# THE FAME.

Case No. 4,634.
{3 Mason, 147.}[1]

Circuit Court, D. Maine. Oct. Term, 1822.

BOUNDARIES—BETWEEN UNITED STATES AND BRITISH PROVINCES—MIDDLE OF STREAM—EXCLUSIVE OCCUPATION.

1. The true line of territorial boundary between the United States and the British provinces on the bay and waters of Passamaquoddy, is the middle of the stream or channel between the territories of the nation, running the line at low water mark.

{Cited in The Atlantic, Case No. 621.}

2. Where there is no exclusive occupation of a river or bay, the law of nations gives to the nations inhabiting the opposite sides a territorial jurisdiction to the middle of the stream.

{Cited in Open Boat, Case No. 10,548.}

3. But each nation may also have a common right of passage and navigation over the whole river or bay, where it is necessary for the convenient access and trade of its own ports.

{Cited in Open Boat, Case No. 10,548.}

{Cited in Mahler v. Transportation Co., 35 N. Y. 355.}

Libel on information of seizure for a violation of the coasting act of 1793, c. 8 {1 Stat. 305}, and the revenue act of 1799, c. 128 {1 Story's Laws, 573; 1 Stat. 627, c. 22}. At the trial at October term, 1821, the acts of illicit trade being proved to be in Passamaquoddy bay, the principal question was, whether they were done within the territorial limits of the United States, or within the British waters.

The deposition of the person who made the seizure, was offered in support of certain facts, on behalf of the United States, and objected to by the counsel for the claimants {B. Adams and others}, on the ground, that he was interested in the event of the suit, being liable for damages, if the seizure was wrongful, even though he had no interest in the forfeiture. But the court overruled the objection, saying that the admissibility of such a witness had always hitherto been allowed in practice upon the ground of public policy; that the liability of the party was remote and contingent, and probable cause of seizure would excuse him; and that to deprive the government of his testimony would, in many cases of seizure, be equivalent to an acquittal, since seizures were often made under circumstances conclusive of guilt, but of which no proof could be effectually obtained, except from persons concerned in the seizure. As, where goods were found concealed, or in remote places, or disguised; and where an immediate seizure must be made, or the goods, though loaded with the strongest presumptions of guilt, would be carried beyond the reach of the law. Officers of the customs and others entitled to a part of the forfeiture were made competent witnesses by the revenue acts. Yet if this objection could now prevail, all such officers,

who made or adopted the seizure, as collectors, &c., would he excluded; which certainly could not have been the understanding of the legislature.

It appeared in evidence, that there had been a sort of conventional understanding between the American and British collectors at Passamaquoddy, as to what line they would deem the true boundary line of their respective governments; and there was strong proof that the acts of illicit trade were committed on the American side of that line, which was about one third way over between Moose island and Campo Bello Island. If the middle of the stream constituted, by the law of nations, the true line, then it was admitted by the parties, that the illicit acts were done within the American waters.

Shepley, for the United States, contended, that the line agreed upon by the collectors was not binding upon either government. The line could only be fixed by a national compact. If not so fixed, it must be decided by the general principles of the law of nations, which gave title to the middle of the stream. Neither the treaty of 1783 nor of 1815 fixed any definite line. There was no prior occupancy or exclusive possession, and therefore the law of nations must govern. He cited Vatt. Law Nat. bk. 1, c. 22, §§ 266, 274; Mart. Law Nat. bk. 4, c. 3, §§ 3, 4; {Handly's Lessee v. Anthony} 5 Wheat. {18 U. S.} 379.

Mr. Longfellow, for claimants, contended, that the conventional line of the collectors might be considered as an agreed line of occupancy by the governments. That if not so, still the general principle of the middle of the stream was not applicable; for, before the Revolution, the British had an exclusive occupancy of the whole waters of the bay, and if they had ceded nothing by the treaty of 1783, they still held the exclusive right to the whole.

