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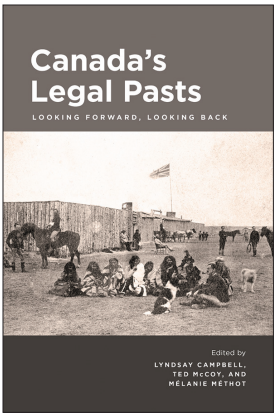

CANADA'S LEGAL PASTS: Looking Forward, Looking Back

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The Last Voyage of the *Frederick Gerring, Jr.*

Christopher Shorey[*]

Twenty-fifth of May 1896. It was late in the afternoon, on a calm day, off the southern coast of Nova Scotia. The Canadian Dominion cruiser *Aberdeen* steamed alongside the American fishing schooner, the *Frederick Gerring, Jr.* The *Gerring*'s crew were busy bailing fish from the purse seine into waiting barrels on deck. The ship's master, Captain Daniel Doren, stepped to the gunnel to speak to the *Aberdeen*'s master, Captain Charles Knowlton. Knowlton told Doren that he was seizing the *Gerring* for fishing in Canadian waters within three miles of the coast, contrary to the treaty of 1818 that established the boundary between the United States and British North America, as implemented through British and Canadian statutes that prohibited foreign ships from fishing in Canadian waters. The *Gerring* would never fish again.

At the admiralty court trial in Halifax, the parties focused on whether the *Gerring* had indeed been within three miles of land when apprehended by the *Aberdeen*. Chief Justice McDonald found that it was. Specifically, the ship was within three miles of a small Canadian island named Gull Ledge and therefore in violation of the treaty.[1]

The owner of the *Gerring*, Captain Edward Morris, appealed the admiralty court's decision to the Supreme Court of Canada. On appeal, the parties assumed the fish had entered the nets in international waters. The parties focused on the legal question of whether the *Gerring* was still

actually "fishing" when it was found in Canadian waters and was therefore in violation of the 1818 treaty, UK legislation, and Canada's *Act Respecting Fishing by Foreign Vessels*, none of which contained a definition of fishing.[2] This issue was tied to a determination of the point at which the *Gerring* had taken possession of the fish. Once possession was complete, the fish legally were no longer wild animals but became the ship's property—at which point the *Gerring* was no longer fishing.[3] The relevant questions were: (a) were the fish captured once secured by the seine, in which case they were caught in international waters and the crew *were not* "fishing" when approached by the *Aberdeen*; or (b) were the fish only captured once secured in barrels on the deck of the *Gerring*, in which case the crew *were* still fishing when the *Aberdeen* arrived?

The Supreme Court favoured the latter interpretation and, on 1 May 1897, upheld Chief Justice McDonald's judgment against the *Gerring*.[4] Undeterred, Morris sought a political solution and pleaded for help from his congressmen and senators. It seemed to work. The Canadian government immediately offered to return the vessel in exchange for a nominal fine. However, Morris rejected the offer, causing significant political embarrassment, the reverberations of which lasted for decades.

After an impasse and many years of delay, the case was included in an international arbitration of outstanding claims between the United States and Great Britain. In May 1914, after eighteen years, it finally seemed that the matter had settled. However, for the second time in the case's history, the perceived resolution failed to materialize. Despite reports in newspapers and legal journals that the case was over, Canada refused to recognize the settlement. The last record of the *Gerring v. Canada* is from 16 October 1924, when Canada, while agreeing to pay the other awards from the international claims arbitration, reaffirmed that it would not pay for the *Gerring*.[5]

Justice Désiré Girouard's concurring reasons for judgment at the Supreme Court of Canada cite and reproduce large sections of a famous New York case about fox hunting from 1805, *Pierson v. Post*.[6] Despite being over two hundred years old, the *Pierson* case is still widely cited in legal academia and taught in Canadian law schools as establishing the rule that one must capture a wild animal in order to possess it. However, the application of the rule is not restricted to wild animal cases. Its use in law

school classrooms and legal literature helps shape our understanding of property law, the legitimacy of claims to possession of all kinds of wild or "fugitive" resources, and even the concept of ownership itself.[7] However, despite the case's importance in legal academia, there has been no academic comment on its prominent link to the Supreme Court's decision in *Gerring v. Canada*, which remains the only case that includes an extensive judicial consideration of *Pierson*.[8]

As a foundational decision for generations of North American lawyers, *Pierson*'s uptake and incorporation in Girouard's judgment warrants greater scrutiny for *Gerring v. Canada*. This is especially so considering the aftermath of the case, which suggests that Canadian political and economic needs, rather than abstract legal concepts, were the ultimate driving force behind the *Gerring*'s fate. The case sparked international scandal, was a thorn in the side of the Minister of Fisheries and Oceans for over a decade, came across the Prime Minister's desk more than once, was energetically covered by the press, and singlehandedly delayed international arbitration proceedings between Great Britain and the United States. More than twenty-five years after the Supreme Court's decision, the controversy was still, unbelievably, live. The extent of Canada's boundaries, its ability to enforce them, and Canada's recent independence from Britain were all at stake in this case and were probably more significant for Canada than whether the *Gerring* took a net or a barrel to catch a fish.

Gerring v. Canada is *the* case that incorporated *Pierson*-style first possession principles into Canadian law. Whether it is only recognized as such, or whether it also sparks further conversation about the legitimacy of these principles in Canadian law, depends on the legal community. Regardless of its legacy, the extraordinary history of the case should be a part of the conversation.

The primary sources for this chapter are the British and American "memorials" that were assembled for the international claims arbitration. These memorials include the transcripts from trial, the factums filed with the Supreme Court, and exhibits from trial such as copies of the chart showing the *Gerring*'s location. Most of the information from the time period after arbitration came from Canadian government correspondence retrieved from the National Archives.[9]

The Arrest of the *Frederick Gerring, Jr.*

The story begins in the late spring of 1896, in the bustling seaport of Gloucester, Massachusetts. Gloucester was renowned for its fishing schooners. Thousands of its handsome wooden sailing ships plied their trade on the east coast and throughout the Maritimes. Every Canadian knows what a fishing schooner looks like, as the famous *Bluenose* is on the face of the dime.

The life of a fisherman was exceedingly dangerous. Between 1860 and 1906, over six hundred fishing vessels were lost at sea from Gloucester alone, either to heavy weather or wrecked on shoals and islands.[10] A schooner like the *Gerring* was not itself used for fishing. Once the ship arrived at the fishing grounds it launched its dories, small, open boats that were rowed into position. From the dories, the dorymen netted the fish, encircling whole schools of fish in large nets called purse seines.

The *Gerring* was built in 1870 in Essex, a few miles west of Gloucester.[11] Edward Morris purchased the ship in November 1892 for approximately $3,000.[12] The *Gerring* was 73'7" in length, with a 21'1" beam, a draft of 7'8, and a displacement of 67 tons.[13] Unlike the coal-powered *Aberdeen*, which towed it away, the *Gerring* recalled an earlier age, being powered only by sail.

Morris was originally from Guysboro, Nova Scotia, but became an American citizen on 20 July 1866, and made his home in Gloucester.[14] He was a fisherman-turned-ship owner.[15] The loss of the *Gerring* and the costs of litigation were ruinous to Morris. According to a sympathetic *Washington Post* report, "It broke the old man completely. Everything he had was tied in that vessel."[16]

The *Gerring* operated with a crew of nine: three Canadians, five Americans, and one Frenchman.[17] Although Morris owned the *Gerring*, he was not on board when it was seized. The master operating the ship at the time was Daniel Doren. Doren had been master of the *Gerring* for only four days when they left Gloucester on 13 May 1896, headed for the White Islands, off of Guysboro County, Nova Scotia.[18]

The *Gerring* arrived at the fishing grounds off the south shore of Nova Scotia at about 3:00 pm on Monday, May 25, joining at least a dozen other

American schooners. The winds were calm and the mackerel were "playing about" on the surface of the water.[19]

The *Vigilant* was also sailing the area. The *Vigilant* was a "Dominion cruiser" that belonged to the precursor of the Canadian Coast Guard, which was not formally created until 1962. Commanded by Hector MacKenzie, the *Vigilant* was a former fishing schooner, previously called the *Highland Light*, which had been seized a few years earlier for fishing within the three-mile limit and bought by the federal government.[20] Charles Hardy, the captain of another American fishing schooner, the *Marguerite Haskins*, called out to MacKenzie to ask if they were outside the three-mile limit. MacKenzie replied, "you are all right, go ahead."[21] Hearing this, the crew of the *Gerring* launched their dories, cast their nets, and started fishing.

