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*May 4, 5.
*June 10.

JOHN MOWAT.....APPELLANT;

AND

WILLIAM McFEE.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

The Fisheries Act, 31 *Vic.*, c. 60—*Jurisdiction of Dominion Parliament over Bay of Chaleurs*—14 *and* 15 *Vic.*, c. 63 (*Imp.*)—*Justification, plea of—Fishery Officer, right of, to seize "on view."*

Under the Imperial Statute, 14 and 15 Vic., c. 63, regulating the boundary line between Old *Canada* and *New-Brunswick*, the whole of the *Bay of Chaleurs* is within the present boundaries of the Provinces of *Quebec* and *New-Brunswick*, and within the Dominion of *Canada* and the operation of *The Fisheries Act*, 31 Vict., c. 60. Therefore the act of drifting for salmon in the *Bay of Chaleurs*, although that drifting may have been more than three miles from either shore of *New-Brunswick* or of *Quebec* abutting on the Bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act and of the regulations made in virtue thereof.

2. The term "on view" in sub-sec. 4 of sec. 16 of *The Fisheries Act* (1) is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act.

(1) "All materials, implements or appliances used, and all fish had in contravention to this Act or any regulation or regulations under it, shall be confiscated to Her Majesty, and may be seized and confiscated on view by any fishery officer, or taken and removed by any person for delivery to any magistrate, and the proceeds of disposal thereof may be applied towards defraying expenses under this Act."

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*Present.—Ritchie, C. J., and Fournier, Henry, Taschereau, and Gwynne, J.J.

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APPEAL from a judgment of the Supreme Court of *New Brunswick* (1), discharging a rule *nisi* to set aside the verdict and to enter a verdict for the defendant (appellant), and for a new trial.

This was an action of trespass for seizing and carrying away plaintiff's (respondent's) boat and nets.

The facts and pleadings sufficiently appear in the judgment of the Court hereinafter given.

Mr. *Lash*, Q. C., for appellant:

The first and most important question which arises in this case is, whether or not the Bay of *Chaleurs* is a part of the territory or territorial waters of *Canada*, and thereby comes within the operation and prohibition of *The Fisheries Act*. I claim the whole Bay is subject to the legislative authority of the Parliament of *Canada*.

The Bay of *Chaleurs* is wholly within the jaws of the land, and is a long bay or gulf, running up between the provinces of *Quebec* and *New Brunswick*, and emptying into the Gulf of *St. Lawrence*, which Gulf is the boundary, on the north, of both provinces. The Court will take judicial notice of the configuration and dimensions of the Bay. The Bay of *Chaleurs* then, by the law of nations, is not a part of the high seas, but a part of the territory or territorial waters of *Canada*, and subject to the laws enacted by the Canadian Parliament. *Direct United States Cable Co.* v. *Anglo American Telegraph Co.* (2); *The Queen* v. *Keyn* (3).

Moreover, by an Act of the Imperial Parliament, 14 and 15 *Vic.*, c. 63, entitled "*An Act for the settlement of the Boundaries between the Provinces of Canada and New Brunswick*," Parliament, confirming the award of the Right Honorable *Stephen Lushington*, and *Travers Twiss*, Doctor of Laws, defined the boundaries between *Canada*

(1) 3 Pug. & Bur. 252.
(2) 2 App. Cases, 394-422.
(3) 2 Ex. D. 63-289.

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and *New Brunswick* (in that respect) as follows: "thence "down the centre of the stream of the *Restigouche* to "its mouth in the Bay of *Chaleurs*, and thence through "the middle of that Bay to the Gulf of *Saint Lawrence*, "etc."

Then, if by the *British North America Act*, the whole of the Bay of *Chaleurs* became part of the territory of the Dominion, *The Fisheries Act* must be held to apply to this particular bay.

The next point is whether the defendant had a right to take the boat and nets for delivery to a magistrate. I claim that the effect of the statute is to confiscate to Her Majesty, immediately at the time of the committing of the illegal act, the materials illegally in use. See The "Annandale" (1).

The same principle is established in the U. S. (2). This is a forfeiture under a statute, and therefore distinguishable from forfeiture at common law, which does not vest *ipso facto*.

But here the boat and nets were afterwards, and after due hearing of the matter, adjudged to be confiscated, and it was while the goods were in Her Majesty's possession, declared by the judgment to be Her property, that the respondent obtained a verdict for $900 for this same property, and for being prevented from carrying on an illegal business.