The cause was continued for advisement to the next October term, and at that term the following opinion, in substance, was delivered by the court:

STORY, Circuit Justice. The general principle in relation to the rights of a nation to rivers and bays, of which it has an exclusive and prior occupancy, is laid down by Vattel and Martens in the passages cited at the bar, need not be disputed. Whether there has been, in point of fact, such an exclusive occupancy, is often a matter of great difficulty to ascertain. The nature, breadth, and extent of a river or bay, and the necessity of its constant use, in all parts, for purposes of trade and navigation, by the nations inhabiting the opposite banks must, in many cases, repel the supposition of an exclusive right. Where no such exclusive right exists, the general principle of the law of nations, as deduced from the authorities, is, that each nation has a right to go to the middle of the stream, calculated from low water mark, as the limit of its territorial boundary. This doctrine has been affirmed by the supreme court in the case of Handly's Lessee v. Anthony, 5 Wheat. {18 U. S.} 374. But although the territorial line of a nation, for purposes of absolute jurisdiction, may not extend beyond the middle of the stream; yet, consistently with this doctrine, the right to the use of the whole river or bay for the purpose of navigation, trade, and passage,

may be common to both nations. Such a right does not destroy the territorial jurisdiction to the middle of the stream; but it is in the nature of an easement as it is called at the common law, or a servitude, as it is called in civil law. It is like the right of a highway, or private way, over the land of another. This right of passage and navigation must exist, as a common right in all those cases, where such passage or navigation is ordinarily used by both nations, and is indispensable for their common convenience, and access to their own shores. A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all times. If, in such a case no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of passage and navigation in both. These are all the principles which I think it necessary to bring into review on this occasion, so far as the case stands upon the general law of nations.

There is no pretence to say, that Great Britain had, as to us, acquired, previously to the revolution, any exclusive right to the waters of Passamaquoddy bay. These waters were common to all the subjects of the realm; and just as much a part of our right and inheritance, as of any other of the British dominions. The American colonies used them on all occasions; and the province of Massachusetts, which was contiguous to the bay, and perpetually used the waters for the purpose of navigation, and trade, and passage, might just as well be deemed the proprietor, as the province of New Brunswick, or as the realm of England. In truth, the law of nations must, under such circumstances, be presumed silently to prevail, and annex the bay to the middle of the stream, to the territories of the adjacent provinces;—and as there was at all times a common right of passage and navigation exercised over the whole bay, and it was necessary for the convenience of all parties, the whole waters must be deemed common for these purposes. When the separation took place by the American Revolution and the treaty of peace, if nothing was stipulated on either side, the status ante bellum prevailed, and there was a continuance of the old rights and privileges.

The treaty of peace of 1783 contains nothing definite on this subject. It fixes generally the eastern boundary line of the United

States on the Bay of Fundy, of which Passamaquoddy bay is part; but it is silentasto the exact line, and the use of the waters. No subsequent treaty has changed or in any shape regulated the general rights growing out of the law of nations on this subject; and therefore, as I conceive, they remain in full force. In the negotiations which have taken place between the governments of Great Britain and the United States, as to this boundary, and which ended in conventions, which, though not ratified, are not understood to have involved any real difference of opinion on this particular point, the view taken by both governments seems entirely in harmony with that of this court. The conventions of 1803 and 1807, take the middle of the channel between the islands belonging to the respective nations, to be the true and proper line.[3] This is the same rule which results from the general law of nations.

As to the line agreed upon by the collectors, it cannot for a moment be admitted as of any validity. They were not public agents intrusted with such negotiations; and their acts are not to be construed as indicating the sense of either government.

Upon the whole, my opinion is, that the Fame, being within the jurisdictional waters of the United States, and on this side of the middle of the channel, when she committed the illicit acts for which condemnation is sought, is brought within the forfeiture. Decree of condemnation accordingly.

[1] {Reported by William P. Mason, Esq.}

[3] See 8 Wait, St. Pap. 387–394; 10 Wait, Confid. St. Pap. p. 470.