The *Gerring* was purse seine fishing. With this type of fishing, a large rectangular net (the *Gerring*'s net was approximately one thousand feet long and one hundred and eighty feet deep)[22] was lowered into the water. The net had floats on the top and weights at the bottom so that it floated vertically. The dorymen would encircle a school of fish with the net so that it formed a large cylinder. The bottom of the cylinder was then drawn closed or "pursed up." When pursed, the net was shallower but still about ninety feet deep.[23] The top ends of the net were then secured to either end of the schooner. The result was a net full of fish attached to the side of the ship. The crew would then bail the fish into barrels on the schooner with a "dip net."[24] The ship would be allowed to drift during the bailing, as the net would foul if the ship were anchored.

The crew of the *Gerring* had finished netting the fish and were bailing them onto the ship when another Dominion cruiser, the *Aberdeen*, arrived.[25] Its captain, Charles Knowlton, had his chief officer take a bearing, and he determined the *Gerring* to be within three miles of Nova Scotia. More specifically, he calculated that they were just less than two miles from a small island called Gull Ledge. Knowlton seized the *Gerring* for fishing within the three-mile limit and towed it to Liscombe Harbour for the night and then on to Halifax for trial in admiralty court five days later, on Saturday, 30 May 1896.[26]

The Trial

The Nova Scotia Court of Vice-Admiralty, Nova Scotia's original admiralty court and the second admiralty court in what would eventually become Canada, had existed since 9 September 1720, when Daniel Henry received his commission and was appointed the judge at Annapolis.[27] One of the court's principal functions was to regulate trade among the North American colonies and Great Britain.[28] Barristers of the Supreme Court of Nova Scotia were permitted to appear at the Court of Vice-Admiralty.[29] British acts of Parliament gave authority to these colonial courts. However, after Confederation in 1867, the provinces started asking for their own home-grown admiralty courts, citing excessive litigation costs, procedural issues, and the general disconnect between local problems and far-away British administration.[30]

The Exchequer and Supreme Courts of Canada were established in 1875[31] and, in 1891, the Exchequer Court acquired admiralty jurisdiction.[32] The vice-admiralty court in Halifax became the "Exchequer Court of Canada, Nova Scotia Admiralty District." The chief justice of the Supreme Court of Nova Scotia, James McDonald, who had been the judge of vice-admiralty since 1881, became the new judge of the Nova Scotia admiralty district.[33] It was McDonald who heard the *Gerring* trial.

The *Gerring* was represented by local lawyer William F. MacCoy, Q.C. of MacCoy, MacCoy & Grant.[34] Morris paid MacCoy $808.11 for representation at trial, $250 for representation at appeal, $80 for transcripts, and $50 for security for court costs he might be required to pay if he lost.[35] For Morris, already suffering the loss of his ship, the total amount—almost $1,200—was a significant sum of money, approximately a third of the cost of a new sailing ship.

Canada was represented by William Bruce Almon Ritchie. Ritchie was a third-generation member of a prominent Nova Scotia legal family.[36] Ritchie's uncle, Sir William Johnstone Ritchie, was one of the first six Supreme Court of Canada judges and chief justice from 1879 to 1892. W.B.A. Ritchie's son, Roland Almon Ritchie, would go on to become a Supreme Court of Canada judge as well, from 1959 to 1984.

W.B.A. Ritchie, educated at Harvard University in 1881 and 1882, was part of a new generation of Canadian lawyers educated in the American,

Harvard style of law rather than traditional British models of legal education.[37] In 1889, he joined Robert Borden, future prime minister of Canada, in forming the firm of Borden, Ritchie, Parker, and Chisholm. Ritchie and Borden were both very successful and sought-after appellate-level barristers.[38] Ritchie was still with Borden in 1896 when he argued the *Gerring* case on behalf of the attorney general of Canada.[39]

The *Gerring* trial began on Saturday, 30 May, and continued on 1 June, 29 June, and 5 August 1896.[40] Procedure was as in any other common law court, and trial proceeded by judge alone, as was always the case in the admiralty court. Although the trial took five days and twenty witnesses were called, the issues in dispute were relatively straightforward.[41] First, where was the *Gerring* when seized by the *Aberdeen*, and second, was the *Gerring*, in law, "fishing" at the time?

The *Gerring* began fishing outside the three-mile territorial limit. As well as telling the master of the *Marguerite Haskins* that they were "all right" to fish, MacKenzie of the *Vigilant* took a bearing of the *Gerring* and determined it was a "good half mile" outside the limit, presumably as measured from Gull Ledge.[42] The real factual dispute came when determining how far the *Gerring* had drifted after an hour or two of bailing fish. Knowlton of the *Aberdeen* testified that the *Gerring* was apprehended "less than a mile and three quarters" from Gull Ledge.[43] If this was correct, the ship had drifted nearly two miles to the northwest.

MacCoy called four witnesses, including Morris, who testified that, given the direction of the wind, to travel northwest towards Gull Ledge would have been impossible.[44] So long as the net was in the water attached to the *Gerring*, it would have acted as a sea anchor, and the swell should not have carried the ship that far. The problem for the *Gerring* was that Knowlton of the *Aberdeen* was the only one who had actually measured the *Gerring*'s final position. Despite the testimony of experienced sailors that they could not see how the *Gerring* could have moved from where MacKenzie thought it had been to where Knowlton said it had ended up, Knowlton's measurement carried the day. For Justice McDonald, it was "immaterial to inquire how the vessel reached that position."[45] Unless Knowlton was dishonest or incompetent, of which McDonald found there was no evidence, the *Gerring* was in fact within three miles of Gull Ledge.[46]

But was Gull Ledge a landform from which the three-mile limit could be drawn? The parties spent significant time at trial determining the nature of Gull Ledge. If it was too small to be considered part of the coast of Canada, then the *Gerring* would have been safely outside the limit. However, MacCoy probably recognized that this was a losing argument and abandoned it before making final submissions, as there is no discussion regarding the size of Gull Ledge in Justice McDonald's decision. While Gull Ledge is a small, barren island, it is not some partially submerged wash rock or "a sunken reef several miles seaward," as described in the American press.[47] Ritchie produced witnesses at trial who testified that a half acre of the island was covered in long grass and that it even held the remnants of an old wooden shanty.[48]

Was the *Gerring* fishing when apprehended? The Court found that the *Gerring* had netted the fish in international waters, but was bailing them in Canadian waters. Whether the bailing of the fish, or simply netting the fish, constituted "fishing" was a legal question, not an evidentiary one. However, Mackenzie, who had originally said that the schooners were "all right" to fish, thought that the seizure was wrong. He gave the following testimony at trial while being cross-examined by MacCoy:

> Q. Where were you when [the *Gerring*] was seized?
>
> A. I was a mile or a mile and a half away.
>
> Q. Why did you not bear down and seize her yourself?
>
> A. I did not feel myself justified in doing so, because I know that she had taken the fish outside.[49]

MacCoy argued that the act of fishing was complete once the fish were trapped in the pursed up seine; however, Justice McDonald did not agree:

> I cannot accept [MacCoy's] contention that the "fishing" and the "catching" of the fish was complete when the seine was successfully thrown. Further labour is required to save the fish from the sea, and reduce the property to useful pos-

> session, and until that be completed the act of fishing and "catching" fish is not in my opinion completed.[50]

