

HIS MAJESTY THE KING (PLAINTIFF)..APPELLANT;

1904

AND

*Mar. 14.

*May. 4.

THE VESSEL "KITTY D." }
(DEFENDANT)..... } RESPONDENT.

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

Illegal fishing—Seizure of vessel—Evidence of vessel's position.

The American vessel "Kitty D." was seized by the Government Cruiser "Petrel" for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture the evidence was conflicting as to the position of both vessels at the time of seizure and the local Judge in Admiralty held that the evidence did not establish that the vessel seized was in Canadian waters at the time. On appeal by the Crown :

Held, Taschereau C.J., dissenting, that, as the "Petrel" was furnished with the most reliable log known to mariners for registering distances and her compass had been carefully tested and corrected for deviation on the morning of the seizure ; as the "Kitty D." and the two tugs in her vicinity at the time whose captains gave evidence to shew that she was on the American side carried no log nor chart and kept no log-book ; and as the local judge had misapprehended the facts as to the course sailed by the "Petrel," the evidence of the officers of the "Petrel" must be accepted and it established that the "Kitty D." had been fishing in Canadian waters and her seizure was lawful.

APPEAL from the decision of the local judge in Admiralty, Toronto division, in favour of the owners of the respondent vessel.

The "Kitty D." was seized on Lake Erie by the Government cruiser "Petrel" for fishing north of the boundary line and an action was brought by the Crown in the Court of Admiralty to have her declared

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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forfeited. The action was tried before Judge Hodgins' local judge in Admiralty for the Toronto district, who decided that the Crown had not proved that the vessel was on the Canadian side at the time of the seizure and he ordered that she be delivered up to the owners.

The following are the reasons given by the local judge for his judgment :

"The question in this case is whether a seizure of the United States fishing boat, "Kitty D." by the Dominion Cruiser "Petrel" on the 3rd July last for alleged fishing was made in Canadian waters, north of the international boundary line.

"Captain Dunn of the cruiser stated that he left Port Dover on that morning at 6.30 o'clock and directed his officers to take the course to clear Long Point by S. E. by S. $\frac{1}{4}$ S., which was the usual course in calm weather, but owing to the variation of the compass the true course would be represented by E. by N. 7-8 N. That he set the log when they were immediately abreast of the Long Point light-house, from which he was approximately about five eighths of a mile; that after registering five knots he turned the "Petrel" on her course down the lake and ran down the boundary line E. by N. $\frac{1}{2}$ N., and that shortly before noon the second officer came and told him there were two tugs, one of which was nearly directly ahead, a little to the port, and the other away to the north of the boat; that he turned to the one on the north which was about two miles off and made a crescent towards the north-west for about ten minutes and then south-west and signalled her to slack speed, and so overtook and seized her. The distance of these different crescent courses was not stated.

"The other witnesses for the Crown were, first officer Inkster, who stated that the "Petrel" left Port Dover

at 6.30 o'clock that morning; that the usual course in calm weather was S. E. by S. $\frac{1}{4}$ S.; that he was on the bridge until 8 o'clock, when she was steering E. by S. $\frac{1}{4}$ S. from Port Dover, and that they passed Long Point about eight-thirty at the distance of about half a mile.

“Second officer McPherson corroborated the first officer as to the course of the “Petrel” on the 3rd July, except as to the steering E. by S. $\frac{1}{4}$ S.—he making it S. E. by S. $\frac{1}{4}$ S. He also said that he could not tell whether they were south or north of the International boundary line; and he estimated that they were about one-half mile from Long Point when the log was set, which, he says, is the usual distance, though it might vary several hundred yards.

“The seamen who steered the “Petrel” on that day were also examined. Slade said that when he took the wheel the vessel was steering S. E. by S. $\frac{1}{4}$ S., thus confirming second officer McPherson, but when asked the nature of the turn from S. E. by S. $\frac{1}{4}$ S., he gives the course E. by N. $\frac{1}{2}$ N. He admitted that he had only been a mariner for one season, and had not much experience in steering, and that he was not known in marine circles as a “wheelsman,” and that this was the first time he had steered from abreast of Long Point out to the boundary line.

“Campbell said that when he took the wheel at 10 o'clock the “Petrel” was steering E. by N. $\frac{1}{2}$ N. and that he continued her on that course; that he had never steered a boat until this summer. Neither of these sailors knew anything about a compass prior to their going on the “Petrel” last April.

