1914
March 30.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING,

PLAINTIFF;

AGAINST

THE SCHOONER *VALIANT*,

DEFENDANT.

Illegal fishing—Three-mile limit—Presence of fishing vessel within prohibited zone without reference to stress of weather or other unavoidable cause.—R.S.C. 1906 cap. 47, sec. 10-3-4 Geo. V. (Dom.) cap. 14, sec. 1—Fisheries and Boundaries Convention, 1818—Convention of Commerce and Navigation, 1815.

Where a foreign fishing vessel has committed a breach of clause (b) of section 10 of the *Customs and Fisheries Protection Act* (R.S. 1906, cap. 47) by entering the three-mile limit for some purpose not permitted she is liable to seizure and forfeiture notwithstanding that she was actually seized outside of the three-mile limit.

2. That the Fisheries and Boundaries Convention of 1818, between Great Britain and the United States does not apply to the coast of British Columbia so far as fisheries are concerned.

3. That under Article 1 of the Convention of Commerce and Navigation, 1815, between Great Britain and the United States, no liberty or right is given to foreign vessels to carry on fisheries, but simply "to come with their cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, but subject always to the laws and statutes of the two countries respectively." Section 186 of *The Customs Act* (R.S. 1906 c. 47.) would, therefore, apply, which makes it unlawful for a vessel, to enter any place other than a port of entry unless from stress of weather or other unavoidable cause; as there was no cause justifying the entry of the vessel into the "place" or natural harbour on Cox Island, it was liable to seizure.

THIS was an action for the forfeiture of a foreign fishing vessel—the gasolene schooner *Valiant*, belonging to the port of Seattle, U.S.A.—seized off West Haycock Island, B.C., by a Fisheries Protection Officer because of an alleged infraction of the *Customs and Fisheries Protection Act*.

The facts are fully stated in the reasons for judgment.

December 18th, 19th, and 30th, 1913.

The case was heard at Victoria before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District.

W. B. A. Ritchie, K.C., for the plaintiff; *A. H. MacNeill, K.C.*, for the ship.

MARTIN, L. J., now (March 30th, 1914) delivered judgment.

In this action is sought the forfeiture of the gasolene schooner, *Valiant*, a foreign fishing vessel of Seattle, U.S.A., gross tonnage 18 tons; length 40 feet; breadth 12 feet 6 in.; depth 4 feet 9 in., engaged in the halibut fishery, and seized on the 11th of May last off West Haycock Island, about 16 miles from Cape Scott, V.I., by Captain Holmes Newcombe, Canadian Fisheries Protection Officer, then on board the *S.S. William Joliffe*, employed in that service, under command of Captain Thomas Thomson, because of an alleged infraction of sec. 10 of the *Customs and Fisheries Protection Act*, cap. 47, R.S.C., as amended by sec. 1 of cap. 14 of 3-4 Geo. V., 1913. The *Valiant* was seized outside the three mile limit about five miles off shore after a "hot pursuit" which began, I am satisfied, when she was first sighted within said limit, and suspected of poaching.

I first consider the reference in sub-secs. (a) and (b) of said section 10 to a fishing vessel being "permitted by any treaty or convention" to fish or prepare to fish within Canadian territorial waters, or being prohibited from entering such waters for a purpose not permitted thereby. The contention of the Crown counsel on this point was that the Convention of

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1818 between Great Britain and the United States respecting fisheries, boundaries, etc., applied to the coast of British Columbia as regards fisheries. Article 2 thereof contains this proviso:

> "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."

And it is urged that since upon the evidence it clearly appears that the *Valiant* did not enter British waters for any of these special purposes but merely spent the night before the seizure in a bay on the uninhabited Cox Island, in Canadian territory, because it was more pleasant and convenient to do so than to remain outside in rough but not dangerous waters, therefore the Convention affords no justification for her presence in said waters. It is further submitted, alternatively, that if the Convention does not apply to these waters, the *Valiant* had no right at all to be where she was, thereby using Canadian bays and natural harbours as bases or points of vantage from which she could conveniently and expeditiously carry on fishing operations on the contiguous halibut banks either within or without the three-mile limit.

For the defence it is submitted that said Convention does not apply to said waters, and that the *Valiant* was entitled to be where she was under the 1st Article of the Convention of Commerce and Navigation of 1815 between Great Britain and the United States

(conveniently given with notes in Malloy's *Treaties and Conventions* (1) as follows:—

"There shall be between the territories of the United States of America, and all the territories of His Britannic Majesty in *Europe*, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purpose of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

I entertain no doubt that the Convention of 1818 (see Malloy's *Treaties*, (2) does not apply to these Pacific waters, so far as fisheries are concerned, because it purports only to enter into an agreement to give the inhabitants of the United States "forever in common with the subjects of His Britannic Majesty" "the liberty to take fish of every kind" on certain specified coasts of Newfoundland and Labrador and also to dry and cure fish thereon with certain limitations. And Article 2 then goes on to provide that

"The United States hereby renounces 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

(1) Vol. 1. p. 631.

(2) Vol. 1, p. 624, Wash. 1910.