Justice McDonald ordered the *Gerring* and its catch forfeited with costs. This was the only penalty available for a foreign vessel caught fishing in Canadian waters.[51]

The Supreme Court of Canada

After the trial, Morris met with US Secretary of State Richard Olney, who was a prominent Boston lawyer before being appointed by President Cleveland and also reportedly an avid fisher. Olney advised Morris to appeal to Canada's Supreme Court.[52] In October 1896, Olney wrote to the American ambassador in London, Thomas Bayard, for help.[53] Olney relied on the following passage from McDonald's decision, which Olney interpreted as supporting the view that this was "a proper case for the exercise of executive clemency":

> It would, I apprehend, be difficult, if not impossible, to enforce these Fishery laws, to which our people attach supreme importance, if those American subjects who so eagerly seek to compete with our people along our shores in this industry, and who are not, I fear, overscrupulous in the observance of laws of which they have ample notice, should be permitted to plead accident or ignorance to a charge of infraction of such laws. *Such a plea, however effective it may be to the executive authority of the country, cannot avail in this court*.[54]

However, London advised that there could be no political intervention until after the decision of the Supreme Court.[55]

At the Supreme Court, MacCoy focused his submissions on where the *Gerring* was apprehended, arguing that Knowlton must have been wrong that the ship was within the three-mile limit, and, in any event, that the *Gerring* was not, at law, "fishing" when it was apprehended by the *Aberdeen*. He argued that the fish had been "taken" once they had

been secured in the seine and that therefore the act of fishing had been completed.[56]

Although the lawyers for Canada addressed the issue of where the *Gerring* was caught, their focus was on the definition of fishing.[57] The crux of their argument was that, whatever property right the *Gerring* might have earned through netting the fish, the act of fishing was not yet complete, because it could still be frustrated by the escape of some or all of the fish:

> It was contended that the act of fishing is complete when in line fishing the fish is hooked, or in net fishing, is surrounded by a net. According to this contention, a fish would be caught as soon as it is hooked, which would, I think, be found to be contrary to experience.
>
> It is submitted that fish caught in a net on the high seas and still in the water are not in the possession in any sense of the fisherman; but assuming that they are to be so regarded, and that property in them is thereby vested in the fisherman his title is qualified, a special interest liable to be divested before they are killed by the escape of the fish.
>
> See Blackstone's Commentaries, 15th edition, page 403.
> Kent's Commentaries Text Book Series, page 348.[58]
>
> It is submitted that the acquiring of this special and very precarious right is not, in the ordinary use of language, the completion of the act of fishing, but that something more remains to be done before the fishing is completed and the fish finally taken.[59]

In May 1897, a panel of five Supreme Court judges released their decisions. Although Chief Justice Sir Henry Strong and Justice John Gwynne would have allowed Morris's appeal, they were in the minority. By a 3:2 majority, Justices Robert Sedgewick, George Edwin King, and Désiré Girouard agreed with Justice McDonald that the *Gerring*'s crew were still

"fishing" when they were bailing the fish into barrels. Sedgewick defined fishing as follows:

> The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what "fishing," according to the ordinary acceptation of the word, means, and that, I think, is the meaning which we must give to the word in the statutes and treaty.[60]

There are currently over sixty cases citing to the Supreme Court case, and Sedgewick's definition of fishing as a "continuous process" is still quoted to this day.[61] For example, the above quotation has been reproduced, exactly, by the Nova Scotia Court of Appeal in 1994,[62] the New Brunswick Court of Queen's Bench in 2003,[63] the Newfoundland Court of Appeal in 2006,[64] the British Columbia Supreme Court in 2008,[65] and the PEI Court of Appeal in 2009.[66] The Federal Court of Canada cited the decision in 2003[67] and the Tax Court of Canada in 2008.[68] The Supreme Court has cited *Gerring v. Canada* three times: in 1914,[69] 1917,[70] and 1931.[71]

Although Sedgewick's judgment is often cited, Justices King's and Girouard's concurring decisions have received little attention.[72] For example, of the over sixty cases that cite *Gerring v. Canada*, only two cite King's or Girouard's decisions.[73] King and Girouard were also the only judges to refer to James Kent's *Commentaries on American Law*, and Girouard is the only judge to cite *Pierson* directly. However, despite *Pierson*'s evident importance to Girouard, none of the cases that reference *Gerring v. Canada* also reference *Pierson*. This is an unfortunate omission, because, for over one hundred and twenty years now, the link between Canadian law and *Pierson*, the foundational American property law case so many American and Canadian lawyers were raised on, has been missed.

Pierson v. Post

Pierson is a very well-known case. It has been referenced in almost eight hundred law journal articles and other secondary sources since it was decided some two hundred years ago[74] and has been a mainstay in American property law casebooks since the early twentieth century.[75] However, despite its incredible uptake into legal academia, *Pierson* has only been cited in reported cases thirty-three times.[76] Until very recently, *Gerring v. Canada* was the only Canadian decision to reference it. There has been no commentary on this Canadian link to *Pierson*.[77]

Pierson was included in Girouard's decision because Ritchie cited it. And Ritchie cited it because, like William Blackstone's *Commentaries on the Laws of England*, James Kent's *Commentaries on American Law* was a staple text both inside and outside the United States. Kent's work was first published in 1827, and in it he discussed *Pierson* (a case he heard as a judge) at length. Kent also mentioned *Buster v. Newkirk*, an 1822 New York case that cited *Pierson*.[78] The cases were in a chapter on qualified property rights and wild animals.[79] Kent's *Commentaries* was hugely influential on American lawyers and was largely responsible for plucking *Pierson* out of obscurity and sending it on its path to rockstar-case status.[80]

W.B.A. Ritchie may have become familiar with *Pierson* during the time he studied at Harvard University in 1881–82, given that 1881 was the year when Oliver Wendell Holmes Jr. published his famous lectures *The Common Law*. In Lecture VI, "Possession," Holmes discussed at length whether the impossibility of escape was the true test for the possession of wild animals. He discussed the facts of *Pierson*, citing it and Kent's discussion of it in the *Commentaries*.[81] As he prepared the Government of Canada's factum for *Gerring*, Ritchie turned to one of the editions of Kent's *Commentaries* published between 1873 and 1896. The most famous 12th edition (1873) was edited by Holmes, and other editions appeared in print as well.[82] The references to *Pierson* in these editions remained essentially the same as they had since the first edition.

As noted above, Ritchie included the reference to Kent's *Commentaries* in his factum, which was relied on by the Supreme Court. Justices Girouard and King both picked up on the reference to Kent's *Commentaries* and

included it in their own judgments. Justice King more or less paraphrased Ritchie's factum:

> It may well be that the "Gerring" people had sufficient control and dominion to have acquired a qualified property in the fish; *Young* v. *Hichens* [6 Q.B. 106]; Pollock & Wright on Possession 37; 2 Kent's Com. 348; but an operation at sea of taking several hundred, or one hundred barrels (as here) of loose and live fish from a bag net, is attended with such obvious chances of some of them at least regaining their natural liberty, that the act of fishing cannot be said to be entirely at an end in a useful sense until the fish are reduced into actual possession.[83]

Girouard took his decision to a loftier scholarly level, citing to famous, if not antiquated, French, German, Dutch, and ancient Roman legal scholars to support his view on whether the crew of the *Gerring* were still fishing.[84] Rather than just citing Kent, he mentioned that "Chancellor Kent" cited two American cases "with approbation," and then proceeded to reproduce large sections of Justice Daniel Tompkins's majority judgment from *Pierson* within his own reasons.[85]

As a final quirk, it is not clear that the *Pierson* case or Kent's *Commentaries* actually fully support the conclusions that Chief Justice McDonald and then Justices Girouard, King, and Sedgewick drew from them. In *Pierson*, Tompkins wrote that,

> [E]ncompassing and *securing such animals with nets* and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, *may justly be deemed to give possession of them* . . .[86]

Here the fish were in the purse seine net. While a few fish might get out, not many would. In fact, fish would sometimes stay in the seine for days if the crew wished to carefully pack and salt the fish while still at sea.[87]

Would the possibility of a few fish escaping mean that the fish, generally, are not caught?