I will now refer shortly to the appeal from the judgment on the demurrer.

The second plea alleges that the fishing boats and nets being implements and materials which *were being illegally used, &c.*, were taken by the defendant, the

(1) 2 Prob. D. 179.

(2) Oakland RR. Co. *v.* Oakland & Fruit Valley RR. Co., 13 Amer. R. at p. 185,

fishery officer, which would mean that they were seized on view.

The Court below have evidently overlooked that part of sec. 16, sub-sec. 4, which authorizes *any person*, whether a fishery officer or not, to take and remove for delivery to any magistrate, fishing materials used in contravention of the Act or regulations made under it, without any limitation as to doing it on view.

It is clearly alleged in the second plea that defendant did take and remove the boat and nets to be delivered to a magistrate, and did deliver the same to *James S. Morse*, Esq., a magistrate, &c., and it makes no difference that in the plea the defendant is described as a fishery officer. That may be treated as description or surplusage. His rights and powers are none the less as an individual because he has special rights and powers as a fishery officer.

The third plea not only alleges in this respect all that the second plea alleges, but states in addition that a trial was had, and that the magistrate adjudged the boat and nets to be confiscated to Her Majesty.

The plaintiff relies on the fact that the action was brought before the conviction, overlooking the fact that the conviction relates back to the time of the committing of the illegal act. *Robert qui tam* v. *Witherhead* (1), *Wilkins* v. *Despard* (2).

Mr. *Hannington*, for respondent:

My first point is, that drifting for salmon is not an illegal act in places not provided for by the Act. By sub-sec. 7 of sec. 7 of *The Fisheries Act*, power is given to the Minister, or any fishery officer, to define the tidal boundary of estuary fishing, and it is only when this has been done that drifting for salmon in that place is illegal. The regulations made under the 19th section

(1) 12 Mod. 92. (2) 5 T. R. 112.

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only apply to the County of *Restigouche*, and they cannot have force outside of the actual boundaries laid down. It was for the appellant to show the act was committed within the limits of the county covered by these regulations.

Outside of his jurisdiction he had no right to act as fishery officer, and still he sued before the magistrate in his capacity of a fishery officer. The act must be construed strictly, and I say appellant was bound to prove that he was acting as a private subject, and on view of the offence took and removed respondents materials for delivery to the magistrate to obtain a conviction.

The law is, that where a limited tribunal takes upon itself to exercise a jurisdiction that does not belong to it, its proceedings are a nullity. The jurisdiction of the fishery officer being limited, to justify any acts as such officer, he should have alleged that they were done within his jurisdiction, and, therefore, the second plea is bad.

Then the plea was not proved.

I contend, also, that the third plea is bad, in not alleging that defendant seized the nets within his jurisdiction ; if good, it is not proved.

The materials were not being used illegally at the time of the seizure, but were confiscated on a pretended view.

The fishing took place more than three miles from the shore, and there was an important point of law in the case that might have been raised if the Government had defined the limits of a district and professed to give jurisdiction to a fishery officer out into the deep sea, beyond the three mile limit from the shore.

It is contended, on the part of the appellant, that proceedings were had on the delivery to the magistrate. But this has not been proved, for they never were

delivered to the Justice, and the proceedings that did take place were on the complaint of the appellant, after he had confiscated the goods himself. The allegation is, in effect, that the conviction was had before the suit was commenced, whilst the evidence shows the conviction was had after action brought. The appellant having taken and confiscated the respondent's property on a pretended view, he is clearly liable. *Regina* v. *Jones* (1). With reference to forfeiture, all I want to establish is, there was no forfeiture until the seizure. The word *confiscated* does not mean *forfeited*. Forfeiture from the time of the offence cannot arise in this case. *Tomlin's* Law Dic. Vo. Confiscation, and Vo. Forfeiture; *Bouvier's* Law Dic., 1 Vol., 268; 4 *Comyn's* Dig., 404, Title Forfeiture note to B. 7.

Mr. *Lash*, Q.C., in reply:

The conviction shifted the onus, and respondent was bound to prove that his property was not liable to seizure.

The judgment of the Court was delivered by GWYNNE, J.:

The respondent sued the appellant in trespass for taking respondent's goods, namely: a fishing boat and fishing nets, and carrying away the same and disposing of them to the appellant's own use.

