

No. 5.

[Extract from the Halifax Daily Reporter and Times, Novr. 15, 1871.]

In the Vice Admiralty Court, 1871.

The "J. H. Nickerson."

"Sir William Young, Judge Vice Admiralty, pronounced the following judgment in the above cause:—

"This is an American Fishing vessel of seventy tons burthen, owned at Salem, Massachusetts, and sailing under a Fishing License issued by the Collector of that Port, and dated March 25th, A. D., 1869. In the month of June 1870, she was seized by Captain Tory of the Dominion Schooner *Ida E.*, while in the North Bay of Ingonish, Cape Breton, about three or four cable lengths from the shore; and it appeared the offence charged against her was that she had run into that Bay for the purpose of procuring bait, had persisted in remaining there for that purpose after warning to depart therefrom, and not to return, and had procured or purchased bait while there. This case, therefore, differs essentially from the cases I have already decided. It comes within the charge of a preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the Treaty of 1818. In giving judgment 10th February last, in the case of the *A. J. Franklin*, I referred to the case in hand, and stated that I would pronounce judgment in this also in a few days, which I was prepared to do. But it was intimated to the Court that some compromise or settlement might possibly take place in reference to the instructions that had been issued from time to time to the cruisers, and to the negotiations pending between the two Governments, and I have accordingly suspended judgment until now, when it has been formally moved for.

"The same arguments were urged at the hearing of this cause as in the case of the *Wampatuck* on the wisdom of the Treaty of 1818, and some severe strictures were passed on the spirit and tendency of the Two Dominion Acts of 1868 and 1870. To all such arguments and strictures the same answer must be given in this as in my former judgments. The libel sets out in separate articles these two acts with the Treaty, and the Imperial Acts of 1819 and 1867, all of which are admitted without any question raised thereon in the responsive allegation. I must take them, therefore, both on general principles and on the pleading, as binding on this Court; and it is of no consequence whether the Judge approves or disapproves of them. A Judge may sometimes intimate a desire that the enactments he is called upon to enforce should be modified or changed; but until they are repealed in whole or in part, they constitute the law, which it is his business and his duty to administer.

"Our present enquiry is, what was the law as it stood on the Statute Book on the 30th June, 1870, when the seizure was made? The Court, as I take it, has nothing to do with the instructions of the Government to its officers, and which, if in their possession on that day, might have induced them to abstain from the seizure of this vessel, or may induce the Government now to exercise the power conferred on them by the 19th section of the Acts of 1868.

"But before pursuing this inquiry, let us first of all ascertain the facts as they appear in evidence. For the prosecution, there were exhibited the examinations duly taken under the rules of 1859, of Capt. Tory and thirteen of his crew, all of whom were examined on cross interrogatories.

"Capt. Tory testifies that he boarded the vessel at Ingonish, on the 25th of June, and the master being on shore, that he asked the crew then on board, what they were doing there, and they said they were after bait, and had procured some while they were there after coming in, and wanted more. About an hour after he saw the master, and told him he had violated the law, that he had no power to allow the vessel to remain, and that he had better leave. On the 26th the vessel was still there in the harbor, and Capt. Tory boarded her and saw fresh herring bait in the ice house; and Capt. McDonald, the master, admitted that he had procured said bait since his arrival; and he afterwards admitted that he had violated the law, and hoped that Captain Tory would not be too severe with him; and as he promised to leave with his vessel, Capt. Tory did not then seize her. She went to sea the same night, but on the 30th was found again at anchor in the same place where Capt. Tory boarded her; and judging from the appearance of her deck, that she had very recently procured more bait, which he saw the next morning, he seized her. In his cross-examination, he says that the herrings he saw on the first occasion in the ice-house on board were fresh, but had been a night or two in the nets, which caused them to be a little damaged; and were large, fat herring, and similar to those caught in the vicinity of Ingonish at that season of the year. The herrings he saw on the second occasion were also fresh, newly caught, with blood on them, of the same description, except that they were sound.

"This evidence, in its main features, is confirmed by several of the crew. Grant went into the ice-house by order of his captain, and there saw about five or six barrels of fresh herring bait and a few fresh mackerel. There were scales of fresh fish on the rails, from which witness judged that they had taken fish that morning. Capt. Tory then seized the "Nickerson" and placed witness on board as one