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*March 16, 17, 18.
*April 28.

THE SHIP "MAY" (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Fisheries—Shipping—Foreign fishing vessel entering Canadian territorial waters—Customs and Fisheries Protection Act, R.S.C., 1927, c. 43, s. 10—"Stress of weather" or other "unavoidable cause" (Customs Act, R.S.C., 1927, c. 42, s. 183)—Convention of October 20, 1818, between Great Britain and the United States.

To justify (as against incurrence of penalty under the *Customs and Fisheries Protection Act,* R.S.C., 1927, c. 43, s. 10) an entry by a foreign fishing vessel into Canadian territorial waters on the ground of "stress of weather" (*Customs Act,* R.S.C., 1927, c. 42, s. 183), the weather must be such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo (*The Eleanor,* Edwards, 135, at 159, 160, 161; *The Diana,* 7 Wallace 354, at 360-361; *The New York,* 3 Wheaton 59, at 68; *Phelps, James & Co.* v. *Hill,* [1891] 1 Q.B. 605, at 614, cited). In each case the questions whether the master fairly and honestly on reasonable ground believed it necessary to take shelter, and whether he exercised reasonable skill, competence and courage in the circumstances, are questions of fact for the tribunal whose duty it is to find the facts.

In the present case, on the evidence, the finding at trial that defendant ship was within such waters when seized, and was not justified on the ground of "stress of weather" in entering them, was affirmed.

A contention that necessity to repair the engine was an "unavoidable cause" (*Customs Act,* s. 183, *supra*) justifying such entry, was rejected, as, on the evidence, the repair in question was not an immediate necessity, the defect not affecting the sailing of the vessel or making it more dangerous; moreover, failure to have the vessel in seasonable repair on going to sea could not be deemed an "unavoidable cause."

The Convention of October 20, 1818, between Great Britain and the United States (respecting fisheries and boundary lines) did not apply to the Pacific waters so far as fisheries were concerned, and therefore could not be available as justification for the entry in question.

APPEAL by the defendant ship from the judgment of Martin J., Local Judge in Admiralty, in the Exchequer Court of Canada, British Columbia Admiralty District, whereby he pronounced that the ship, a foreign fishing vessel within the meaning of the *Customs and Fisheries Protection Act,* R.S.C., 1927, c. 43, at the time of her seizure in

*PRESENT:—Newcombe, Rinfret, Lamont and Cannon JJ. and Maclean J. *ad hoc.*

British waters, had entered British waters within three marine miles of the coast of Canada for a purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force, in violation of the *Customs and Fisheries Protection Act* aforesaid; and condemned the said vessel and the tackle, rigging, apparel, furniture, stores and cargo thereof as forfeited to His Majesty.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Wm. Savage for the appellant.

D. L. McCarthy K.C. and *J. E. Read K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from a judgment of Mr. Justice Martin pronounced in the Exchequer Court of Canada, British Columbia Admiralty Division, in which he condemned as forfeited to His Majesty a fishing vessel named *May* registered at Ketchikan, U.S.A., and all her equipment, cargo and stores. The vessel was condemned on the ground that she was a foreign fishing vessel within the meaning of the *Customs and Fisheries Protection Act*, cap. 43, R.S.C., 1927, and that, at the time of her seizure, she was within three marine miles of the coast of Canada, having entered British waters for a purpose not permitted by treaty or convention or by any law of Great Britain or Canada, in violation of the said Act.

The *May* was a ten ton salmon trawler owned by B. O. Knudsen, and operated by Knudsen and one fisherman, Henry Christophersen. She was propelled by a 30 horsepower oil burning engine. She left Ketchikan at 9 a.m., June 3, 1930, and had on board 6 tons of ice, 700 gallons of oil and 100 gallons of water. Knudsen says he set out to go to the Cape Calvert fishing grounds, off Goose Island, some 200 or 250 miles south. His course lay straight across Dixon Entrance and down Hecate Straits. He says that about 3 or 4 p.m., a southeast wind sprang up and the sea became choppy; at 5 p.m., as the wind was increasing and dead ahead, he concluded it was too rough to venture

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down Hecate Straits, so he turned to go back to Cape Chacon, in American territory. After running a short distance before the wind, he says, a wave broke over his stern, so he directed his course southwesterly to find shelter behind Rose Spit Point of Graham Island. He sighted Rose Spit buoy between 6 and 7 p.m. and was then about two miles northwest of it. He says he headed south for the anchorage in McIntyre Bay, sailing by compass as it was misty, until about 9.30 when Christophersen took the soundings and found 40 fathoms of water. From the depth of the water he concluded he was outside the three mile limit. He then anchored and, after he had put some packing in the pump which is used to supply the engine with oil, he went to bed.