To this declaration the appellant pleaded three special pleas, viz.:

And for a second plea the defendant says, that at the time of the defendant's seizing and taking the plaintiff's goods, that is to say, the fishing boat and the ten fishing nets stated in the declaration, the said plaintiff was illegally and wrongfully using, and had been using the same for the purpose of drifting for salmon in the waters of the Dominion of *Canada*, and the said defendant, being a fishery officer duly appointed under the provisions of the *Fisheries Act*, did remove and detain the said fishing boat and fishing nets, being then

(1) 12 A. & E. 684.

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materials illegally in use, for the purpose of drifting for salmon, *which is the seizing, taking, carrying away and conversion in the said declaration alleged.*

The plaintiff joined issue on this plea.

Now it is to be observed, that this issue does not dispute the allegation in the plea that the taking therein admitted and justified is the taking and conversion complained of in the declaration. If the plaintiff intended to dispute that averment, the only way in which he could have done so was by new assigning specially what other act or acts he relied upon as the trespass and conversion complained of. So, neither by joining issue did the plaintiff dispute the fact that the defendant acted in virtue of the authority under which he justified. The only issue, in fact, raised by the joinder in issue to the plea, was whether or not the plaintiff was and had been illegally and wrongfully using the boat and nets for the purpose of drifting for salmon in the waters of the Dominion of *Canada*; whether, under such circumstances, *The Fisheries Act* did, or not, authorize the taking of the boat and nets which was admitted by the plea, was a question of law.

The defendant further pleaded:

That the said fishing boat and fishing nets, in the said declaration mentioned, being materials, implements and appliances that had been and were being illegally used, and in contravention of *The Fisheries Act*, for the purpose of drifting for salmon, the said defendant, being a fishery officer duly appointed under the said Act, *did take and remove the said fishing boat and fishing nets to be delivered to a magistrate, pursuant to the provisions of the said Act*, and the said defendant did afterwards deliver the same to *James S. Morse*, Esq., a justice of the peace in and for the County of *Restigouche*, being the county in which the said materials, implements and appliances had been and were being used, *which is the taking, seizing, carrying away, and conversion in the said declaration alleged.*

Upon this plea also the plaintiff joined issue. Now, joinder in issue upon this plea raised no question as to

any of the matters admitted in the plea as coming within the averment of "*quae sunt eadem.*" If the plaintiff intended to raise any issue as to any of these matters, as, for example, that the taking and conversion complained of was not that admitted in the plea; that it was not a taking for the purpose of being delivered to a magistrate under the provisions of the Act; that, as matter of fact, the things taken were not delivered to a magistrate of the County of *Restigouche*, as alleged; or that the illegal uses alleged in the plea was not at all within the County of *Restigouche*, if that was material; or that the defendant, instead of dealing with the things taken as authorised by the Act, had converted and disposed thereof to his own use; the only way in which he could have raised an issue as to any of those matters admitted in the plea, and averred to be the taking and conversion complained of, would be by new assignment. The only issue in fact raised by joinder in issue to this plea was, whether or not the boat and nets had been and were being illegally used in contravention of *The Fisheries Act* for the purpose of drifting for salmon. Whether or not the Act authorised the taking and disposition of them, *admitted* in the plea, was a question of law.

The defendant further pleaded:

That the said plaintiff having used and was using the said fishing boat and fishing nets as materials, implements and appliances for drifting for salmon in certain waters within the County of *Restigouche*, or in the waters forming the boundary between the County of *Bonaventure*, in the Province of *Quebec*, and the said County of *Restigouche*, illegally, and in contravention of *The Fisheries Act*, the said defendant took and removed the same for delivery to a magistrate, in pursuance of the provisions of the said Act, and did deliver the same to one *James S. Morse*, Esq., then being a justice of the peace or magistrate of the said County of *Restigouche*, and such proceedings under the said Act were thereupon had that the said magistrate, upon hearing the matter and the evidence, and what was alleged in his defence on behalf of the said plaintiff, adjudged the said plaintiff to be guilty

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of an infraction of the said *Fisheries Act*, and that the said fishing boat and fishing nets had been materials, implements and appliances used for drifting for salmon in the said waters and in contravention of the said *Fisheries Act*, and did adjudge the same to be confiscated to Her Majesty in pursuance of the provisions of the said Act, *and which taking and removal and delivery to the said magistrate and the confiscation thereof is the taking, seizing, carrying away and conversion in the said declaration alleged.*

