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*Mar. 17, 18.
*April 28.

THE SHIP "QUEEN CITY" (DEFENDANT)..APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

THE SHIP "TILLIE M." (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

THE SHIP "SUNRISE" (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" (Customs Act, R.S.C., 1927, c. 42, s. 183)—Class of vessel—Weaknesses in vessel—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) a foreign fishing vessel entering Canadian territorial waters on the ground of "stress of weather" (*Customs Act,* R.S.C., 1927, c. 42, s. 183), there must be such a condition of atmosphere and sea as would 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 May* v. *the King, ante,* p. 374, and authorities there cited).

In the present case, *held,* that the evidence amply supported the finding at trial that there was no stress of weather or other sufficient cause to justify the entry of defendant vessels into such waters, and that the judgment at trial declaring them forfeited under s. 10 of the *Customs and Fisheries Protection Act* should be affirmed.

Remarks as to suspicion against *bona fides,* if a foreign fishing vessel entered Canadian waters for shelter because it was of such a class of construction that it could not with safety remain outside against weather that was known to prevail on its fishing grounds. A want of *bona fides* would abrogate any right or privilege to shelter given by the statute. Further, weaknesses in a vessel may be such (as instanced in certain respects in the present case, as, e.g., glass of inadequate thickness in pilot house windows a small height from the sea, constituting a special danger from waves) that any distress arising from them should be deemed a distress created by the owner or master

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

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himself (*The Eleanor*, Edwards, 135, at 161), and not due to "stress of weather or other unavoidable cause" (*Customs Act*, s. 183).

The Convention of October 20, 1818, between Great Britain and the United States (respecting fisheries and boundary lines) has no application to Canadian territorial waters on the Pacific Coast, so far as fisheries are concerned (*The May* v. *The King, ante*, p. 374). Even if it had, the defendant vessels could claim no privilege under it, as the only permission to take shelter in Canadian waters given by the proviso to article 1 thereof (or by 59 Geo. III, c. 38, Imp., passed to sanction the Convention) is permission to enter "bays or harbours," and the place where they were seized was not shewn to be a bay or harbour.

APPEAL by the defendant vessels from the judgment of Martin J., Local Judge in Admiralty, in the Exchequer Court of Canada, British Columbia Admiralty District, holding that the vessels, foreign fishing vessels within the meaning of the *Customs and Fisheries Protection Act*, R.S.C., 1927, c. 43, had violated s. 10 of said Act, in that each vessel, (as pronounced in the formal judgment) "at the time of her seizure in 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"; the learned judge holding that, under the particular circumstances, there was no "stress of weather or other unavoidable cause" within the true meaning of s. 183 of the *Customs Act*, R.S.C., 1927, c. 42, warranting such entry; and condemning the vessels and their tackle, rigging, apparel, furniture, stores and cargo as forfeited to His Majesty.

The three actions had been tried together. The material facts of the case are sufficiently stated in the judgment now reported. The appeal in each case was dismissed with costs.

Wm. Savage for the appellants.

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

The judgment of the court was delivered by

LAMONT J.—These three cases were heard together before Mr. Justice Martin in the Exchequer Court of Canada, British Columbia Admiralty Division, who held that each vessel was a foreign fishing vessel which had entered Canadian territorial waters for a purpose not permitted

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by treaty or convention or by any law of Great Britain or Canada, in violation of section 10 of the *Customs and Fisheries Protection Act*, cap. 43, R.S.C., 1927.

On the morning of June 18, 1930, between 1.30 and 2 a.m., Captain Sheppard of the fisheries patrol launch *Rividis* found five vessels at anchor in Canadian territorial waters on the east side of Rose Spit about three-quarters of a mile from shore. He boarded each in turn and ordered the master of each to come on board the *Rividis* with his ship's papers and manifest. There he questioned each master separately and entered the material questions and answers in the log. Lieutenant Commander Barnes of the Canadian Navy, who was at the time on board the *Rividis*, was present at the examination of each master; heard the questions asked and the answers given, and saw Captain Sheppard enter question and answer in the log. Immediately thereafter he read what Captain Sheppard had written and testified that the questions and answers appearing in the log were the questions put to and the answers given by the several masters. After questioning the masters of the respective vessels, Captain Sheppard directed three of the vessels, namely, the *Sunrise*, the *Queen City* and the *Tillie M.*, to proceed to Prince Rupert. Arriving there the vessels were put in the hands of the customs officers and proceedings were commenced which resulted in their forfeiture. The other two vessels, the *Frederick* and the *Anne*, were not seized, as the explanation of their masters for entering Canadian waters was deemed satisfactory.