At 2.30 on the morning of June 4 the Canadian Government Patrol launch *Rividis,* commanded by Captain Sheppard, a commissioned officer in the Fishery Protection Service, ran alongside the *May* and Captain Sheppard boarded her. Both Knudsen and Christophersen were then asleep. He woke them up and Knudsen asked him if he thought he was within the three mile limit, to which Sheppard replied that he thought he was, but that he would wait until it was clear daylight so that he could verify the *May's* position. He then took possession of her papers and manifest and requested Knudsen to come on board the *Rividis* where he questioned him, entering the questions and answers in the log. The material questions and answers are as follows:—

Q. 1. What time did you anchor here?—A. 9.30 p.m. Date June 3rd.

Q. 2. What were the weather conditions when you anchored?—A. Pretty good when I anchored here.

Q. 3. What were the weather conditions for the past 48 hours?—A. Fine when I left Ketchikan and until 4 p.m. 3rd when it started to blow hard, well—not blow hard, but a choppy sea.

Q. 4. What was your reason for anchoring?—A. Bad weather off Rose Spit Buoy. It was very uncomfortable there.

* * * * *

Q. 9. How long have you been fishing in the locality?—A. About 3 weeks this season.

Q. 10. Do you think it was calm and smooth 8 to 10 miles off McIntyre Bay when you anchored off Rose Spit?—A. Possibly it was.

Q. 11. You did not trouble to go off shore and make certain?—A. No 1 steered for the anchorage first.

At daylight between the hours of 3 and 3.30 a.m., June 4, Captain Sheppard took both compass bearings and sex-

tant angles in order to fix the location of the *May*, and found her to be 2·5 miles from shore, half a mile within Canadian territorial waters. The entry in the log as to the location of the vessel is as follows:—

The following sextant angles were taken and verified by Lieut. Comdr. Godfrey.

Tow Hill and Argonaut Hill 25° 15′.

Argonaut Hill and end of trees 64° 10′.

The above angles placed boat *May* 2·5 miles S. 82 W. from end of trees and 1·8 miles from Boundary line between end of Rose Spit and Yakin Pt. I informed the skipper he was anchored inside the 3 mile limit, that the weather was fair and calm when he anchored, and was still fair with light S.E. wind and they were both asleep—so I would have to take him to Rupert. Would he use his own engines? Reply—No I am finished I am inside so do what you like; he would not start his engine to heave in his cable. The boat was taken in tow of Rividis 4.45 a.m. proceeding toward Prince Rupert.

At Prince Rupert proceedings were commenced which resulted in the *May* being declared forfeited.

The *Customs and Fisheries Protection Act*, under which proceedings were taken, provides as follows:—

10. Every fishing ship, vessel or boat which is foreign, or not navigated according to the laws of Great Britain or of Canada, which,

(*a*) Not being thereto permitted by any treaty or convention, or by any law of Great Britain, or of Canada for the time being in force, has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks or harbours of Canada, or in or upon the inland waters of Canada;

(*b*) has entered such waters for any purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force;

* * * * *

shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited.

It is not contended that the *May* from the time she entered McIntyre Bay until she was seized was fishing or preparing to fish.

It is subsection (*b*) of section 10 that the Crown contends has been violated.

That the *May* was a foreign fishing vessel is admitted. Two questions, therefore, arise in the appeal: (1) When found by Captain Sheppard at anchor in McIntyre Bay, was the *May* within Canadian territorial waters? (2) If so, had she entered such waters for any purpose not permitted by treaty or convention or by the law of Great Britain or Canada then in force? These are purely ques-

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tions of fact or inference from fact or of interpretation. The trial judge gave no reasons for judgment but the formal judgment shews that he found the *May* to be in British waters when Captain Sheppard boarded her and that she had entered those waters in violation of the above Act.

Was the *May* within the three mile limit when seized? The trial judge had before him the evidence of Captain Sheppard that he had taken the sextant angles, which, it is common ground, is the most accurate method of ascertaining location; that he took the angles accurately and that the *May* was anchored two and a half miles from shore. He had also the evidence of D. S. Godfrey, Lieutenant-Commander in the Royal Canadian Navy, who also took the sextant angles and corroborated the evidence of Captain Sheppard. Commander Godfrey had no connection with, or interest in the Fishery Protection Service. His presence on the *Rividis* is accounted for by his having been sent to acquire some knowledge of the coast of the Queen Charlotte Islands. Both these men were highly qualified to ascertain the location of any boat by taking the sextant angles. Captain Sheppard also testified that he had asked Knudsen the questions quoted from the log and that the answers there reported were those given by Knudsen.