The observations addressed to the joinder in issue upon the other pleas apply, but with additional force, to this plea, when we observe the peculiar frame of the plea and its difference from the others. It alleges, as did the other pleas, the illegal drifting for salmon in contravention of the *Fisheries Act*, and it admits the taking and delivery to a magistrate under the provisions of the Act, as in the last preceding plea, but proceeds to allege new matter consequential upon these acts, namely, that the plaintiff was convicted before the magistrate of the above offence, and that the boat and fishing nets of the plaintiff, for the alleged wrongful taking and conversion of which this action was brought, were adjudicated to be, and became, confiscated to Her Majesty, in pursuance of the provisions of *The Fisheries Act*. The short substance of the plea is that it confesses the taking the property as property by law liable to forfeiture to Her Majesty for the illegal act of drifting for salmon, but avoids all liability of the defendant to the plaintiff for such taking, for that the plaintiff, by due process of law, was found guilty of the illegal act, and that the property was in due form of law adjudicated to be, and became, for such illegal act confiscated to Her Majesty: and the gist of the plea is, that under such circumstances no action lies at suit of the plaintiff. By merely joining issue upon this plea, the plaintiff has placed himself in this position: that he must be concluded by such conviction and adjudication upon its being pro-

duced. Not having by replication pleaded anything in avoidance of the conviction and adjudication—as that it had been quashed—he could not, even if it had been quashed, have availed himself of that answer, upon joinder in issue to the plea.

Besides joining in issue on the pleas, the plaintiff, also by leave of the Court, demurred thereto, but the issues in fact went down to trial before argument of the issues in law. At the trial the sole question upon the issues joined was as to the legality of the drifting for salmon at the place where it took place, for the fact was not denied, but was admitted to have taken place in the Bay of *Chaleurs* opposite to the River *Charlo*, but, as was contended by plaintiff, at a greater distance than three miles from either shore of *New Brunswick*, or of *Quebec*—the whole defence being, that in such case, as was contended by the plaintiff, *The Fisheries Act* had no operation; the contention being, that if more than three miles from either shore the drifting took place in the open sea, and not within the Dominion of *Canada*, or the jurisdiction of the Dominion Parliament. Attention does not appear to have been drawn at the trial to the issue upon the third special plea, which set up the conviction of the plaintiff for having committed the offence charged *at or near the River Charlo, in the Parish of Colborne, in the County of Restigouche, in the Bay of Chaleurs* in contravention of *The Fisheries Act*, and whereby the plaintiff was adjudged to forfeit the net, fixings and apparatus thereto connected, and also the boat as forfeited under *The Fisheries Act*, to be applied according to law—which conviction, not having been quashed or impeached, remained in full force and conclusive upon the plaintiff as to the facts thereby adjudicated.

The parties seem to have been willing to stand upon

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the ground which was the real substantial matter in contest, namely: whether, assuming the drifting to have taken place more than three miles from either shore, if the jury should find that to be the fact, such drifting would come within the operation and prohibition of *The Fisheries Act?*

Much evidence was entered into to establish at what distance from shore the drifting did take place, and at the close of the evidence it was agreed between the parties that the following questions should be submitted to the jury, namely:

1st. Was the fishing by the plaintiff within three miles of any shore of the Dominion of *Canada*?

2nd. What do the jury assess the damages at?

and that a verdict should be entered for the plaintiff upon all the issues, with liberty to the defendant to move the Court to alter the verdict and to enter a verdict for the defendant upon all or any of the issues, and to enter the verdict or judgment for either party, as well upon the finding at the trial and the results of the demurrer, or both, or either, as the Court may think proper.

The jury found that the fishing by the plaintiff was not within three miles of any shore of the Dominion of *Canada*, and they rendered a verdict for the plaintiff with $900 damages.

Upon a rule being obtained in the ensuing term to set aside this verdict and to enter a verdict for the defendant in accordance with the agreement in that behalf entered into at the trial, and the demurrers being argued at the same time, the Court held the second and third of the above special pleas to be bad in law, and that the first was good in law but was not proved in fact, and they discharged the rule for setting aside the verdict, holding that,

Without considering whether the provisions of the Act apply to

persons who may be fishing more than three miles from the shore, the defendant had no power of seizure and detention, unless the offence was committed in his view, which it clearly was not in the present case; and they held that therefore the defendant had entirely failed to prove his justification, and that there is no ground for disturbing the verdict.