“Captain Spain gave evidence that he came to Port Colborne on the 8th July and hired the “Golden City” and steered out into the lake to see if he could find the nets of the “Kitty D.” which were reported to have been

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left in the lake, and that he was accompanied by Captain Jones of the "Kitty D." and Mr. Dechert, one of the owners. He suggested that Capt. Jones should take the wheel, but the captain of the "Golden City" did not give it to him. Jones then offered that if he were taken across to Dunkirk and could start from there, as he knew that course, he could find the "Kitty D's" nets, and he described to Captain Spain the kind of buoy attached to the nets of the "Kitty D." Jones' offer was, however, declined and the "Golden City" returned, after failing to find the place where the "Kitty D's" nets had been set. Captain Spain further stated that the "Petrel" left Port Colborne on the following morning at 6 o'clock, and that he instructed Captain Dunn to go to Long Point and take the course he had reported to him he had taken on the 3rd July, S. E. by S. $\frac{1}{4}$ S. for five miles out; that after steaming out for about five miles from Long Point he said they got to about a mile and three-quarters north of the boundary line, and owing to not having allowed for the over-registering of the log the "Petrel" was a little further out than that. He also estimated from Captain Dunn's report that the place of seizure was nine and three-quarter knots from Lapp Point on the Canadian shore; and he showed that the British chart made Lapp Point ten and one-half miles from the boundary line, though the real boundary line there is $11\frac{1}{4}$ miles. According to his estimate the "Kitty D." was $\frac{3}{4}$ of a mile north of the Canadian side of the boundary line, to which he would add, on the statement of Captain Jones, that the place of the "Kitty D's" nets was "five minutes north," a further $\frac{3}{4}$ of a mile—making in all $1\frac{1}{2}$ miles north on the Canadian side. But he admitted that he could only give the distances approximately.

The only witnesses for the Crown who gave evidence of the locality of the seizure were Captain Dunn and

Captain Spain, the latter only estimating the locality of the seizure by the report made to him by Captain Dunn.

“The following may be taken as a fairly condensed summary of the defendants’ evidence as to the seizure of the “Kitty D.” on the 3rd July:—

“Jones, her captain, said that he started from Dunkirk about five o’clock that morning, and steamed out for about an hour and five minutes N. by W. $\frac{1}{2}$ W. to where he had set his nets east by south on the 2nd July; that the buoy of his nets was about $9\frac{3}{4}$ miles from Dunkirk, and that his ship was seized by the “Petrel” at that distance from the United States shore. He also steamed out on the “Desmond” on the 7th on the same course, $9\frac{3}{4}$ miles, and found his nets and that one of the corks was then taken off with the owners’ mark, “R. & D.” on it, and that all the nets remained out until the 26th July, when they were taken up except one, which he left, and he asserts that he was fishing at the time of seizure on the United States side of the boundary line, and so stated to the captain of the “Petrel.”

“Dewitt, one of the hands on board the “Kitty D.” said they left Dunkirk about five or half past or six o’clock, and steamed out into the lake for somewheres in the neighbourhood of an hour. He also said that about the end of July he saw the “Kitty D.” buoy and fished around it.

“Helwig, the captain of the tug “Lucy,” said that on the 3rd July he was out from Dunkirk about nine or ten miles lifting his nets; that he was a little to the north of the “Kitty D.” with his outer net; that he saw the “Petrel” go to the westward and seize the “Kitty D.”; that on the 4th July he found that the “Kitty D.’s” nets, which had been set on the 3rd had crossed his, which he had previously set on the 2nd July north and south;

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that his most northerly nets were a mile to the north of the "Kitty D's"; and he is positive that the "Kitty D." was in United States waters at the time of seizure, and that his outer (north) buoy was also in the same water.

"Connor, the engineer of the "Lucy," said that on the 3rd July they were about a mile north of the "Kitty D." and saw the seizure; that their nets had been set on about the 2nd July north and south, and that in lifting them on the 4th they found that the nets of the which had been set on the 3rd had crossed the "Lucy's"; that their outer buoy was about a mile north of the "Kitty D.'s" nets. He also said that it took him about thirty minutes to get to his inside buoy, and that his nets extended out $3\frac{1}{4}$ or 4 miles and made their distance from Dunkirk about 7 or 8 miles. And he also said that at the time of seizure the "Kitty D." was in United States waters.

"Captain Howison of the United States navy, who had been sent by the Secretary of the Treasury of the United States to investigate the case, said that on the 27th July he left Dunkirk on the United States Revenue Cutter "Fessenden," preceded by the tug "Desmond," to show him the locality of the "Kitty D.'s" buoy; that they found it and had two corks taken off marked "R. & D.," and on returning to Dunkirk he logged the distance from the "Kitty D.'s" buoy, which he found to be $9\frac{1}{2}$ statute miles. He further stated that the International boundary line is about $11\frac{1}{2}$ miles from Dunkirk, and a little over two miles north of the western buoy of the "Kitty D.'s" nets. He also added that from where he found the buoy he could see the American shore, but not very well the Canadian shore.