Both Knudsen and Christophersen knew that the sextant angles were being taken to locate the position of their vessel and that its fate might depend on the result arrived at; yet no request was made by either of them to be allowed to verify the angles taken. Furthermore, they both say they took compass bearings which shewed the *May* to be three and a half miles from shore, yet they made no protest when informed that they were within the three mile limit, nor did they ask Captain Sheppard to log into shore to verify the distance. Knudsen in his evidence admits that when he was asked to start his engine he replied "No, I think I am through with this boat," while, according to Captain Sheppard, his reply was " No, I am finished, I am inside so do what you like."

The conclusion of Captain Sheppard as to the location of the *May* when seized was questioned at the trial. The defence produced three expert witnesses who took Captain

Sheppard's angles and, by applying them on the chart to a point on Tow Hill and one on Argonaut Hill, found the *May* to be outside of Canadian territorial waters. When asked to explain how, with the same angles, there could be a difference between the location fixed by Captain Sheppard and themselves, they admitted that the difference might arise from his having taken a slightly different point on Argonaut Hill and Tow Hill from those on which they placed their lines on the chart. The discrepancy really arose from the fact that in the log the two hills were mentioned as the points taken. Now Argonaut Hill is situated inland and the top comprises a plateau more than half a mile square, the northwesterly face of which is shewn on the chart to be 535 feet high, while the opposite face is shewn to be 490 feet high. To get the same result it is obvious that each expert must take exactly the same points on Tow Hill and on Argonaut Hill. The defendant's experts frankly admitted that unless the fixed points taken on the ground were so clearly defined in the log that they could be accurately located on the chart, the man who sighted these fixed points on the ground had an advantage over those who had not seen the hills, as he alone knew the exact points on the hills which had been taken. When asked why he did not define in the log the exact points on those two hills, which he took to get the sextant angles, Captain Sheppard said he did not think it was necessary as every navigating officer taking observations around Tow Hill, Argonaut Hill and the "end of the trees" knew exactly the points which were always taken, and "would never use the top of Tow Hill for the simple reason that you cannot get such a fine cut on the sextant with the square faced bluff on Argonaut Hill." The point on Tow Hill which he took was the east side where it drops perpendicularly to the base of the river flat. On Argonaut Hill he took a point on a very conspicuous bluff on the centre of the hill at its highest part—"a peculiar wooded part of the hill that always stands out" when looked at from the position from which he took the angles. Captain MacDonald, one of the defendant's experts, on being recalled, admitted that, taking the points sighted by Captain Sheppard, the location of the *May* was within the three mile limit.

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On this evidence it is impossible to reverse the finding of the trial judge as to the location of the *May* without disbelieving the evidence of witnesses whom he heard and believed.

The next question is: did the *May* enter Canadian territorial waters for any purpose not permitted by treaty or convention or by the law of Great Britain or of Canada for the time being in force?

Counsel for the appellant vessel contended that she was permitted to enter Canadian waters under, (1) the *Customs Act*, section 183, and (2) "The Convention of 1818" between Great Britain and the United States. Section 183 of the *Customs Act* reads as follows:—

183. If any vessel enters any place other than a port of entry, unless from stress of weather or other unavoidable cause, any dutiable goods on board thereof, except those of an innocent owner, shall be seized and forfeited, and the vessel may also be seized, and the master or person in charge thereof shall incur a penalty of eight hundred dollars, if the vessel is worth eight hundred dollars or more, or a penalty not exceeding four hundred dollars, if the value of the vessel is less than eight hundred dollars, and the vessel may be detained until such penalty is paid.

It is common ground that this section, although primarily enacted as a customs provision for the protection of the revenue, does, by the exception contained in the words "unless from stress of weather or other unavoidable cause," give effect to a principle of International Law recognized by both countries, namely, that vessels of one nation will be excused for entering the territory of another if there is an actual necessity for their so doing. It is a well recognized principle, both in this country and in the United States, that the jurisdiction of a nation is exclusive and absolute within its own territory, of which its territorial waters within three marine miles from shore are as clearly a part as the land. All exceptions, therefore, to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself given as a general rule by treaty, convention or statute. From this it follows that each nation has the absolute right to prescribe the conditions upon which the vessels of another nation will be permitted to enter its territorial waters. What we have to do, therefore, is to ascertain what conditions have been prescribed, to define the limits thereof, and then see if the facts, as disclosed by the evidence, bring the *May* within these limits.