It is not disputed that the three vessels were registered in the United States of America, nor that they were within three-quarters of a mile of the Canadian shore when they were seized by Captain Sheppard. The contention of their counsel is that they were permitted to enter Canadian waters (1) by virtue of section 183 of the *Customs Act*, and (2) under article 1 of the "Convention Respecting Fisheries and Boundary Lines, etc.," concluded between Great Britain and the United States on October 20, 1918.

For the reasons set out in the judgment of this court in *The Ship May* v. *The King* (delivered herewith) (1), we are of opinion that the Convention of 1818 has no

(1) *Ante*, p. 374.

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application to the territorial waters of Canada on the Pacific coast, so far as fisheries are concerned. But even if it had, not one of these vessels could claim any privilege under it. By article 1 of the Convention the United States renounced forever the liberty theretofore enjoyed or claimed by the inhabitants thereof to fish within three marine miles of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America, not included in the limits mentioned. But it was provided that American fishermen should be permitted 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." The only permission to take shelter in Canadian waters given by the proviso of article 1, or by the Imperial statute, 59 Geo. III, cap 38 (which was passed to sanction the Convention) is permission to enter the bays and harbours. Now the place where these three vessels were seized is not shewn on the chart or established by the evidence to have been either a bay or a harbour, and if it is not there is no provision either of treaty or statute which authorizes entry for the purpose of shelter. Moreover the absence from the proviso of article 1, of the words "coasts" and "creeks," which appear in conjunction with bays and harbours in the first part of the article, conclusively indicates that the privileges conferred as to bays and harbours were not meant to extend to coasts not included in that description. The sole question in this appeal, therefore, is: were these vessels, or any one of them, permitted to enter Canadian waters by virtue of section 183 of the *Customs Act,* which inferentially permits entry by a foreign vessel when "stress of weather or other unavoidable cause" compels her to seek shelter therein.

On the authorities referred to in the judgment in *The Ship May* v. *The King* (1), we came to the conclusion that "stress of weather" which would justify a foreign fishing vessel entering Canadian waters—on the ground of stress of weather—must be such a condition of atmosphere and sea as would 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

(1) *Ante,* p. 374.

outside the Canadian waters he will put in jeopardy his vessel and cargo. Does the evidence disclose the existence of such a state of atmosphere and sea on June 17, 1930, in the vicinity of Rose Spit, as would justify the entry of a foreign vessel into Canadian waters on the ground of "stress of weather"?

The learned trial judge had before him the evidence of Captain Sheppard and Lieutenant Commander Barnes as to the condition of the weather on June 17, and the early morning of June 18, when these vessels were seized. He had also their evidence as to the statements made by the master of each vessel as set out in the log and the statements of the several masters in the witness box at the trial, which were, in some material respects, in conflict therewith. Further he had certain facts, established by uncontradicted evidence, from which he was entitled to draw inferences as to the credibility of the witnesses.

Captain Sheppard and Lieutenant Commander Barnes testified that, on June 17, they left Skidgate and came up the easterly side of Graham Island, running from three to five miles off shore; that from one o'clock in the afternoon until the vessels in question in this appeal were boarded the wind was "light to fresh westerly, sea smooth, weather clear, barometer steady," and that there was no necessity for any vessel to seek protection from the weather. At 10.30 p.m. they anchored off the east coast of Rose Point and saw five vessels about two or two and a half miles farther north, likewise anchored within half or three-quarters of a mile from the shore. There were also two other vessels, similar in type to those seized, anchored outside the three mile limit. These were later inspected by Captain Sheppard and found to be, one a Canadian trawler, and the other an American. Their crews were then all asleep and the boats were riding peacefully at anchor. Both these witnesses testify that Graham Island furnished protection to vessels as far out as six or eight miles from shore.