"Mr. Harvey, consul for the United States at Fort Erie, went out from Dunkirk on the "Desmond" on the 7th July to the western boundary buoy of the "Kitty

D.'s" nets, Captain Jones of the "Kitty D." and others being with him; that the time going out was one hour and six minutes; that he logged the distance, which was found to be $9\frac{3}{4}$ miles; that he took off a cork with the initials of the owners, "R. & D." on which he put his own initials, and produced it at the trial; that in returning to Dunkirk it took one hour and seven minutes, and that the log showed $9\frac{3}{4}$ miles from where the "Kitty D.'s" nets were found.

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"Donnelly, the captain of the "Desmond" said he was setting nets on the 3rd July, and saw the "Kitty D." while about a mile south-east of the "Desmond"; that he was then about seven or eight miles from Dunkirk. He saw the "Kitty D." seized. He further said that he went out on the "Desmond" on the 7th July, with Mr. Harvey, Captain Jones and Mr. Ryan, one of the owners of the "Kitty D.," to take the distance from the shore to the "Kitty D.'s" buoy, and found the buoy, and took off one of the cords with "R. & D." on it; that the distance from Dunkirk to it was $9\frac{3}{4}$ miles, and that the time occupied was one hour and six minutes; and that on logging back the distance they found it the same.

"Burns, captain of the fishing tug "Charm," also went out on the "Desmond" on the 7th July and found the buoy of the "Kitty D.'s" nets less than one-eighth of a mile of $9\frac{3}{4}$ miles distance from Dunkirk, and took off a cork marked "R. & D." He also said that the place where they found the buoy was about $2\frac{1}{2}$ miles on the United States side of the boundary line.

"Jones, on being recalled, stated that when he took Captain Howison out they went to the most northerly buoy of the "Kitty D.'s" nets.

"Dechert, one of the owners, who went out with Captain Spain on the "Golden City" on the 8th July, and on the "Petrel" on the 9th July to find the "Kitty

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D.'s" nets, stated that they were unable to find their locality on both occasions.

"From the above it will be seen that the weight of evidence as to the place of seizure of the "Kitty D." is with the defence.

"But there are also incidents to be taken into consideration which seem to be material to the decision. In taking the turn into the lake from Long Point on the 3rd July, Captain Dunn stated that the rounding of the "Petrel" might increase the outward distance from Long Point by say 200 yards, and it might throw the ship out of her bearings that much, and that the turning might fluctuate from 200 to 500 yards off Long Point, which would seem to throw doubt as to the locality where the turning to the international boundary line actually took place; and to this he added that in taking a course along the international boundary line there would, of course, be some deviation from a straight course to the right or left—a fact which it is reasonable to assent to, seeing that the vessel was proceeding on a liquid highway and out of sight of any distinctive land-mark on the shores, and on this day through an atmosphere described in the log book 'wind, light baffling to calm; heavy thunder squall with rain,' and by several witnesses as, cloudy, raining, misty; weather thick, kind of squally, rainy weather, quite a storm came up that day.'

"Then with these atmospheric difficulties there was the inexperience of the seamen in the practice of steering a ship, and their recent acquaintance with the points of a ship's compass, which leaves it somewhat doubtful as to their knowledge of its deviations, and especially, as it came out in the evidence, that the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in a vessel's course over a distance of some thirty miles.

“ Add to this the fact that the buoy of the “ Kitty D.’s” nets was a red pole, ten feet high, with an oil-skin flag at the top, then a piece of a pair of overalls, and next below a piece of shirt, which, neither on the search of the “ Golden City” on the 8th, nor the search of the “ Petrel” on the 9th July, was discovered— although the course of the “ Petrel” on the 9th July is said by Captain Dunn to have been precisely the same as that taken by the “ Petrel” the day he captured the “ Kitty D.”

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“ It has been well said by Judge Black of the Quebec Admiralty Court that ‘ statements as to time and distance in maritime cases are probably more or less erroneous.’ And Sir Wm. Scott when dealing with the evidence of estimated distances at sea in the case of the ‘ *Twee Gebroeders*’ (1) at page 163 says: ‘ An exact measurement cannot be easily obtained, but in a case of this nature, in which a court would not willingly act with an unfavourable minuteness towards a neutral state, it will be disposed to calculate the distance very liberally.’ And this conclusion was approved by the United States Admiralty Court, ‘ *Soult v. L’Africaine*’ (2), at page 205. For, as Sir William Scott afterwards said (3) on page 338: ‘ It is scarcely necessary to observe that a claim of territory is of a most sacred nature. In ordinary cases where the place of capture is admitted it proves itself,’ but he adds that it is otherwise when it happens in places where it is contended that no right exists, and then, the facts on which the right depends must be competently established.

“ These cases affirm the doctrines of International Law, which have been truly stated in Bar’s Private International Law, page 1067-8:

‘ In the case of any real doubt the decision must be against the subjection of a ship to a territorial

(1) 3 Rob. 162.

(3) 3 Rob. 336.

(2) Bee’s Admiralty Reports 204.