The condition prescribed by the *Customs Act* is "stress of weather or other unavoidable cause." In this case the appellant vessel must rely for her justification upon "stress of weather," for the other cause advanced, namely, that it was necessary to seek shelter to repair the engine, does not, in my opinion, merit serious consideration. The only repairing required was to renew the packing of the oil pump, which had become worn, thus causing the pump to leak. The leaking of the pump did not affect its usefulness for feeding the engine with oil, but it resulted in a waste of oil. It in no way affected the sailing of the vessel or made it more dangerous. This is shewn by the fact that Knudsen ran the vessel from, at least, 5 p.m. to 9.30 p.m. with the oil pump in its leaky condition, and stated that if he had found 15 fathoms of water under him instead of 40, when Christophersen took the soundings, he would have gone farther out. The packing of the oil pump was, therefore, not an immediate necessity. Besides, it was Knudsen's duty, not only to have his vessel seaworthy when he left Ketchikan on the morning of June 3, but to have her in seasonable repair, and, if he was compelled to enter into Canadian territorial waters by reason of his failure to have his vessel in seasonable repair, his failure cannot be designated as an unavoidable cause.

What, then, does "stress of weather" connote?

In *The Eleanor* (1), Sir William Scott said:

> Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws. But if a party is a false mendicant, if he brings into a port a ship or cargo under a pretence which does not exist, the holding out of such a false cause fixes him with a fraudulent purpose. * * * Now it must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act, where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: Such a case, though there might be no existing storm, would be veiwed with tenderness; but there must be at least a moral necessity. Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of

(1) (1809) Edwards' Admiralty Reports, 135, at 159, 160 and 161.

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the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.

In *The Diana* (1), Field J. said:—

It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. "Nothing less," says Sir William Scott, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud.

In *The New York* (2), Livingston J. said:—

The necessity must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well grounded apprehension of the loss of vessel and cargo, or of the lives of the crew. It is not every injury that may be received in a storm, as the splitting of a sail, the springing of a yard, or a trifling leak, which will excuse a violation of the laws of trade. Such accidents happen in every voyage; and the commerce of no country could be subject to any regulations, if they might be avoided by the setting up of such trivial accidents as these.

And Johnston J., in his dissenting opinion, remarked (3) that it was not questioned that if a vessel in the course of its voyage "sustained such damage as rendered it unsafe to keep the sea, she might innocently enter the ports of the United States to repair, and resume her voyage."

In *Phelps, James & Co.* v. *Hill* (4), the question was whether the master of a vessel was justified in deviating from his prescribed course. In his judgment Lopes J., at page 614, said:

A reasonable necessity implies the existence of such a state of things as, having regard to the interests of all concerned, would properly influence the decision of a reasonably competent and skilful master.

A perusal of the above authorities leads to the conclusion that an entry by a foreign vessel into Canadian waters cannot be justified on the ground of "stress of weather" unless the weather is such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside the territorial waters he will put in jeopardy his vessel and cargo.

(1) (1868) 7 Wallace, 354, at 360-361.
(2) (1818) 3 Wheaton, 59, at 68.
(3) *Ibid*, at 75.
(4) [1891] 1 Q.B. 605.

In every case the questions whether the master fairly and honestly on reasonable ground believed it necessary to take shelter, and whether he exercised reasonable skill, competence and courage in the circumstances, are questions of fact for the tribunal whose duty it is to find the facts.

The evidence in this case does not shew any necessity whatever for entering Canadian waters, much less any apprehension on the part of Knudsen that if he continued his voyage he would be risking the loss of his vessel. On the afternoon of June 3, Christophersen says they were off Zayas Island to the south and west, and were opposite Dundas Island, and passed two or three fishing vessels going north towards Ketchikan. One of them was the *Queen City,* whose captain, Thorgersen, testified in favour of the appellant. The wind was then blowing from the southeast and the other vessels were heading for American territory and running before the wind. Thorgersen says that his boat was getting the sea over her stern once in a while. These boats experienced no difficulty in going with the wind, so why should the *May?* Furthermore, if Knudsen thought there was any danger in continuing his voyage, all he had to do was to run behind Zayas Island, or Dundas Island, and wait until the wind subsided. Instead, however, he sailed southwest for McIntyre Bay. In following that course he was crossing the sea running almost in its trough for a distance nearly as far as that required to take him to Cape Chacon. If the waves passed over his stern when running before the wind it is difficult to understand how he could escape them by taking them on his side. In addition there is the admission of Knudsen that when he was two miles off Rose Spit buoy the wind was moderating and that the weather was "pretty good" when he anchored.