State v. Shaw, an American case from 1902, concerned fish in Lake Erie caught in a "pound," basically a large net with a one-way entrance.[88] Fish could escape the net, especially when heavy weather caused waves to roll over the top of it. Shaw was charged with larceny for stealing the fish out of the pound, but argued that unowned property cannot be stolen. Citing a number of cases as well as Kent's *Commentaries* as authority, he argued that the owner of the pound had only a qualified possessory right in the fish, as escape from the pound was not impossible. The Supreme Court of Ohio disagreed:

> We think that this doctrine is both unnecessarily technical and erroneous. . . .
>
> They were confined in nets, from which it was not absolutely impossible for them to escape, yet it was practically so impossible; for it seems that under ordinary circumstances few, if any, of the fish escape.[89]

This case, aside from being another example of the pervasiveness of Kent's *Commentaries* at the turn of the century, also shows that the *Gerring* case could have been decided differently. That it was not suggests that the driving force behind the decision was the policy reason behind the Treaty of 1818, that is, the enforcement of Canada's borders and sovereignty, rather than what was *necessarily* so in property law. Clearly this political concern was on McDonald's mind in the Nova Scotia admiralty court, as he reasoned that it would "be difficult, if not impossible" to enforce Canada's fishery laws if American ships could claim that they accidentally drifted over while engaged in lawful fishing under the treaty.[90]

Failed Diplomacy after the Supreme Court's Decision

In June 1897, soon after the Supreme Court's decision, Morris wrote to the US Secretary of State, John Sherman, for assistance with the case.[91] Rather than dealing with Canada directly, Sherman wrote to the British ambassador, Lord Julian Pauncefote. Sherman explained to Pauncefote that the violation of the treaty was unintentional and asked for the *Gerring*'s return.[92]

The Canadian Minister of Marine and Fisheries, Louis Henry Davies, sympathized with the plight of the *Gerring* and recommended that the ship be returned to Morris:

> [The minister] is convinced that notwithstanding the fact that the vessel was found actually taking fish from the seine within the three-mile limit, that these fish had been practically taken, to all intents and purposes, so far as the actual netting is concerned, outside the prohibited zone. . . . "[93]

On 15 July 1897, the British happily reported to Sherman that the "Government of the Dominion" was prepared to return the ship, less a nominal fine ($1) and litigation costs.[94] On 19 July, the Acting Secretary of State, William Day, wrote to Morris with the good news.[95] Day also wrote to the British Chargé d'Affaires, Frederick Adam, warmly thanking the British government for the positive outcome.[96] It seemed that, despite the Supreme Court's decision against Morris, just over two months later the parties had come to an amicable conclusion. However, on 7 September 1897, Morris wrote back to Sherman, explaining that the *Gerring* had been left in terrible condition by the Canadians and was not worth the cost to recover.[97] He had good reason to believe this as, in July that year, his insurance agent from the Mutual Fishing Insurance Company had inspected the *Gerring* and, Morris asserted, reported that it had deteriorated to a near worthless condition. The seine was ruined, the boats had lain in the water and one had "split to pieces," the stores and provisions had spoiled, the sails had been put away wet, and other equipment had rusted. The whole thing was now worthless, Morris said.[98]

On 25 November 1897, Prime Minister Wilfrid Laurier wrote to Davies, asking about the *Gerring*.[99] Laurier had read a letter from Morris (probably the letter he wrote to Sherman) that had alleged that the *Gerring* was in poor condition. Davies assured Laurier that the *Gerring* had been well taken care of and the "innuendos" from Morris were unfounded.[100]

On 1 March 1898, Sherman wrote an apologetic letter to the British ambassador Pauncefote, explaining that, despite the apparent agreement made with Acting Secretary Day, Morris had rejected the Canadian offer. Sherman acknowledged that it was exceptional to reopen a matter after a diplomatic settlement had been reached.[101]

In April 1898, Pauncefote wrote back to Sherman. He appended a 31 March 1898 report from the Privy Council of Canada about the *Gerring*. The report explained that while the Canadian government was originally sympathetic with Morris's plight after the trial decision, they had waited for the Supreme Court's decision in case it allowed the appeal.[102] When the Supreme Court upheld the trial decision, Canada "voluntarily offered to exert Executive clemency, and remitted the penalty of forfeiture, substituting a fine of one dollar," and about $600 in costs.[103] The Privy Council thought this was a generous offer and that the *Gerring* was in good shape; the Minister was "unable to see what further relief Canada could afford."[104] They also made a point of stating that they were not under orders from Britain.

By July 1898, the Canadian government was unsure about how to proceed. The *Gerring* was incurring holding costs and they were not sure whether the offer to return the vessel had been squarely rejected or not.[105] The Americans suggested that, in order to resolve the matter, representatives from both the United States and Canada go to inspect the vessel's condition.[106] However, Minister Davies objected, saying that there should be no survey of the *Gerring*:

> The offer for the return of the vessel was an offer made purely as a matter of grace and favor on the part of the Crown, and whether the vessel had deteriorated or not could not in any possible way affect the offer, though it might affect the determination of the owners to receive her.[107]

The Privy Council authorized the sale of the *Gerring* at public auction and the ship was sold by James Duggan & Sons at Halifax on 31 May 1899.[108] Morris had sworn that the vessel and gear together were worth $5,251.50.[109] Three other affidavits, from Gloucester-based ship owners and a purse seine manufacturer, supported his valuation of the *Gerring*.[110] However, the federal government ultimately purchased the *Gerring* and its gear for only $870.

The *Gerring*'s low selling price indicates that it probably was in bad condition. Moreover, it was never again used as a proper sailing ship. The federal government converted the *Gerring* into a lightship (a floating lighthouse), stripping its rigging and anchoring it to the floor of Miramichi Bay, New Brunswick, to guide mariners in fog and darkness.[111] The *Gerring* was the Miramichi lightship until at least 1904.[112] Captain Robert McLean received his salary as the lightkeeper of the "Miramichi lightship"—quite possibly still the *Gerring*—from 1902 until at least 1916.[113]

Although the *Gerring* sold at auction in 1899, the matter was not over. On 6 December 1900, the American ambassador, Joseph Choate, wrote a lengthy letter to Lord Lansdowne, a former Governor General of Canada and the British Secretary of State for Foreign Affairs. Choate wrote a detailed history of the matter and requested "payment of a just and reasonable indemnity."[114] Included in his letter were memoranda from Senator George Hoar and Congressman William H. Moody, both of Massachusetts. Moody, who chaired the Appropriations Committee in the House of Representatives, stated that Morris was seeking $11,549.11 from the Canadian government.[115]

Moody's letter, aside from disagreeing with the judge's concept of fishing, addressed the issue of the three-mile boundary. The Treaty of 1818 demarcated a boundary "within three marine miles of any of the coasts, bays, creeks, or harbours" of what had become Canada.[116] According to the American ambassador, senator, and representative, Gull Ledge was such a minor and "isolated piece of rock" that it should not be considered part of Nova Scotia's coast from which to extend the three-mile boundary.