These observations apply plainly only to the first of the above special pleas, which the Court held to be sufficient in law, for, as to the others, which they pronounced to be insufficient, they wholly disregarded the issues in fact raised thereon.

From this judgment, both upon the rule *nisi* and upon the demurrers to the above second and third special pleas, the defendant appeals; the plaintiff raises no cross appeal.

That there has been a miscarriage of justice by this judgment will be apparent when we consider its effect to be, that it wholly sets at nought the material point which the parties went down to try, and the issues in fact raised upon the record, namely, whether drifting for salmon in the Bay of *Chaleurs*, at the place in question, opposite the mouth of the River *Charlo*, was an illegal act within the prohibition and operation of *The Fisheries Act*, and damages, which were assessed by the jury at $900, upon the assumption that the act of drifting complained of was not illegal, and that therefore the seizure was wholly unjustified, are sustained by the court, wholly regardless of the fact whether the act was illegal or not, and in the face of a conviction for its illegality not complained of as bad on its face, whereby the plaintiff has been convicted of the offence charged, and the property, for the taking of which this action has been brought, has been adjudicated to be confiscated to Her Majesty by a conviction and adjudication of confiscation which has not been reversed or quashed.

The fourth plea on the record, that is, the third of the

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above special pleas, is unobjectionable in point of law, and shows, if true, a clear defence to the action by way of confession and avoidance. *Robert, qui tam* v. *Witherhead* (1), and *Wilkins* v. *Despard* (2), were cited as authorities for the contention, that inasmuch as the Act declares all materials, implements and appliances used in contravention of the Act, or of any regulation under it, shall be confiscated to Her Majesty, and may be seized and confiscated on view by any fishery officer, or taken and removed by any person for delivery to any magistrate, the plaintiff could not maintain trespass against the defendant, although no conviction of the plaintiff for the offence charged, or condemnation of the property, had ensued upon the seizure ; but where, as is pleaded in this plea, the conviction and condemnation did, in due process of law, ensue upon the seizure, there can be no doubt that these judicial proceedings enure to protect the person justifying the taking for the purpose stated, and to defeat the plaintiff's action, the facts alleged in the plea being then admitted by the demurrer, judgment should be for the defendant upon the sufficiency of the plea in law. The case of *Jones* v. *Owen* (3), relied upon by the Court below, was a very different case. There, to an action of trespass, the defendant pleaded, confessing the alleged trespass, but justifying it as authorized by an Act of Parliament, but alleging the act of trespass admitted to have been committed for a purpose which was not warranted by the Act, and it was held bad upon demurrer, the Court, however, holding that the plea well alleged two offences committed against the Act, for either of which the defendant might have convicted the plaintiff on his own view as a magistrate, or might, as a private individual, have apprehended the plaintiff for the purpose of being dealt

(1) 12 Mod. 92.

(2) 5 T. R. 112.

(3) 2 D. & Ry. 600.

with according to law, but that instead of doing either of those things, which the Act authorized, his plea attempted to justify the trespass as done under the Act, although alleged to have been done for a purpose not warranted by the Act.

Now, as to the issue in fact joined upon this plea: there being no new assignment disputing any of the matters averred under the *quae sunt eadem*, nor any replication avoiding the conviction and condemnation pleaded, all that remained to be proved was the allegation of the committal of the offence of illegal drifting for salmon in contravention of *The Fisheries Act*, and the plea was proved by the record of the conviction and condemnation of the property which was produced. Independently, however, of the conviction still remaining in force and unreversed, it is clear that the act of drifting for salmon, which was proved, and indeed throughout admitted, although that drifting may have been more than three miles from either shore of *New Brunswick* or of *Quebec* abutting on the Bay of *Chaleurs*, was a drifting in Canadian waters, and was within the prohibition of *The Fisheries Act*, and of the regulations made in virtue thereof, produced in evidence; for the Imperial Statute, 14 and 15 *Vic.*, c. 63, makes the boundary line between old *Canada* and *New Brunswick* proceed from the mouth of the *Mistouche* River, at its confluence with the *Restigouche*, down the centre of the stream of the *Restigouche* to its mouth in the Bay of *Chaleurs*, and thence through the middle of that Bay to the Gulf of *St. Lawrence*; so that the whole of the Bay is within the present boundaries of the Provinces of *Quebec* and *New Brunswick*, and within the Dominion of *Canada*, and the operation of *The Fisheries Act*.