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sovereignty. The hull of the ship presents at once to the mind the notion of the subjection of that ship to the law of her own flag. We cannot regard that subjection as removed unless some sensible and unmistakable cause for its removal has intervened. Any other determination of the question would involve legal relations in uncertainty and confusion.

‘On 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 them, just as in the case with rivers. But if there is a condominium of the surrounding states, we are forced to consider a ship in matters of civil law, while she is on a voyage on the lake, as a part of the territory from which she hails, just as we do in the case of a ship upon the high seas. As regards contentious jurisdiction there is a question about arresting a ship, but this expedient seems not to be desirable, because it might easily be abused, and would be exceedingly apt to lead to a small warfare of jurisdictions.’

“On the facts disclosed in the evidence, and aided by the authorities cited, I must find that the locality of the “Kitty D.” fishing on 3rd July last was not within the Canadian waters on the north of the international boundary line in Lake Erie, and that her seizure on that day by the cruiser “Petrel” cannot be sustained, and that an order do issue for her restoration to her owners.”

“TORONTO, December 3rd, 1903.

“Since disposing of this case the counsel for the Crown has moved for a certificate under sec. 15 of the Act respecting Fishing by Foreign Vessels, R. S. C.

ch. 94, that there was probably cause for the seizure of the "Kitty D." on the 3rd July last. That section provides that if such certificate is issued the owners 'shall not recover more than four cents damages, and shall not recover any costs, and the defendant shall not be fined more than twenty cents.' But I think section 20 of the Act relieves me of the responsibility of considering whether such a certificate should issue or not; for that section declares that 'the Act shall apply to every foreign ship, vessel or boat in or upon the inland waters of Canada.' My finding on the evidence was that this foreign ship, "Kitty D.", was not 'in or upon the inland waters of Canada' at the time of her seizure, and I must therefore hold that such finding negatives the statutory power to grant the certificate moved for.

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"By rule 132 of the General Rules in Admiralty Cases it is provided that costs are to follow the event, and under that rule the owners are entitled to their costs of this action against the Crown.

Newcombe K. C. Deputy Minister of Justice and *Kinnear* for the appellant.

German K. C. for the respondent.

C. H. Ritchie K. C. for the Government of the United States of America.

THE CHIEF JUSTICE.—I regret not to be able to concur in the allowance of this appeal that the majority of the court has agreed upon. It seems to me impossible to reverse the findings of fact of the court below without disbelieving the evidence of witnesses whom the judge who has heard them has believed. Now, I can see nothing in the case that would justify us in doing so. Then the judgment about to be rendered is based upon a question of fact

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raised for the first time in this court, and upon which, had it been directly raised at the trial, evidence might have been brought to affect it and elucidate it.

I am of opinion, with deference, that this should not be done. *City of Victoria v. Patterson* (1); *Owners of the Ship "Tasmania" v. Smith et al.* (2); *Lyall v. Jardine* (3); *Mussumat Imam Bandi v. Hurgovind Ghose* (4); *The "Tasmania"* (2), per Lord Herschell at page 225; *The Owners of S.S. "Pleiades" v. Page et al.* (5).

I would have agreed to a judgment ordering a new trial, so as to give the respondent an opportunity of meeting the point in question, but I cannot agree to a judgment against him. An appellant has no right so to ask us to act as a court of first instance.

SEDGEWICK J.—I am of opinion that the appeal should be allowed.

DAVIES J.—The "Kitty D." was an American tug boat engaged in fishing in Lake Erie in the year 1903. On the 3rd day of July of that year about mid-day she was seized by the Canadian cutter "Petrel" for fishing in Canadian waters, some two miles north of the boundary line. The line is not marked by buoys or otherwise across the lake, and the question for our determination was solely one of fact. Was the tug "Kitty D." at the time she was engaged with her nets in fishing on the 3rd July, and when a few minutes afterwards she was captured by the cruiser "Petrel" as she was running away south from her nets, on the Canadian or American side of the line? The contention on the part of the Crown was that the evidence shewed the nets and the tug boat to have been at least two

(1) [1899] A. C. 615.

(2) 15 App. Cas. 223.

(3) L. R. 3 P. C. 318.

(4) 4 Moo Ind. App. 403.

(5) [1891] A. C. 259.

miles north of the line, while for the defence it was contended that they were at least two miles south of the boundary and in their own waters. The differences are not reconcilable on any theory of mistakes of memory or misjudgment of distances on the part of the seizing officers, but can be accounted for possibly if the singular error with regard to the course sailed by the "Petrel" that day which seems by the report of the trial judge's decision to have been adopted by him was once accepted. I am inclined to think that the trial judge reached the conclusion he did very largely because of the error respecting the course of the "Petrel" with which his judgment opens. He says that Capt. Dunn stated

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that he left Port Dover on that morning (3rd July) at 6.30 o'clock and directed his officers to take the course to clear Long Point S. E. by S. $\frac{1}{4}$ S. which was the usual course in calm weather, but owing to the variation of the compass the true course would be represented E. by N. 7-8 N.