The following spring, in May 1901, Minister Davies outlined the ministry's position to the Canadian cabinet.[117] Davies disagreed with the Americans that the three-mile boundary could not be drawn from Gull Ledge.[118] Davies quoted Thomas Bayard himself—the American

ambassador who began the dialogue with London—who, while Secretary of State, wrote,

> [T]he sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands, so as to place around such islands the same belt.[119]

Davies also referenced a British admiralty case from 1805, the *Anna*, in which an American ship was seized by a British privateer within a mile and a half of islands formed from "temporary deposits of logs and drift" off the mouth of the Mississippi River. In that case, the High Court of Admiralty in London proclaimed that islands must form a part of the territory, or else they could be "'embanked and fortified'" by foreign powers, creating hostile bases just offshore.[120] Also, Morris had not brought a further appeal to the Privy Council in England, apparently on the advice of then-Secretary of State Olney. Davies thought it "inconceivable" that Olney would have advised *against* bringing the appeal so long as there was any doubt about the legal basis for the decision because, in the past, the US had prohibited any diplomatic efforts before judicial options were exhausted.[121] Finally, Davies addressed the fact that America and Canada had each released ships to each other in the past when they had accidentally drifted into foreign waters in similar circumstances. In each case the ships were returned without compensation, the same offer that Morris rejected.[122] Davies advised Lansdowne that, in short, the request for compensation could not be entertained. Lansdowne, in turn, paraphrased Davies's report, editing out some of the less diplomatic turns of phrase, in a letter to the American ambassador Joseph Choate on 12 August 1901.[123] Congressman William Moody relayed the bad news to Morris.[124]

However, although three years passed, the matter of the *Gerring* was not over. On 16 June 1904, the American Secretary of State, John Hay, proposed that the British and American governments come to "'an arrangement for the adjustment of all claims of citizens of the United States

against the British Government and of all claims of British subjects against the Government of the United States by a mixed claims Commission.'"[125]

On 5 January 1906, the British foreign secretary, Sir Edward Grey, instructed the British ambassador to the United States, Sir Mortimer Durand, that an independent arbitration at The Hague would be preferable, and that Britain and the United States should exchange a preliminary list of claims that they would like included in the arbitration.[126] However, American Secretary of State Elihu Root, who replaced Hay, doubted that Congress would agree to the expense associated with arbitration at the Hague, which had the potential to eclipse the amount of the claims at issue; Root would have favoured a mixed-claims commission.[127] Britain preferred to discuss costs after "the value of the claims and the form of procedure" had been agreed to.[128]

On 20 February 1906, Durand spoke with Root.[129] Already, the *Gerring* was getting in the way. Root told Durand that "certain Senators" still thought "the Gerring case involved 'gross injustice'" and asked Durand whether they "could not get the case 'out of the way'."[130] At Britain's request, Canada reluctantly agreed that the *Gerring* claim "would not be excluded from the scope of the proposed arbitration."[131]

By January 1907, further pressure was mounting on Canada. Britain's Chargé d'Affaires in Washington, Esme Howard (standing in for the ambassador), sent a confidential dispatch to Canada's Governor General, Albert Grey.[132] Howard advised that there were several British claims that the Americans recognized as payable but for which Congress had not ratified payment. Senator Henry Cabot Lodge of Massachusetts was preventing any payments until the *Gerring* case was settled:

> [T]here are only three or four American claims outstanding against His Majesty's Government, and of these the claim of the "Frederick Gerring Junior" is the most important.... Mr. Lodge, from his place in the Senate, has said that they are just, and ought to be paid, but that they will not be paid until the British Government settle the American claims.[133]

In February 1907, Prime Minister Laurier demanded a full report on the *Gerring* and an explanation for why the claim could not be paid.[134]

On 6 July 6 1911, the Americans and British agreed to a schedule of claims that included the *Gerring*, and in August they agreed to establish an arbitral tribunal to hear these claims.[135] In September 1911, the *Washington Post* reported,

> No redress was obtainable for the Captain. So Senator Lodge planted himself on the floor of the Senate against allowing the payment of any claims of British subjects against the United States. This held up the pecuniary claims of both countries. The agreement to include the Frederick Gerring claim among those to be adjudicated in the forthcoming arbitration loosened the key-log and claimants on both sides now have a chance, of adjudication at least, although even after that it may take years to get the money from Congress for such damages as may be awarded the Americans.[136]

The Americans and the British prepared and submitted the detailed memorials that contain much of the information supplied in this chapter. The parties argued their case in Washington in the spring of 1914.[137] Instead of imposing an arbitrated resolution, the president of the tribunal, Henri Fromageot, suggested that Canada settle the matter by paying out the value of the ship, minus the costs of prosecution and a nominal fine—nominally identical to their original offer to return the ship.[138] On 1 May 1914, it appeared that Canada had agreed to pay $9,000, more than ten times what the *Gerring* sold for at public auction, and the settlement was put on the record of the tribunal.[139]

Unfortunately, for the second time, the reported settlement was premature, although this time it was the Canadians who were backing out. What Canada had meant to agree to was for the arbitrator to make a "recommendation" that they pay approximately $7,000, with the understanding that the Canadian government would then implement that recommendation.[140] However, the idea that the issue had been "settled" for payment of $9,000 was unacceptable to Canada, and it refused to ratify the settlement. World War I would break out in a matter of months and the problem was left unresolved.

After the war, the parties were arranging to have their respective awards paid, and Britain contacted Canada to see if it was prepared to pay the awards made against it. On 16 October 1924, Canada advised that it concurred that "provisions should be made . . . for immediate payment of the awards," but that it was "unable to regard the F. Gerring Jr. claim as the subject of any award or liability."[141] Canada remained steadfast that it had not settled the case for $9,000, and it appears the claim was never paid.[142]

The Legacy of the *Frederick Gerring, Jr.*

There is a divergence between what a judge orders and what actually happens after a trial.[143] The *Frederick Gerring, Jr.* case is a good example of how different those outcomes can be. The decision itself nowhere reveals (and could not have revealed) that the Supreme Court's judgment was only a prelude to over two decades of diplomatic efforts. Had the case been included in Canadian law school property law casebooks in the standard way, this long and complicated after-life of the case would very likely have gone untold.

After the Supreme Court's decision, the Canadian government was quick to offer to return the *Gerring*, although they had just spent a year and great expense litigating over the validity of the seizure. Perhaps the government was concerned with establishing a principle? The Minister of Marine and Fisheries, Davies, at least at first, questioned the legal principle regarding fishing, arguing that for "all intents and purposes" the act of fishing had been complete before the *Gerring* was apprehended by the *Aberdeen*.[144] Given the initial offer to return the ship, albeit spurned, and given that Canada was later prepared to pay $7,000, if recommended by the arbitrator, what do such concessions mean for *Gerring v. Canada* as a piece of legal doctrine and as a precedent? Should it matter that the seemingly correct result at law is treated as impractical, harsh, and unworkable by nearly all parties involved? *Gerring v. Canada* is the leading case on the definition of fishing under the *Fisheries Act*, although the diplomacy, arbitration, settlement, and connections to *Pierson v. Post* and Kent's *Commentaries* are all but forgotten. With how much reverence ought we to treat the decision when the federal government was ultimately prepared to fully compensate Morris for seizing his ship? If the majority of the

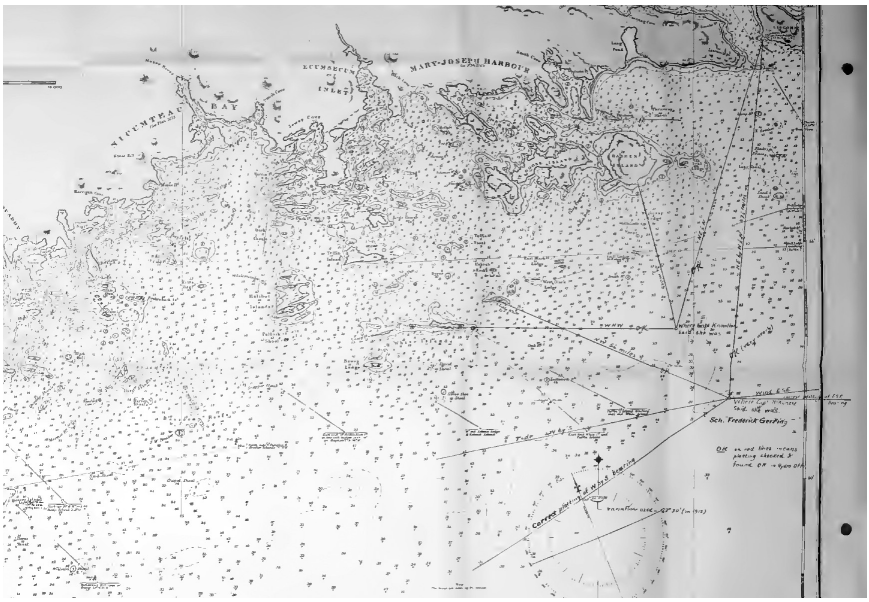

FIGURE 5.1 Detail of the chart of Nova Scotia's south east coast included in the *US Memorial* showing the location and bearing of the *Frederick Gerring, Jr.*

Supreme Court of Canada judges were politically motivated in deciding to adopt the capture rule, how confident can we be that the correct definition of fishing was adopted?