L. Sandberg, master of the *Sunrise,* and his partner, Erick Wilson, testified that they were fishing off Rose Spit buoy on June 15, and anchored that night on the fishing grounds, but, about 3.30 a.m. of the 16th, as the wind began to blow hard from the west, they pulled up anchor and came to the east side of Rose Spit for shelter, being

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protected from the force of the waves by Sand Island; they further testified that they remained there until 8 a.m. on the 17th, in the belief that it was not safe to be outside the three mile limit. On the morning of the 17th, being under the impression that they could not remain more than twenty-four hours in Canadian waters, they left for the fishing grounds north of Rose Spit buoy. After going eight or nine miles they turned and came back as the sea was too rough for fishing and, according to their statement, it was not safe for the vessel to remain outside. They got back about 2 p.m., having been out at sea for five hours. According to Captain Sheppard and Lieutenant Commander Barnes, Sandberg stated, when being questioned on board the *Rividis,* that he anchored on the east side of the point at 1 p.m., on the 17th, and, when asked if he could not with safety have run back and forth four miles off shore, replied "No doubt I could." This was denied by Sandberg in his evidence.

Captain Jepsen of the *Tillie M.* testified that he anchored in the fishing ground north of the Rose Spit buoy on the night of the 15th, but came in for shelter on the morning of the 16th, and remained there until 8.30 on the morning of the 17th, when he went out to the fishing grounds again, two or three miles north of the buoy. He started to fish but found the sea too rough, so he came back to the anchorage about 2 p.m., having also been out some five hours. According to the entries in the log Jepsen, when questioned on board the *Rividis,* stated that he had anchored at Rose Spit, "on the 16th p.m.," because "it was blowing too hard to lay off shore."

J. E. Thorgersen, owner and master of the *Queen City,* and his assistant, Jens Blyseth, testified that they left Ketchikan on the morning of June 17 to go to Seattle to get a new block for their engine, but that they intended to fish on the way. They set a course from the east side of Duke Island for Bonila Island fishing grounds on the east side of Hecate Straits, but, in the afternoon, altered their course to the southwest so as to reach the east side of Rose Spit; that, when about fifteen miles from Rose Spit buoy, the wind was blowing hard and the sea was rough; that when they saw Rose Spit buoy they turned south and ran for six or seven miles outside the three mile limit but, fearing they

might be swamped, they turned and ran in close to shore, and anchored at 9.15 p.m. According to the entries in the log, Thorgersen told Captain Sheppard that he anchored at Rose Spit at 10 a.m. on the 17th June; that the weather was stormy and wind increasing. When asked if he thought he could have run up and down the coast four miles off shore with safety, his answer was, "Yes I think I could if everything worked all right."

All these witnesses for the defence claimed that it was too rough to remain outside the three mile limit in safety.

In corroboration of the evidence of Captain Sheppard and Lieutenant Commander Barnes, the trial judge had before him the admission of Captain Jepsen that, when he was attempting to fish on the 17th, he did not consider himself in any danger; and the statement of the master of the *Frederick* that he did not think his boat would have been in danger of swamping had he stayed off shore, but that it would have been uncomfortable. He also had the fact that, on the afternoon and evening of the 17th, the *Queen City* ran right across Dixon's Entrance with the wind on her quarter, going through what is known to be the roughest waters in those parts and at a time when she was supposed to be in a crippled condition by reason of her split engine block. Her master, Thorgersen, when questioned as to the state of the weather when he anchored would not say that it was then any worse than it had been at 6 p.m. The *Queen City* was the smallest of all these vessels, having a capacity of only eight tons net, and having, when loaded with ice as she was that day, both at her stern and amidships, a free board of only 6 or 8 inches. In addition the trial judge had before him the significant fact that outside the three mile limit and directly east of these vessels, two other fishing vessels were riding at anchor, although one of them, the Canadian vessel, had a perfect right to be within the three mile limit if she thought it desirable. The masters of these vessels evidently had no apprehension of loss or damage to their vessels or danger to themselves if they anchored outside the three mile limit, and the Canadian vessel could not have found it even uncomfortable or she would have exercised her right to draw into shore.

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Whether there was "stress of weather" within the meaning of section 183 on the afternoon and evening of June 17, was a question of fact depending upon the credibility of the witnesses. The trial judge is known as an able and careful judge, with more than thirty years' experience in cases similar to those before us, and he accepted the evidence submitted on behalf of the Crown in preference to that submitted on behalf of the several vessels. In *Ruddy* v. *Toronto Eastern Railway Company* (1), the Privy Council said:—

> But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

The trial judge found that there was no stress of weather or other sufficient cause to justify the entry of these vessels into Canadian territorial waters and, in our opinion, the evidence amply supports the finding, which should be affirmed.