This unfortunate mistake has arisen from the trial judge confounding the course E. by N. 7-8 N. which is stated by Capt. Dunn to be the true course when running down the lake parallel to the boundary, with the course which he evidently thought she followed from Port Dover past Long Point towards the boundary line and before and until she turned down the lake. Comparing the charts produced in evidence with the concurrent testimony of all the witnesses for the Crown who could speak upon the point that the course the "Petrel" took and followed from Port Dover past Long Point towards the boundary line was S. E. by S. $\frac{1}{4}$ S. the error with which the learned judge starts of upwards of 7 points in the course is a fatal one. If the learned judge was correct in that and the officers of the ship wrong, he might well have distrusted their con-

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clusions as to their position in the lake some five hours afterwards. I also think the learned judge was led to look with doubt upon the testimony of the ship's officers by a discrepancy which he thought existed between their statements as to the course of the ship from Port Dover to the boundary line. The captain stated the course to be S. E. by S. $\frac{1}{4}$ S. The first officer, Inkster, and second officer, McPherson, both corroborated this and the seamen who were at the wheel confirmed it. No doubt was attempted in the argument at bar to be thrown upon a fact so clearly and indisputably proved. The printed record however in one part of officer Inkster's evidence omits the first letter S. and makes him say in one place that at 8 o'clock the course of the ship was E. by S. $\frac{1}{4}$ S. It does not appear whether the error was one of the printers or stenographers but the context of officer Inkster's evidence makes it quite patent that the omission of the letter S. on that line of the printed record was a mistake. The difference between the two courses is 4 points and if the course E. by S. $\frac{1}{4}$ S. had been the course followed, the steamer would have gone almost directly away from Long Point to the eastward and not towards the boundary line at all.

The learned judge in a later part of his judgment seemed to entertain grave doubts whether the position of a vessel on a lake could be determined with any degree of accuracy by its officers under the circumstances that accompanied the short voyage of the "Petrel" on the 3rd. After referring to Capt. Dunn's statement that the turning of the vessel might fluctuate from 200 to 500 yards off Long Point which the judge remarks

would seem to throw doubt as to the locality where the turning to the international boundary line actually took place

the trial judge goes on to say :

And to this he added that in taking a course along the international boundary line there would of course, be some deviation from a straight course to the right or left a fact which it is reasonable to assent to seeing that the vessel was proceeding on a liquid highway and out of sight of any distinctive land-mark on the shores, and on this day, through an atmosphere described in the log book as "wind light baffling to calm; heavy thunder squall with rain" and by several witnesses as cloudy, raining, misty, weather thick, kind of squally, rainy weather, quite a storm came up that day.

Then with these atmospheric difficulties there was the inexperience of the seamen in the practice of steering a ship, and their recent acquaintance with the points on a ship's compass, which leaves it somewhat doubtful as to their *knowledge of its deviations*, and especially, as it came out in the evidence, that the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in a vessel's course over a distance of some thirty miles.

I merely quote the above extract to shew that the trial judge evidently was under the impression that when a vessel sails on "a liquid highway out of sight of any distinctive land-mark on the shores" and is steered by men at the wheel whose knowledge of the deviations of the compass is somewhat doubtful, the course of such vessel may well be accepted as erratic and uncertain. But, as we know, sailors who steer ships are not supposed to know anything of the compass' deviation or to act on such knowledge if they do possess it. They simply steer the ship by the points shewn on the compass before them and under the direction of an officer. The captain of the ship when making up his run, either from the log or observation or both, in determining and marking his position on the chart makes the proper allowance for the deviation and variation of his compass. If the unfortunate wheelsman had to make the necessary allowances for deviation when steering, pitiable indeed would be the captain's position when he came to determine the ship's location. I have thought it desirable to call attention to what I conceive to be car-

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dinal errors in the trial judge's assumption of the facts in order to shew that his conclusions were not based upon any questions arising out of the demeanour or credibility of witnesses, matters which would be peculiarly within his province and with a decision upon which an appeal court would not interfere.

The question, it appears to me, we have to decide, is whether or not the evidence satisfies us beyond reasonable doubt that the "Kitty D.," at the time of her seizure was in Canadian waters, and had been immediately before her capture fishing there. We have had the advantage of having had the evidence for and against the Crown subjected to able criticism, and careful comparison and collation. So far as the direct evidence for the Crown is concerned, it would, if accepted, seem to leave no room for doubt as to the positions of the cruiser and the tug when the latter was seized. The direct distance across the lake at the point of seizure is $22\frac{1}{2}$ miles and the boundary line running through the middle of the lake would be $11\frac{1}{4}$ miles from the Canadian shore. At the time and place of seizure there was no land in sight, and it was therefore necessary to establish the position of the cruiser by reference to the courses and distances which she had sailed from the land.