Regardless of the case's extrajudicial history, as a matter of law, the legal principle remains suspect: the Supreme Court was split on the matter, and the majority judges' reasons included references to Kent's *Commentaries* and *Pierson*. Both of these authorities specifically contemplate possession by way of catching wild animals in nets and lean towards a standard of impossible escape.[145] However, was it truly significant that a few fish, out of thousands, might escape?

Whether the *Gerring* case continues as a throw-away reference in fishing cases or becomes part of a broader discussion about how we treat possession cases in Canada is up to the legal community. As a first step, *Gerring v. Canada* should be recognized not simply as a fishing case but as the case that incorporated *Pierson*-style first possession principles into Canadian law. The next step, given what we know about the history of the

case, would be to consider whether we should rethink our understanding of those principles. Generally, I hope that this chapter shows how important and interesting it can be to look beyond the reported decision of a case.

Lastly, I hope the reader feels some sympathy for Captain Morris and his ship. Whatever the merits of the case, it seems wrong for a once proud wooden schooner to spend its final years with its sails cut, chained to the bottom of a harbour. The legacy of the *Frederick Gerring, Jr.* should be more than that.

NOTES

* This essay began as a paper for "Legal Archaeology: Study of Cases in Context," a course taught by Angela Fernandez at the University of Toronto Faculty of Law in 2015. She and I are currently working with Bradley Miller of the University of British Columbia Department of History on a longer book project, to be published with UBC Press in the Landmark Cases in Canadian Law series. The book is tentatively entitled *The Frederick Gerring, Canada's Twenty-First Century* Pierson v Post.

1 *Canada v Frederick Gerring, Jr. (The)* (1896), 5 Ex CR 164 ["*Canada v Gerring*"].

2 *Convention Respecting Fisheries, Boundary, and Restoration of Slaves*, United States and United Kingdom, 20 October 1818, TS 112, 8 Stat 248 (entered into force on 20 October 1818) ["Treaty of 1818"]; *An Act to Enable His Majesty to Make Regulations with Respect to the Taking and Curing Fish on Certain Parts of the Coasts of Newfoundland, Labrador, and His Majesty's Other Possessions in North America, According to a Convention Made between His Majesty and the United States of America*, 59 Geo. III (1819), c 38 (UK); *An Act Respecting Fishing by Foreign Vessels*, RSC 1886, c 94, s 3, stipulating that any vessel "found fishing or preparing to fish" within three miles of the coast "shall be forfeited." Miles were "marine miles" (nautical miles), equal to 1.852 km.

3 Ships are treated like legal "persons" in maritime law.

4 *Frederick Gerring Jr. (The) v Canada* (1897), 27 SCR 271 ["*Gerring v Canada*"].

5 Public Archives Canada / Governor General's Office, RG 7, G21, vol. 103, File/Dossier 192G, pt. 5a. (Copy of Telegram from the Governor General [Julian Byng] to the Secretary of State for the Colonies [James Thomas], 15 October 1924).

6 *Pierson v Post*, 3 Cai R 175 (NY SC 1805) ["*Pierson*"].

7 See Angela Fernandez, *Pierson v Post, the Hunt for the Fox: Law and Professionalization in American Legal Culture* (New York: Cambridge University Press, 2018).

8 Two recent cases mention *Pierson*, the first really as an aside: *R v Hamm*, 2018 NSPC 17 at para 6 and *Association for the Protection of Fur-Bearing Animals v British Columbia (Minister of Environment and Climate Change Strategy)*, 2017 BCSC 2296 at para 35.

9 Details are in the primary source bibliography.

10 Gordon Thomas, *Fast and Able*, *Life Stories of Great Gloucester Fishing Vessels*, 50th anniversary ed. (Beverly, MA: Commonwealth Editions, 2002), 301.

11 United States. *American and British Claims Arbitration: Frederick Gerring, Jr. Memorial of the United States in Support of the Claim* (Washington, G.P.O., 1913), 11 ["*US Memorial*"].

12 Swearing an affidavit about his damages, Morris set the value of the ship and its seine, dories, and other gear at more than twice this amount: *US Memorial*, 102, 197.

13 *US Memorial*, 11, 102.

14 *US Memorial*, 12.

15 Morris described having to go back to fishing to earn a living: *US Memorial*, 109.

16 "Claims Against Government: Some Famous Cases in Which Efforts Were Made to Get Damages from Uncle Sam," *Washington Post*, 10 September 1911, MS3 ["Some Famous Cases"].

17 In the order in which they testified, they were Daniel Doren (master—Gloucester, Massachusetts); James Gracie (crew—Nova Scotia); Harvey L. Bailey (crew—Le Havre, France); Henry Burhester/Burmeister (crew—American); John Gough/Goff (crew—St. John's, Newfoundland); Leander Gaudet (crew—Weymouth, Nova Scotia); John R. Gammett (crew—Gloucester, Massachusetts); Joseph Carpenter (crew—Gloucester, Massachusetts); and Alfred Deane (cook—Connecticut). See *US Memorial*, 13, 31-37.

18 *US Memorial*, 20.

19 *US Memorial*, 20.

20 The *Highland Light* was seized on 1 September 1886, off of East Point, PEI. The ship was tried in the vice-admiralty court at Charlottetown, but the master, J.H. Ryder, admitted the offence and offered no defence, thus surrendering the ship to the federal government. The ship was sold at auction in Georgetown, PEI, on December 14 when the "Dominion Govt" picked it up for $5,800 and put it to use: Henry James Morgan ed., *The Dominion Annual Register and Review for the Twentieth Year of the Canadian Union, 1886* (Montreal: Eusèbe Senécal & fils, Printers, 1887) at 125, 322–23; Brian Payne, *Fishing a Borderless Sea: Environmental Territorialism in the North Atlantic, 1818–1910* (East Lansing: Michigan State University Press, 2010), 42. Note that Morris ended up claiming a similar amount, $5,251, for the *Gerring* and its gear.

21 *US Memorial*, 71.

22 *US Memorial*, 87.

23 *US Memorial*.

24 *US Memorial*, 46.

25 *US Memorial*, 24.

26 *US Memorial*, *supra* note 6 at 3.

27 *The Admiralty Act, 1891*, SC 1891, c 29, s 3 ["*Admiralty Act*"].

28 Arthur Stone, "The Admiralty Court in Colonial Nova Scotia," *Dalhousie Law Journal* 17, no. 2 (1994): 366.

29 Stone, "The Admiralty Court in Colonial Nova Scotia," 373.

30 Stone, "The Admiralty Court in Colonial Nova Scotia," 418–19.

31 Stone, "The Admiralty Court in Colonial Nova Scotia," 424; *An Act to Establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, SC 1875, c 11.

32 *Admiralty Act*.

33 Stone, "Admiralty Court in Colonial Nova Scotia," 427.

34 William MacCoy to Mr. Cassels, 7 November 1896. In "Schooner Frederick Gerring Jr. v The Queen (1896)," file 1597, vol. 144, R927, RG125-A, Library and Archives Canada ("LAC").

35 *US Memorial*, 101 and 198.

36 Philip Girard, "Ritchie, William Bruce Almon," in *Dictionary of Canadian Biography*, vol. 14, University of Toronto/Université Laval, 2003–, http://www.biographi.ca/en/bio/ritchie_william_bruce_almon_14E.html.