The conclusion which we have reached is sufficient to dispose of the appeal in favour of the respondent, but as, on the argument, great stress was laid by the appellants on the contention that "the extent of the stress of weather should be considered in relation to the class of vessels involved," it may not be inadvisable to make some reference thereto. It was argued on behalf of the appellants that these fishing vessels "have some weaknesses which make them vulnerable when the waves break over them." These weaknesses are specified in the factum as follows:—

(*a*) They have a low free board, i.e., they sit low in the water.

(*b*) They carry no navigating sails, the only sail being a small canvas called a "leg of mutton sail" which is used to assist in steadying the vessel from rolling in the seaway.

(*c*) The *Tillie M.* presented a weak glass front pilot house to the sea which being only a small height from the sea constitutes a special danger in case of waves.

(*d*) They have a large open cockpit at the stern of the vessel in which they clean and dress their fish * * * and when the waves come over the vessel the cockpit fills and settles the vessel down in the sea at the stern making it unsteerable and dangerous.

(*e*) They were powered by diesel or gasoline engines having very delicate parts which are liable to get out of order in storm.

(*f*) These fishing vessels must of necessity carry a large weight in ice for preservation of fish, of fuel for their engines and of water

(1) (1917) 116 L.T. 257, at 258.

and supplies. * * * They are thus too heavily loaded to stand severe storms.

(g) Each vessel is manned by a master and fisherman, one of whom usually navigates the vessel and the other operates the engine. These men fish from daylight to dark so that if riding out a storm at night is added to their duties they must suffer from exhaustion.

On the other hand counsel for the Crown strongly urged that the employment for fishing of vessels which present these weaknesses is nothing more or less than a ruse on the part of the owners thereof to occupy Canadian waters under the pretence that their vessels cannot remain outside with safety, and that they then either fish in these waters or use them as a base from which to compete with Canadian fishermen on the international fishing grounds.

In both Great Britain and the United States it is recognized that the jurisdiction of a nation is exclusive and absolute within its own territory which includes the waters within three marine miles from the shore. No other nation can claim jurisdiction as a matter of right within the territorial waters of an independent state. It follows, therefore, that the citizens of a foreign state cannot claim any right or privilege in Canadian waters except such as has been given to them by the British or Canadian Governments. In *The Eleanor* (1), Sir William Scott enunciated the principle which, in our opinion, applies to the weaknesses of the vessels as above set out. He says:—

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 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.

Canada has nothing to say as to the class of vessel which the citizens of a foreign state may employ to carry on fishing operations outside of Canadian territorial waters. If, however, a foreign fishing vessel enters Canadian waters for shelter against weather which is known to prevail on the fishing grounds, and the vessel is so constructed that it cannot with safety remain outside the three mile limit in such weather, there might arise a suspicion of want of *bona fides* on the part of the master or owner in bringing

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

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a vessel of that class into such seas to fish. A want of *bona fides* would abrogate any right or privilege to shelter given by the statute.

Apart from any distress which may result from the employment of vessels unsuited to the seas or weather which prevail in Dixon's Entrance or Hecate Straits, any distress arising from other "weaknesses" for which consideration is claimed, is, in our opinion, a distress created by the owner or master himself which it is in his power to prevent and therefore cannot be said to be due to "stress of weather or other unavoidable cause."

The frivolous character of these "weaknesses" is illustrated by the contention that the "*Tillie M.* presented a weak glass front pilot house which constituted a special danger in case of waves." A perusal of the evidence of P. C. Jepsen, her master, shews that when the vessel was built the builder put square window glass 12 x 14 in the three windows of the house over the engine room, instead of, as he contends it should have been, port lights, i.e., glass of the thickness of port lights. Jepsen has sailed this vessel for three years without harm, and he says that the window glass is all that he is afraid of in a storm. If he had any real fear as to the safety of his vessel, we think it would have occurred to him sometime during those three years to take out the window glass and put thicker glass in its place.

The evidence in these cases shews that the boats could have remained outside the three mile limit in safety even directly east of the place where they were anchored. Farther to the south they would have been protected as far out as six or eight miles from the shore because the island is higher to the south than at the point where they anchored. It is true it might not have been as comfortable for sleeping outside the three mile limit, owing to the motion of the sea, as in the quiet waters near the shore. The statute, however, has not provided that foreign vessels may enter Canadian waters if it is more comfortable there than outside. From a westerly wind, such as existed on June 17, shelter outside the three mile limit can always be found by running south in Hecate Straits on the east side of Graham Island and, in our opinion, there was no

necessity to approach within three miles of the coast for shelter or by reason of stress of weather.

These appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Savage & Keith.*

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

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