The "Petrel" had sailed from Port Dover on the morning of the 3rd July, and had taken her usual course towards the boundary S. E. by S. $\frac{1}{4}$ S., passing Long Point light at a distance of about $\frac{1}{2}$ a mile, and with the light bearing directly abeam had set her patent Negus log to indicate the distance run from that point. It is not disputed that the Negus log is one of the most approved logs known to mariners for the purpose of registering distances sailed.

All these patent logs have to be corrected from experience.

The "Petrel's" log had been carefully tested and corrected and found by actual experience and measurement to over register $2\frac{1}{4}$ knots in every 40 knots.

Likewise her compass had been carefully tested and corrected for deviation and the variation in the locality, of course, was known.

In fact the "Petrel's" compass carried a quarter of a point westerly deviation and the variation was 3.30 degrees.

The "Petrel" then, according to her officers, having set her log with Long Point light abeam, on her compass course S. E. by S. $\frac{1}{4}$ S. continued that course until her log registered 5 knots, which brought her $1\frac{3}{4}$ miles to the north of the boundary line.

At this point she turned to run down eastwardly parallel with the line within Canadian waters, and her compass course was as usual from there E by N. $\frac{1}{2}$ N., which course she continued until her log registered 27 knots from the turn, making in all 32 knots from Long Point light.

Arrived at this point the "Kitty" D.. was sighted fishing about 2 miles to the northward of the *Petrel*, and a pursuit took place which ended in the capture of the former.

The pursuit lasted at full speed of both vessels for 10 minutes, the courses steered by the "Petrel" during that time beginning with a northwest course and changing to westward until, at the point of the capture. the "Petrel" was steering W. by N. a course considerably to the northward of that which the "Petrel" had sailed down the lake. The place of fishing, of course, was still further north.

The wind during the voyage of the "Petrel" down the lake was light, baffling to calm from the south-east.

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The effect of this wind if any would have been to set the "Petrel" further into Canadian waters during her voyage down the lake.

There were no currents or other conditions to affect the course of the "Petrel" on her voyage.

Immediately after the seizure Captain Dunn says he laid down the true position upon his chart, having regard to the courses and distances sailed. This chart, which is Exhibit 5, is a chart issued by the United States Government, and shows the boundary line at the point in question somewhat south of the middle of the lake. According to this chart, which was in use on the "Petrel" the seizure took place two miles north of the boundary.

The soundings at this point as shewn by the chart gave $15\frac{1}{2}$ fathoms, and upon taking the soundings subsequently to verify the position it was found that they corresponded absolutely.

Commander Spain says that when on board the "Petrel" using the same compass and log, on the 9th July following the seizure, he verified the position as stated by Captain Dunn, starting from Long Point and running the same courses and distances.

Having thus arrived at the point of seizure, Commander Spain steered directly to the nearest Canadian land, to which he approached within three quarters of a mile, being as near as the vessel could go—the distance so sailed being 9 knots by the "Petrel's" log.

The place of seizure is, therefore, established by his evidence to have been precisely 9 knots according to the "Petrel's" log, plus $\frac{3}{4}$ of a mile, from the Canadian shore. Making the correction mathematically for error in the "Petrel's" log:

9 knots of "Petrel's" log=8.52 true knots.

8.52 knots=9.79 statute miles.

9.79 statute miles (being the distance logged) plus $\frac{3}{4}$ of a mile (being the distance from land)=10.54 miles.

The seizure, therefore, if his premises are accepted, took place $\frac{3}{4}$ of a mile, as nearly as may be, north of the middle of the lake, which is the boundary line.

The "Kitty D" had run according to her own admission about a mile towards the American shore from where she was fishing previous to the seizure.

According to Captain Dunn, she had run considerably further, because when the pursuit began the "Kitty D." was about 2 miles to the northward of the "Petrel," and the pursuit lasting ten minutes ended by the seizure only $2\frac{1}{2}$ points north of the "Petrel's" course coming down the lake. Upon the most favourable conclusions for the defence therefore, accepting the accuracy of the courses and distances run by the "Petrel" from Port Dover that morning, the fishing took place $1\frac{3}{4}$ miles within Canadian waters.

At the hearing I was much impressed with the argument presented by Mr. German with respect to this exact location and the corroborative evidence the Crown had offered in Captain Spain's test. Mr. German submitted that accepting the evidence of Captains Spain and Dunn with regard to this distance the result shewed that the "Petrel" was at the place of capture well south of the boundary line instead of about a mile north of that line. This however is erroneous and is caused mainly by omitting to allow mathematically for the error in the "Petrel's" log proved by Captain Dunn. I have made the necessary correction in this respect and have shewn that, assuming the courses and distances proved by the officers of the "Petrel," to be correct the seizure was $\frac{3}{4}$ of a mile or more north of the boundary. I see no reason whatever to justify this court in declining to accept the evidence of Captain Dunn and his officers Inkster and McPherson. With respect to Slade and Campbell, the wheelmen, they steered the ship as ordered and always with

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one of the officers standing by to see that the course was correctly kept. It is not a question of their being a few hundred yards north or south of where they believed themselves to be. It is a question of from 4 to 6 miles on a short run of 32 miles and to throw over this mass of evidence unless some very strong doubts are thrown upon its accuracy by some proved facts would, in my opinion, be impossible.