37 Girard, "Ritchie."

38 Girard, "Ritchie."

39 *US Memorial*, 19. Ritchie also has the dubious distinction of having represented Canada in a notorious immigration decision, the case of the *Komagata Maru*, or *Canada v Singh* (1914), 6 WWR 1347, 20 BCR 243 (CA). The *Komagata Maru* was a ship commissioned by immigrants from British India, bound for Canada. Canada's "continuous voyage" law (*The Immigration Act*, SC 1910, c 27, s 38) required immigrants to arrive in Canada via a non-stop voyage. The voyage of the *Komagata Maru* became the test case to challenge this piece of legislation. On 23 May 1914, 376 weary and mostly Sikh immigrants arrived in Vancouver, but the federal government denied them admission. Although the immigrants challenged the decision, Ritchie won the case for Canada and the vast majority of immigrants, that is, 352, were turned away. I invite the reader to visit http://komagatamarujourney.ca for more information. The *Komagata Maru* was escorted out of Vancouver Harbour on 23 July 1914. See also Janet Mary Nicol, "'Not to Be Bought, Nor for Sale': The Trials of Joseph Edward Bird," *Labour / Le Travail* 78 (fall 2016): 219–36, regarding one of the lawyers for the *Komagatu Maru*.

40 *US Memorial*.

41 *US Memorial*, 102.

42 *US Memorial*, 67.

43 *US Memorial*, 46.

44 *US Memorial*, 81, 87, 91, 93.

45 *Canada v Gerring*, 172.

46 *Canada v Gerring*, 172–73.

47 "Some Famous Cases."

48 *US Memorial*, 76, 77. The reader can see Gull Ledge on Google Maps at 44°54'37.8"N 62°01'54.4"W.

49 *US Memorial*, 71.

50 *Canada v Gerring*, 173.

51 *Canada v Gerring*, 173.

52 *US Memorial*, 108; "Richard Olney Dies; Veteran Statesman," *New York Times*, 10 April 1917, 13.

53 *US Memorial*, 104, 14 October 1896.

54 *Canada v Gerring*, 173 (emphasis added), quoted in Richard Olney to Thomas F. Bayard, 14 October 1896. In *US Memorial*, 104–5.

55 Lord Salisbury to Thomas Bayard, 20 February 1897. In *US Memorial*, 107–8.

56 Great Britain, *Arbitration of Outstanding Pecuniary Claims between Great Britain and the United States of America: The Frederick Gerring, Jr.* (Ottawa: Government Printing Bureau, 1913), 14–24 ["*British Memorial*"].

57 The Supreme Court decision identifies "Newcombe Q.C." as representing Canada and W.B.A. Ritchie as the solicitor. Edmund Leslie Newcombe was deputy minister of justice and deputy attorney general of Canada and was therefore nominally responsible for all crown lawsuits. He also appeared personally at most Supreme Court hearings, including, it would seem, *Gerring v Canada*. He was appointed to the Supreme Court in 1924: Girard, "Newcombe, Edmund Leslie."

58 Ritchie was likely referring to James Kent, *Commentaries on American Law*, new and revised edition, ed. William M. Lacy, vol. 2 (Philadelphia: Blackstone Publishing Co., 1889), *348–50; and William Blackstone, *Commentaries on the Laws of England*, 15th ed., ed. Edward Christian (London: A. Strahan, 1809), 2:*403, wherein Blackstone writes that everyone has a right to "take" wild animals unless he is otherwise restrained by municipal law, and "they become while living his qualified property, or, if dead, are absolutely his own: so that to steal them, or otherwise invade this property, is, according to the respective values sometimes a criminal offence, sometimes only a civil injury." See in this volume Angela Fernandez, "The Text Book Edition of James Kent's *Commentaries* Used in *Canada v Gerring*." Many editions of Blackstone's and Kent's respective *Commentaries* have been published, with lengthy notes added by later editors. The asterisks refer to Blackstone's or Kent's original pagination. Later editions will of course have their own pagination, but they also note the original page numbers, so if you open a later edition, you will find that you are on Blackstone's or Kent's page *101, when in fact you are on perhaps page 114 of the edition you hold in your hands. This practice allows for the easy tracking of text added by later commentators.

59 *British Memorial*, 31.

60 *Gerring v Canada*, 280–81.

61 See e.g., *R v Steer*, 2013 BCPC 163, para 56.

62 *R v Morash* (1994), 129 NSR (2d) 34, 37 (NSCA).

63 *R v Kelly*, 2003 NBQB 148 at paras 17, 20.

64 *Canada v White*, 2006 NLCA 71 at para 11.

65 *R v Aleck*, 2008 BCSC 1096 at para 107.

66 *R v Gavin*, 2009 PECA 23 at para 19.

67 *Kwicksutaineuk/Ah-kwa-mish Tribes v Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30 at para 23 (to argue that fishing is complete once possession of the fish is obtained).

68 *Chon v Canada (Minister of National Revenue)*, 2008 TCC 622 at para 9 (to argue that oyster farming is not fishing because the oysters have no possibility of escape).

69 *Carlson v Canada*, [1914] 49 SCR 180, 192.

70 *John J. Fallon (The) v Canada*, [1917] 55 SCR 348, 351.

71 *R v Krakowec* (1931), [1932] SCR 134, 142.

72 Girouard was an academic and well-read lawyer. He studied law at McGill, graduating in 1860, the same year that he published a notable legal text (Désiré Girouard, *Essai sur les lettres de change et les billets promissoires* [Montreal: J. Lovell, 1860]). Although politically conservative, he declined Conservative cabinet positions in 1891 and 1895, and in 1895 he accepted appointment to the Supreme Court of Canada where he stayed for ten years: Michael Lawrence Smith, "Girouard, Désiré," in *Dictionary of Canadian Biography*, vol. 14, University of Toronto/Université Laval, 2003–, accessed October 2, 2019, http://www.biographi.ca/en/bio/girouard_desire_14E.html.

73 *R v Johnson and Wilson* (1987), 78 NBR (2d) 411, 427, 198 APR 411 (NBPC) & *R v Weir* (1993), 110 Nfld & PEIR 121, 128–29, 346 APR 121 (NLSCTD).

74 See Fernandez, *Pierson v Post, the Hunt for the Fox*, 1 (using the online database HeinOnline).

75 For a discussion that traces the way *Pierson* was included in American property law casebooks starting in 1915, see Fernandez, *Pierson v Post, the Hunt for the Fox*, 274–86. On Canada, see e.g. *R v Hamm*, 2018 NSPC 17 at para. 6, where Justice Scovil observes, "The first lesson taught in our class in Property Law at then Dalhousie Law School in the late 1970s was the case of *Pierson v Post* from Massachusetts in 1802." Scovil mistook New York for Massachusetts, and the appellate report is dated 1805, not 1802. Ironically, though, the dispute actually did happen in December 1802, a fact that was unknown until Angela Fernandez discovered the judgment roll in the *Pierson* case and publicized it in 2009. See Fernandez, "The Lost Record of *Pierson v Post*, the Famous Fox Case," *Law and History Review* 27, no. 1 (2009): 149–78. A transcript of the roll is reproduced in Fernandez, *Pierson v Post, the Hunt for the Fox*, Appendix B, 336–57.

76 See Fernandez, *Pierson v Post, the Hunt for the Fox*, Appendix A, 331–35, which provides names, citations, a brief statement of what the case was about, and a division of the citations into animal and non-animal cases.

77 Apart from Fernandez, *Pierson v Post, the Hunt for the Fox*, the book project upon which I was working when I discovered that *Gerring v Canada* considered *Pierson* extensively (which led to the book's discussion of the connection between the cases), I have located two other texts that cite both cases but fail to mention the connection between them: William Mack, *Cyclopedia of Law and Procedure*, vol. 19 (New York:

American Law Book Company, 1905), 988 (*Pierson*), and 1006, 1026 (*Gerring*), and Bruce Ziff, "The Law of Capture, Newfoundland-Style," *University of Toronto Law Journal* 63, no. 1 (2013): 54 (*Pierson*) and note 11 (*Gerring*).

78 *Buster v Newkirk*, 20 Johns Rep 75 (1822).

