

mackerel, and was then about a mile from the shore. The witness saw no mackerel caught, and no fish thrown overboard. Rodenizer states that the *A. J. Franklin* and his vessel lay 100 yards apart. The skipper of the *A. J. Franklin* said "mackerel were scarce; he did not do much yet." He was at the bait box. The crew were preparing for fishing on the starboard side, which is the invariable usage. David Heckman says "we were on the starboard bow of the *A. J. Franklin*. She had her mackerel lines out, and they were heaving bait. She continued trying for mackerel till after the *Ida E.* fired the second time, when the crew hauled in their mackerel lines, hoisted jib, trimmed their sails, and stood off out from the fleet, and set staysail. Thomas Herman says, four of the crew of the *A. J. Franklin* were fishing for cod-fish—the skipper was throwing bait for mackerel, and threw his mackerel lines—others were on the rail on the starboard side, looking over. She was hove to, jib down, foresail and mainsail up, and sheets off on port side. Peter Heckman states that he saw some of the crew of the *A. J. Franklin* trying to catch mackerel—they threw their lines over the starboard side—they threw bait over to raise mackerel—they were throwing bait with lines over, trying for mackerel, as the *Ida E.* approached—the crew, after she fired, hauled in the lines, hoisted jib, and stood off the shore. The crew cheered and shouted as they got out of the fleet, and set their staysail. George W. Nass says that he saw some of the crew of the *A. J. Franklin* heaving bait, and they had mackerel lines out on the starboard side. She was hove to, jib down, mainsail and foresail to port, as is usual in fishing for mackerel—she was then within two miles of Broad Cove shore, and about three miles to westward of Seawolf Island. When the *Ida E.* came from the westward, the witness heard skipper Nass call out something to one of the other vessels—the reply to him was that it was one of the cutters. The *A. J. Franklin* then hauled in her mackerel lines, and hoisted her jib, and stood to the northward, and then set her staysail.

"Neither this witness nor any of the others saw any mackerel caught, nor any fish thrown over from the *A. J. Franklin*.

"The case for the prosecution is strengthened by certain declarations of the crew, which were not objected to at the hearing, and being against their interest as sharesmen, are receivable, I think, in evidence.

"Captain Tory testifies that he heard several of the crew of the *A. J. Franklin* say on the day of the seizure at the Strait of Canso, that after he left their vessel at Broad Cove, they advised Captain Nass to clear out of the Bay, and go immediately home—that Capt. Tory would find out they had been fishing, and seize them, and that they would lose their fish, to which Capt. Nass replied, that he would like to try a few days longer—that Capt. Tory had been aboard, and was not likely to trouble them again, or such like words.

"Sullivan heard one of the crew make a like declaration; and McMaster heard one of the crew say, that after the *A. J. Franklin* was seized, that they had caught mackerel the morning Capt. Tory boarded them off Broad Cove.

"Of the depositions for the defence, that of Regis Raimond, who was first mate of the *Ida E.*, merely repeats what has been already stated—that Capt. Tory, after he boarded the *A. J. Franklin*, assigned as his reason for not seizing her, that he had found no fish taken that morning, and did not think they had been fishing. The seizure, obviously, resulted from information subsequently received.

"The depositions of Capt. Nass and two of his crew, go much further, and deny a fishing, or preparing to fish altogether. They allege that the jib was let down to prevent their running into another vessel that was ahead. On no day, say they, between the 1st and 15th October, had the *A. J. Franklin*, or any of her crew been fishing or preparing to fish, or had fished, within three marine miles of the North West coast of Cape Breton. On the morning of the 11th they sailed from Port Hood towards Broadcove. After hoisting their jib to go to East Point, and having got outside of the fleet, a gun was fired from the *Ida E.* They continued on their course, and, after running about half-a-mile, a second gun was fired, when the *A. J. Franklin* hove to, and was boarded, and, after enquiry, was let go. This is the substance of Captain Nass's affidavit, who states also that Captain Tory was doubtful or reluctant to serve him, and in his statement of what occurred on the 11th he is confirmed by Morash and Mitchell.

"These three deponents, in fact, are in direct conflict with the six men who have given evidence from Lunenburg. All the minute circumstances they have detailed—the first, that the *A. J. Franklin* was in the centre of the fleet,—that, within 100 yards of the Nova Scotia vessels she was in the position for fishing, throwing bait to attract the mackerel, and with her lines down,—her hasty retreat on the approach of the cutter—all are to be rejected as fabrications, and the six witnesses from Lunenburg, who have no interest in the matter, to be disbelieved. I need not say that no Court could come to such a conclusion, and for all the purposes of this suit, the evidence of these Lunenburg men must be taken as substantially true.

"To what result, then, does it tend. On the charge of preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the treaty—I shall say little in this judgment, because it will be the main enquiry in the judgment I am to pronounce in a few days in the far more important case of the *J. H. Nickerson*. Had I considered the facts in this case to amount to nothing more than a preparing to fish, I would have postponed my decision till the other was prepared and delivered. But I look upon the throwing of bait—the heaving to with sheets off, and the jib down, and the vessel thus lying in the position to catch mackerel, with the mackerel lines out, and hauled in on the approach of the cutter—these circumstances, coupled with the declaration and actions of Captain Nass, bring the case clearly, as I think, within the meaning of the Dominion Acts of 1868 and 1870, as a fishing, and subject the vessel