Now the facts upon which we are asked to disbelieve or not to accept the evidence for the "Petrel" are the statements of Capt. Jones and Dewitt, one of the hands of the tug seized, and of Captain Hellwig of the fishing tug "Lucy" and Thomas Connor, her engineer. This latter tug was near the "Kitty D." at the time and also steamed away, or, as the witnesses say, "ran away" southward towards the boundary line, the moment the thunderstorm cleared up and shewed her the cruiser. Capt. Donnelly, of the tug "Desmond," is also referred to as confirming the evidence of the other witnesses respecting the place of fishing. I have very carefully gone over the evidence of each of them. The locality of the seizure is variously stated by them to have been from 6 to $9\frac{1}{4}$ miles from Dunkirk depending upon uncertain estimates of time, distance and speed. These tugs did not carry or use any log, or chart or keep any log book. The witnesses relied entirely upon their memory and judgment as to time, distance and courses. When out of sight of land, as they admittedly were on the occasion of the seizure, it must be apparent that their judgment would often be at fault, and that the best they could do would be to form an approximate judgment, the accuracy of which would depend largely upon experience and might vary with the interest the witness had. Mr. German argued that because when seized Capt. Jones stated that he felt quite sure he was within his own waters, the statement made at the

moment ought to be accepted as some evidence of his *bonâ fide* belief. But even if it was so accepted *bonâ fide* belief would not alter actual facts and the very fact that every one of the tugs in the vicinity including the "Kitty D." and the "Lucy" started full steam southward apparently to escape from the cruiser is strong evidence against even the existence of such *bonâ fide* belief. In this connection I noticed a statement made by Dewitt the seaman aboard the "Kitty D." He was asked :

Q. Were there many other fishing tugs out in the lake at that time ?

—A. Yes. There was quite a lot of others around there.

Q. Any further out in the lake than your boat ?—A. Yes. One was outside of us, to the north of us, one or two of them.

Q. One or two of them were out to the northward of the "Kitty D." ?

—A. Yes, when the "Petrel" saw us I would say there was one to the north of us, it must have been a couple of miles. *We were wondering why the "Petrel" didn't go and seize them ; he could have got them all right.*

Now why would they wonder the "Petrel" did not go and seize the tug to the north if they thought themselves in American waters ? Mr. German, however, relied chiefly upon the positive testimony respecting the locality in which the nets of the "Kitty D." were found by the witnesses who went out with Capt. Jones on the 7th July, Capt. Donnelly of the tug "Desmond," Capt. Burns of the tug "Charm," and American Consul Harvey and Capt. Harrison, who went out on the 26th July.

It is not necessary, however, in my judgment, to discredit the testimony of any one of these gentlemen as to what they saw or was shown to them on either of these occasions. Their testimony is not inconsistent with the fact that the "Kitty D." had set out her nets and was fishing on the 3rd July in Canadian waters. The nets so set out by her on the 3rd may well have been removed before the 7th and set south of the line,

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or, as seems much more probable, in fact almost certain from the evidence, the "Kitty D." had two sets or gangs of nets, and the gang of nets seen by and shown to the witnesses on the 7th and 26th, and which were not taken up until after the latter date, were those which were set on the day before the seizure. As to the removal of the "Kitty D.'s" nets which were set by her *on the day of the seizure*, it seems to be explained by Thomas Connor, the engineer of the "Lucy," who said, in answer to Mr. German :

Q. You say that when you saw the "Petrel" seize the "Kitty D." you took up what nets had been set on the 3rd?—A. *It was the "Kitty D.'s" nets that she set on the day she was seized.*

Q. On the 3rd July you saw the "Petrel" seize the "Kitty D."?—A. Yes.

Q. At that time had you set any nets from the tug "Lucy"?—A. *These nets that she crossed ours were set on the 2nd July.*

Of course it was not essential to the case for the Crown to prove the removal of these nets, but to appreciate the full significance of this statement of the witness Connor, it must be remembered that the "Lucy" had not set her nets on the morning of the seizure. She was "getting ready to do so," as her captain says, but had not got them out. The nets that were out were those set by the "Kitty D." and left behind her when she steamed away, and it was these nets the "Kitty D.'s" "nets that she set on the day she was seized" that the "Lucy" "took up." But they did not cross the nets set out by the "Lucy" on the 2nd, away to the south. That fact stated by Connor would sufficiently account for the inability of Captain Spain in the "Golden City" to find them on the 7th, four days after the seizure even with such assistance as Captain Jones of the "Kitty D." gave. Connor does not answer question 95, put to him by Mr. German, whether at the time he saw the "Petrel" seize the "Kitty D." they had set any nets from the tug "Lucy." He gives what might seem

an irrelevant answer. But Captain Hellwig, of the "Lucy," puts that important and vital question at rest. His evidence as to what he did and did not do when he saw the "Petrel" is as follows :

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Q. When the "Petrel" came along and seized the "Kitty D.," did you put all your nets down?—A. I started in for the south shore.