79 James Kent, *Commentaries on American Law*, vol. 2 (New York: O. Halsted, 1827), 281–83, citing *Pierson* at 282 and *Buster v Newkirk* at 283.

80 See Fernandez, *Pierson v Post, the Hunt for the Fox*, 14–23, 26–31, 252–57.

81 Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown and Company, 1871), 216–18.

82 See Fernandez, *Pierson v Post, the Hunt for the Fox*, 257–63 (discussing Holmes' work on possession and the connections to *Pierson* and his edition of Kent's *Commentaries*).

83 *Gerring v Canada*, 298.

84 Girouard cites Pufendorf, Trebatius (as cited by Justinian), Domat, Savigny, Heineccius, and Grotius, among others.

85 *Gerring v Canada*, 305–7.

86 *Pierson*, 178 (emphasis added).

87 *US Memorial*, 184.

88 *State v Shaw*, 67 Ohio St 157 (1902).

89 *State v Shaw*, 164–65.

90 See above. Interestingly, Ritchie argued in his factum that even if the *Gerring* were not "fishing," Canada was still permitted to seize the ship for being within its waters without lawful purpose: *British Memorial*, 33, 34.

91 *US Memorial*, 143.

92 *US Memorial*, 149.

93 L.H. Davies to Governor General in Council, 21 June 1897. In Privy Council Office, "Seizure of fishing vessel FREDERICK GERRING JR., that same be released and returned to owners on payt [payment] of costs and copy of report be forwarded to Col Secy [Colonial Secretary]—Min M and F [Minister of Marine and Fisheries] 1897/06/21 recs," Privy Council Minutes, Jun. 28–30, 1897, Series A-1-a, RG2, LAC ["Privy Council Minutes"].

94 *US Memorial*, 152.

95 *US Memorial*.

96 *US Memorial*, 153.

97 *US Memorial*, 155.

98 *US Memorial*, 145–46.

99 Davies to Laurier, 6 December 1897. In Sir Wilfrid Laurier fonds. Political papers. General correspondence (20 December 1897), C-752, vol. 59, MG26-G, LAC ["Davies Letter"].

100 Davies Letter.

101 *US Memorial*, 159–60.

102 *US Memorial*, 163.

103 *US Memorial*, originally $1,200, less $600 for the sale of the fish.

104 *US Memorial*, 165.

105 *US Memorial*, 165–66.

106 *US Memorial*, 167–68.

107 *US Memorial*, 171.

108 *US Memorial*, 210.

109 *US Memorial*, 197.

110 *US Memorial*, 200–3.

111 *US Memorial*, 209; W. Bell Dawson, "Annual Report of the Chief Engineer of the Department of Marine and Fisheries," in *Thirty-Third Annual Report of the Department of Marine and Fisheries 1900: Marine*, 22–81 (*Sessional Papers of the Dominion of Canada* [*CSP*] 1901, vol. 9, no. 21), 55.

112 William P. Anderson, "Annual Report of the Chief Engineer of the Department of Marine and Fisheries," in *Thirty-Sixth Annual Report of the Department of Marine and Fisheries 1900: Marine*, 35–77 (*CSP* 1904, vol. 8, no. 21), 65.

113 J.G. MacPhail, "Report of the Commissioner of Lights," Appendix 2 to "Report of the Deputy Minister of Marine and Fisheries," in *Forty-Eighth Annual Report of the Department of Marine and Fisheries for the Fiscal Year 1914–15: Marine*, 64–94 (*CSP* 1901, vol. 17, no. 21), 67. After 1916, the *Sessional Papers* stopped recording the names and salaries of the lightkeepers, and merely recorded the number of lightships per province. At least one lightship was operating in New Brunswick until 1925, when the *Sessional Papers* ceased publication. Beyond that, I cannot say what became of the *Frederick Gerring, Jr.*

114 *US Memorial*, 179.

115 *US Memorial*, 187, 197–99.

116 Treaty of 1818, article I.

117 L.H. Davies to Governor General in Council, 25 May 1901. In "Claim of United States Government for compensation for seizure of schooner FREDERICK GERRING JR.—For breach of the fishery laws—From Marine Department," files 1901–320 and 1901–69, vol. 2306, RG13-A-2, LAC.

118 Davies to Governor General in Council, 25 May 1901, 8.

119 *US Memorial*, 192.

120 Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty; Commencing with the Judgments of the Right Hon. Sir William Scott, Michaelmas Term 1798*, vol. 5, 373–385d (London: A. Strahan, 1806), 376, 385d. See also *The "Anna"* (1805), 165 ER 809.

121 Davies to Governor General in Council, 25 May 1901, 10, 11.

122 Davies, to Governor General in Council, 25 May 1901, 12.

123 *US Memorial*, 188.

124 *US Memorial*, 195.

125 Quoted by F.H. Villiers, in Villiers (for Sir Edward Grey) to Sir Mortimer Durand, 5 January 1906. In Privy Council Office, Proposal for settlement of outstanding claims U.S. [United States] and Canada by arbitration—Tribunal at The Hague—following claims will be considered: COQUITLAM, KATE, and FAVOURITE and possibly, FREDERICK GERRING JR—Col Sec [Colonial Secretary], Order-in-Council 1906–0923M, Series A-1-a, RG2, LAC ["Settlement Proposal Letters"].

126 Villiers to Durand, 5 January 1906.

127 Durand to Grey, 22 January 1906. In Settlement Proposal Letters.

128 Grey to Durand, 31 January 1906. In Settlement Proposal Letters.

129 Durand to Grey, 21 February 1906. In Settlement Proposal Letters.

130 Durand to Grey, 21 February 1906.

131 Extract from a Report to Council, 29 March 1906. In The British Ambassador at Washington—Respecting the claims of the Canadian Electric Light Company and Radcliffe and Eastry against the United States Government—Also seizure of the United States fishing vessel FREDERICK GERRING JR., 1907, Secretary of State of Canada general correspondence, file 967, vol. 128, RG6-A-1, R174-26-2-E, LAC. ["1907 Files"].

132 Howard to Grey, 16 February 1907. In 1907 Files.

133 Howard to Grey, 16 February 1907.

134 J. Pope to Mr. Venning, 21 February 1907. In 1907 Files.

135 37 Stat. 1627–30 (1911–13); Chandler P. Anderson, "American and British Claims Arbitration Tribunal," *American Journal of International Law* 15, no. 2 (April 1921): 266–68.

136 "Some Famous Cases."

137 37 Stat. 1627–30 (1911–13); Anderson, "American and British Claims Arbitration Tribunal."

138 "Tribunal Has Awarded $9,000 To Captain Morris," *Gloucester Daily Times*, 2 May 1914.

139 "Award in the Matter of the Frederick Gerring, Jr," *American Journal of International Law* 8, no. 3 (1914): 655.

140 C.J.B. Hurst to Edward Grey, 4 June 1914. In Foreign Office, Settlement of Questions between the United States, Canada and Newfoundland. Further Correspondence Part XV, 1914–15, Confidential Print: North America, FO 414/243, National Archives, UK.

141 Governor General Julian Byng to Secretary of State for the Colonies James Henry Thomas, 16 October 1924. Office of the Governor General of Canada fonds, file 192G, pt. 5a, vol. 103, G21, RG 7, LAC.

142 I have not found any more recent correspondence than this 1924 letter.

143 Richard Danzig describes this as a version of "the capability problem": Richard Danzig, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (Mineola, NY: Foundation Press, 1978), 2–3.

144 L.H. Davies to Governor in Council, 21 June 1897. In Privy Council Minutes.

145 See discussion above. Both Kent and the majority in *Pierson* understood the issue in terms of the insufficiency of mere pursuit. This fine parsing was lost on subsequent commentators, including Holmes, who put aside his doubts about impossible escape owing to Kent's equivocation on the issue and failure to make it clear in *Buster v Newkirk*. On this issue, see Fernandez, *Pierson v Post, the Hunt for the Fox*, 17–21, 258–64.