The answers given by Knudsen to the questions put to him by Captain Sheppard and recorded in the log shew that his real reason for going into McIntyre Bay was that it was more comfortable in its sheltered waters than it would have been outside the three mile limit. That there was no necessity for taking shelter is shewn by the fact that outside, some ten or twelve miles from shore, there were, according to Captain Sheppard and Commander Godfrey,

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18 or 20 trawlers fishing, between 5 and 7 p.m., and that at 7 p.m. they appeared to Commander Godfrey to have anchored. It was for the trial judge to pass upon the evidence before him and say whether or not the proper inference to be drawn from it was that there existed at the time such "stress of weather" that the *May* was justified in entering Canadian territorial waters for shelter. His finding was that none existed and, in my opinion, that finding should be affirmed.

Counsel for the appellant argued that even if the term "stress of weather" was held to mean an uncontrollable necessity when applied to merchant ships, it should not be given that meaning when applied to fishing vessels, as fishermen were "wards of civilization and entitled to favourable treatment." The statute makes no such distinction and I am unable to see any good reason why fishing vessels should not comply with the statute. The owners or operators of these vessels carry on their business for profit and, in this case, in competition with Canadian fishermen. They should, therefore, be held to a strict observance of the conditions which the statute prescribes for their entry into Canadian waters.

It is also claimed on behalf of the appellant that the *May* had a right to enter Canadian waters under article 1 of the "Convention respecting Fisheries and Boundary Lines," etc., concluded between Great Britain and the United States on October 20, 1818, which, it is contended, applies to the Pacific coast of Canada. Article I of the Convention contains the following:—

> And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

To properly understand this article it is necessary to refer to the treaty made at Paris between the two nations in September, 1783. By article 1 of that treaty Great Britain

recognized the independence of the United States. Article 2 defined the boundaries of the United States and fixed the boundary line between the two countries from the Atlantic Ocean westerly to the Lake of the Woods. By article 3 it was agreed that the people of the United States should continue to enjoy the fisheries of Newfoundland and the Gulf of St. Lawrence and at all other places in the sea where the inhabitants of both countries used theretofore to fish, and also that they should have *liberty* to take fish on the British coast generally, and to dry and cure fish on the unsettled bays, harbours and creeks of Nova Scotia, Magdalen and Labrador.

Differences arose between the two countries as to the extent of these liberties, which differences continued until the war of 1812. After that war Great Britain claimed that the liberties were abrogated by the war, while the United States Government contended that they still existed. To settle the dispute a new agreement was entered into by the Convention of 1818. Under that convention the right to take fish, granted by article 3 of the treaty of 1783, was continued, but the liberty to fish within three marine miles of the coasts, bays, creeks or harbours of His Britannic Majesty in America, except in certain specified places, was, by the American Government, renounced forever, but subject to the proviso of article 1 quoted above. The Convention also fixed the boundary between the two countries, west from the Lake of the Woods to Stony (Rocky) Mountains at the 49th parallel of north latitude. Article 3 of the Convention, in part, reads as follows:—

> It is agreed that any country that may be claimed by either party on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years from the date of the signature of the present convention, to the vessels, citizens, and subjects of the two powers.

In 1827 the provisions of article 3 were extended indefinitely. In 1846 the two nations entered into a treaty defining the boundary line between them from the Rocky Mountains, where it had been fixed by the Convention of 1818, to the Pacific Ocean, at the 49th parallel of north latitude. All north of that line to parallel 54° 40′ was awarded to Great Britain, and all south of it to the United

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States. It was not until the ratification of this treaty that the sovereignty of Great Britain to any part of the Pacific Slope, north of the 49th parallel of latitude, was recognized by the United States. This is admitted in the appellant's factum, where the following appears:—

> It should be noted that Article III of the "Convention of 1818" was passed without prejudice to any claim of either party to the territory of the coast of the North Pacific. This did not mean that the territory was "then almost wholly terra incognita." (*The King* v. *The Valiant, supra* (1)) but on the contrary it meant that the territory was claimed by both United States and Great Britain and was finally settled as the property of Great Britain from Lat. 49° Northward to 54° 40′ including the locus in question in this case.

In view of the fact that at the date of the "Convention of 1818" the United States had not recognized the sovereignty of Great Britain to the Pacific slope, it is, in my opinion, impossible to hold that the reference to the "coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America," contained in article 1 of the "Convention," was intended by either party to apply to the Pacific coast. I, therefore, agree with the conclusion reached by Mr. Justice Martin in *The King* v. *The Valiant* (1), that the "Convention of 1818" did not apply to the Pacific waters so far as fisheries were concerned.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Savage & Keith.*

Solicitors for the respondent: *MacNeill, Pratt, MacDougall & Morrison.*

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(1) (1914) 15 Can. Ex. C.R. 392; 19 B.C.R. 521.