traversed about thirteen and a half miles from the point of seizure to Port Colborne. He also says they reached Port Colborne light at twelve o'clock, and the *Dolphin* came in thirty-five minutes afterwards. Now, the *Dolphin's* log shows that she reached the dock at 11.40, fifty-five minutes before the time given by Captain Helwig. Weaver, a witness called by the Crown, who was fishing on the dock, says that the *Dolphin* got into Port Colborne a few minutes before

twelve o'clock, just before he went to dinner. Captain Helwig says the *Dolphin* must have been twelve, or thirteen, or fourteen miles from Port Colborne when the *Grace* came up to her; he says he saw the *Benson* wreck, and that this wreck was at least ten miles from Port Colborne; he says it was seven or eight miles from his southernmost fish buoy to the American shore, and about ten miles from his northernmost buoy. Mr. Meisener, the engineer of the *Grace*, who was also part owner, says that when running the *Grace* to inspect the nets he closes off the throttle, so as to make about nine miles an hour, though his boat will run twelve miles an hour when at full speed. He says that when the boat was arrested they went in past the *Benson* wreck, and he judged it would be ten miles from this wreck to the Port Colborne light. The engineer is unable to tell what time the *Grace* got into Port Colborne, but he thinks about twelve o'clock, or a few minutes after; the engineer is unable to say how long they were running into Port Colborne from the point where the *Dolphin* seized the vessel. Fred. Helwig, a fisherman on the *Grace*, and an owner of one share, gives a different version of the distance between the *Dolphin* and the *Grace*, when the latter finished taking in her nets; he says the *Dolphin* was over three miles away, the captain and engineer say four and a-half. John Waltus, a fisherman on board the *Grace*, makes the distance between the *Grace* and the *Dolphin* at the time the *Grace* started over to see what the *Dolphin* was doing, as between three and four miles.

I have to determine on this evidence whether the *Grace* had set her nets in Canadian waters on the morning of the 21st April. We have one fixed point established, namely, the position of the *Benson* wreck; that was accurately measured; it was distant from Port Colborne light 7.4 miles; the distance from the wreck

1894
 THE GRACE.
 Reasons
 for
 Judgment.

1894
 THE GRACE.
 Reasons
 for
 Judgment.

to the boundary line would be from four and a-half to five miles at the very least. All the witnesses for the Crown agree that the *Dolphin* commenced taking in the *Puritan* nets at a point not exceeding half a mile south of the wreck; they substantially agree that at that time the *Grace* was not over three-quarters of a mile to a mile, at the outside, distant from them.

But even assuming that the *Grace* was, say, three or three and a-half miles away, as claimed by two of her own witnesses, she would then be at most not more than from eleven to eleven and a-half miles from Port Colborne, or from half a mile to a mile and a-half north of the international boundary line. Now, at this time she was in the act of taking in her nets, working northward, so that at that particular moment of time she was some little distance south of her northernmost fish buoy. If her nets were two miles long, at least a mile and a-half of her nets were in Canadian waters. If the evidence of the Crown witnesses, on the other hand, is taken, it establishes that her whole gang of nets was clearly north of the international line, and her southernmost fish buoy at least, a mile or a mile and a-half north of that line.

It is in evidence that the fish had been moving steadily northward all the spring; they had been freely taken at the first of the season a few miles from the American shore; but each week had worked their way towards the Canadian shore; and the fishing tugs followed the run of the fish. The only reasonable conclusion from the whole evidence is that the fish passed to the north of the boundary line, and that the fishing tugs and their nets followed them. It must be borne in mind, too, that the nets of the *Puritan*, another American fishing tug, were found set in Canadian waters, their northern buoy being located only eight

miles from the Canadian shore, or half a mile south of the wreck of the *Benson*.

1894

THE GRACE.

Reasons
for
Judgment.

Upon this review of the evidence I find that the *Grace* had set her nets, and was engaged in taking them up within, at most, two or two and a-half miles south of where the *Puritan* nets were set, and that such locality where she was thus engaged in fishing was wholly within Canadian waters.

There will be judgment for the Crown, with full costs of suit; and the said tug *Grace*, her tackle, rigging, apparel, furniture, nets, stores, and cargo be declared to be forfeited to Her Majesty.

Judgment accordingly.

Solicitor for ship: *W. M. German.*

Solicitor for Crown: *J. C. Eccles.*