The second special plea also appears to me to be sufficient in law, even if it be necessary to make it good (which I do not feel called upon here to decide), that it

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should be averred that the things seized were, at the time of the seizure, in the actual illegal use which exposed them to seizure; for that averment is substantially involved in the allegation, which is, not only that they had been, but *were being* used illegally, in contravention of *The Fisheries Act*, for the purpose of drifting for salmon; and the plea avers that the property was taken for the purpose of being delivered to a magistrate, and was delivered to *Jas. S. Morse*, a magistrate of the County of *Restigouche*, in which county, as the plea alleged, the property had been and *was being* so illegally used, and the plea shows a delivery of the property seized to a magistrate having jurisdiction over the offence charged, and the plea avers that this taking and disposition of the property is the taking and conversion alleged in the declaration; the demurrer admitting all this, the plea, in my opinion, is a sufficient answer to the declaration, and as to the issue in fact joined upon this plea, there being, as before observed, no new assignment, the only question was as to the fact of the committal of the offence alleged as the justification of the taking. Upon the issues in fact, therefore, joined upon both of these pleas, the verdict should have been for the defendant.

We are not called upon to pronounce upon the sufficiency or insufficiency in law of the first of the above special pleas. It has been pronounced by the court below to be sufficient in law, and the plaintiff has not appealed or given notice of a cross appeal from this judgment, so that this is the appeal of the defendant only. At any rate, as it only involves a question of costs we are not bound to interefere, even though it might be open to us to pronounce judgment upon this demurrer. And as to the issue in fact joined upon the plea, there being no new assignment, the joinder in issue

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raised only a question as to the fact of the committal of the offence which was pleaded as the justification of the taking admitted, and that fact was clearly established as already shown.

I confess, however, that even if the fact of the offence having been committed *on view* of the defendant had been a matter in issue under the joinder in issue to the plea, the evidence given upon that subject was, in my opinion, sufficient, otherwise a most beneficial Act will be stripped of much of its efficiency. I do not think that the term "on view" in the Act is to be limited to seeing the net in the water while in the very act of drifting; it appears to me if the party acting "*on view*" himself sees what if testified to by him would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. Now the defendant's evidence is that, having been informed by the plaintiff that he intended to drift for salmon three miles out in the Bay of *Chaleurs*, and having heard that he was doing so, and having informed the plaintiff if he should do so he would seize his net and appliances, he came down to look after the plaintiff. The defendant says:

I went twice to *Charlo* before I got the boat and nets; the time I went the boat did not go out. On the night of the 5th July, 1876, I landed below the station, found the boat had gone out, and I went down the *Charlo* River, got a boat and two men and rowed out from *Charlo* up along the coast,—could not find the boat; in the morning about day-break I saw the boat coming ashore at *Charlo* Station. I waited until the boat came ashore, and then I seized the boat and nets. The net was piled upon the boat, wet; they had one fish. I took the nets and boat, the net was between three and four hundred fathoms, and about twenty feet deep, meshes 6 or $6\frac{1}{4}$ inches—it was a drifting salmon net.

The men also informed him that they had been drifting for salmon. The fish, it is true, was a shad—not a salmon; but the net was wet, and it was sufficiently apparent that the fish was caught with the net. The defendant had therefore ocular demonstration that the

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net, which was a drifting salmon net, had been just recently used in that bay, and that the boat with the net had but reached the shore on return from such use when he seized ; this evidence appears to me to have been quite sufficient to come within the provisions of the 4th sub-sec. of the 16th sec. of *The Fisheries Act* to justify the defendant to seize the materials, implements and appliances so used.

Our judgment, upon the whole, will be to allow the appeal with costs, and to order that judgment upon the demurrers to the second and third of the above special pleas, being the third and fourth pleas upon the record, be entered for the defendant, and that the rule *nisi* in the Court below be made absolute to enter a verdict for the defendant upon all the issues in fact joined, with costs.

Appeal dismissed with costs.

Solicitors for appellant : *Harrison & Burbridge.*

Solicitor for respondent : *C. A. Palmer.*