Q. When you saw the "Petrel" ?—A. Yes.

Q. Before you saw her had you set any nets?—A. I was getting ready to start.

Q. Had you put any nets down before you saw the "Petrel" ?—
A. No.

Q. But you were getting ready and were going to put them down ?
—A. Yes.

Q. And when you saw the "Petrel" you steamed for the south side ?
—A. Yes.

Q. As fast as you could go ?—A. No.

Q. What is your speed ?—A. Seven and a half ; but we can go eight or nine miles.

Q. What steam did you carry then ?—A. One hundred and ten pounds.

Q. Are you the master of your boat ?—A. Yes.

Q. What is her name ?—A. The "Lucy."

Q. You were at the wheel, I suppose, when you started for the south side ?—A. Yes.

Q. Did you come back to where you were setting those nets that day ?—A. No.

Q. Did you set your nets that day ?—A. Yes.

Q. Afterwards ?—A. Yes.

Q. At what time ?—A. After 12 o'clock, we started.

Q. It was about 12 o'clock that the boat was seized ?—A. Yes.

Q. How far did you run toward the south shore ?—A. I should judge about a mile.

Q. Did you see the "Petrel" take the "Kitty D." in tow ?—A.
Yes.

Q. And steam away for the Canadian side ?—A. Yes.

Q. You saw her do that ?—A. Yes.

Q. Then you went back to this place and put your nets down ?—A.
Yes.

Q. You put your nets down from where you had run to ?—A. Yes.

Q. In what direction ?—A. South.

Q. You went south putting down your nets ?—A. Yes.

Q. That was after they had taken the "Kitty D." away to the Canadian side ?—A. Yes.

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Q. Whereabouts from where you began to put your nets down was it they seized the "Kitty D."—A. A little to the west—about a mile—not a mile.

Q. A little to the north?—A. It might have been a trifle, but not much.

By His Lordship :

Q. A mile where?—A. About a mile from where I was setting the nets to where the "Kitty D." was seized.

Then the further evidence of Hellwig, shows beyond reasonable doubt to my mind, first, that each tug has two sets of nets, and secondly, that the set put out by the "Kitty D." on the day she was seized was not the set which crossed Hellwig's. He says :

Q. In the setting of the "Kitty D.'s" nets east and west did they come in contact at all with your nets that were set north and south?—A. Yes.

Q. Were they across yours or were yours across the "Kitty D.'s"?—A. They were across the gang I had set the 2nd day of July ; and I went across them with the gang I was setting on the 3rd ; I had two sets.

I admit other parts of his evidence do not seem consistent with this, but when it is recollected that he had not put out his nets on the day of the seizure until after the "Kitty D." had been seized, and after he had run away he judged *a mile to the southward*, it does not seem to leave room for doubt that both tugs had two sets, that the "Lucy's" set put out on the 2nd were crossed by a set of the "Kitty D.'s" put out on the same day, or at the utmost on the early morning of the third, and that both of these were within American waters and were again crossed by the second set of the "Lucy's" nets put down after she had seen the "Kitty D." captured on the third, and had herself escaped into her own waters. The second set serves to explain and make consistent the evidence of all the officers and men who speak of the place where they saw the "Kitty D.'s" nets on the 7th and 26th. There was no

suggestion on the part of either Jones or Dewitt of any crossing of the nets of the "Kitty D." put out just before the capture. The "Lucy's" nets were not put out till after the capture and after she had run away to the southward and was satisfied she was in her own waters.

On the whole I am of the opinion that no room for reasonable doubt exists as to the fact of the "Kitty D." having been engaged in fishing in Canadian waters on the morning of the 3rd July and being in those waters at the time of her capture. I think, therefore, the appeal should be allowed with costs, and judgment of condemnation of the tug "Kitty D." her tackle, apparel and appurtenances awarded with costs.

NESBITT J.—I concur in the judgment of Mr. Justice Davies which I have read, and would only add that it appears to me the case is another illustration of the clash of scientific accuracy with human guess work. Either ships can be and are run by the improvements of modern science so that a captain can tell where he is without the sun, or all our boasted advances are naught. If compasses and logs, &c., are to be defeated by the judgment or estimate or guess of interested fishermen, poaching is made easy.

KILLAM J. concurred in the judgment allowing the appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Louis Kinnear.*

Solicitors for the respondents: *German & Pettit.*

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