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limits: Provided however" (then follows the proviso quoted *supra.*)

Now on this coast there never was any such "liberty heretofore enjoyed or claimed" to take fish etc., within three miles of the British Coasts etc., so the proviso has no application thereto. And furthermore it is apparent by Art. iii relating to territorial and navigation claims on the Northwest coast of America "westward of the Stony (Rocky) Mountains" that such matters were excluded from the Convention and that it had no reference to disputes between them or "to the claims of any other Power or State "to any part of the said country" which was then almost wholly *terra incognita.*

Then as to the claim under the Convention of 1815. The Article already cited shows that no liberty or right whatever is given to foreign vessels to carry on fisheries, but simply, as to vessels, "to come with "their ships and cargoes to all such places, ports and "rivers in the territories aforesaid to which other "foreigners are permitted to come..... "but subject always to the laws and statutes of the "two countries respectively." Now one of the laws of Canada is sec. 186 of the Customs Act. R.S.C., cap. 48, which declares that:—

> "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.

2. Unless payment is made within thirty days, such vessel may, after the expiration of such delay, be sold to pay such penalty and any expenses incurred in making the seizure and in the safe-keeping and sale of such vessel."

Here there was no "stress of weather or other unavoidable cause" justifying the entry into this wild place i.e. natural harbour on Cox Island, not a port of entry, which the *Valiant* was making use of for fishing purposes, and the vessel was consequently liable to seizure and sale in default of payment of fine, and her dutiable goods to forfeiture, i.e. stores and supplies gear and bait which had been purchased in the State of Washington and which were not those of an innocent owner because her master, John Courage, was half owner subject to a bill of sale. In so making use of Cox Island she was not entering a Canadian port for any one of those "innocent and naturally beneficial purposes" which were detailed by Mr. Phelps in 1886 in the *David J. Adams Case*, which may in appropriate circumstances be well regarded with a lenient eye.

It follows therefore that the *Valiant* has, by said entry of "such waters for a purpose not permitted" committed a breach of said s.s. (b) and is liable to seizure and forfeiture as therein provided. The objection was taken that as she was seized outside the three-mile limit, she is not liable to seizure under the decision of this court in *The King v. the North* (2). which it was argued does not extend to an infraction of sub. sec. (b). A perusal of the case however shows that there is no such distinction and that the same

(1) See Moore's Int. Law Dig. (1909) p. 818, etc., and p. 847.

(2) (1905) 11 Ex.C.R. 141, affirmed by the Supreme Court of Canada (1906) 37 S.C.R., 385.

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right of seizure exists in regard to that sub-section as to sub-section (a) which deals with fishing only. This is clear from the judgment of Mr. Justice Davies, with which Mr. Justice MacLennan, concurred at p. 394, as follows:—

> "I think the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts she may be immediately pursued into the open seas, beyond the territorial limits, and there taken."

And Mr. Justice Idington says at p. 403:—

> "The fundamental right existed to so legislate that a foreign vessel might become forfeited for non-observance of a municipal regulation, and be seized beyond the three mile zone. This right has been repeatedly asserted by legislation relative to breaches of shipping laws, neutrality laws, and customs, or revenue laws as well as the case of fisheries."

But while I should feel justified in condemning the *Valiant* on this charge alone (and in so doing I should derive much support from the case of *The Frederick Gerring, Jr. v. The Queen* (1). I prefer also to consider the other charge of unlawful fishing, because of the misapprehension that may have existed in regard to liberties or rights under Conventions, but I trust that hereafter the owners of foreign fishing vessels will be careful to ascertain what their rights and duties are before venturing into these Canadian waters. I make this observation and give this warning because in the course of the many years experience I have had in trying cases of this description in this

(1) (1896) 5 Ex. C.R. 164; 27 S.C.R. 271, wherein the Convention of 1818 and domestic legislation of Canada on the point are considered.

Court, I take judicial cognizance of the fact that immense damage has been done to Canadian fisheries on this coast by foreign vessels using these waters and bays and natural harbours as shifting and temporary headquarters from which they have for years made repeated sudden and secret raids upon adjacent Canadian fishing banks. These acts are a gross "abuse" (to use the word employed in the Convention of 1818) of international hospitality, and the presence of such vessels in such localities without good and sufficient cause is calculated to raise a just suspicion of their motives and conduct. I again draw attention to this apt language of the Chief Justice of the United States (Marshall) uttered in the case of *The Exchange*(1) cited by me in the *North Case*, (*supra*) as follows:—

> "When merchant vessels enter (foreign ports) for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such..... merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

But leaving this aspect of the matter, and turning to consider the facts of the present seizure, it is sufficient in the view I take of the matter to say, in addition to the facts already stated, that the question as to whether or not the *Valiant* was fishing within the three-mile limit primarily depends upon the contention of the Crown that the halibut which were discovered in her hold that day packed in ice were caught that morning. She was first observed at 11.35 a.m. and was pursued and finally overhauled at 12.20, when Captain Newcombe, accompanied by Chief Officer

(1) (1812) 12 Cranch, 116, at p. 144.

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Moore went on board her. The master of the *Valiant*, John Courage, says, in brief, that said fish (about two thousand five hundred pounds in all) had all been caught the evening before between 6 and 9.15 o'clock at a point outside the three-mile limit, and that he had gone to a bay or natural harbour in Cox Island near by, to spend the night, which bay he reached about midnight. Next morning about six o'clock, the day being fine and clear, he left to return to the same halibut bank, passing the N.W. corner of Lanz Island on the way, and then setting a course about N.W. by W. $\frac{1}{2}$ W., (which he had taken bearings for the night before, so as to reach said bank); and after proceeding on that course about an hour, at a speed of about 5 knots, the engine broke down and he had to lie-to for repairs which took all on board (except the cook) about three hours to make, and the vessel during that time drifted about carried by the tide, which was setting in an easterly direction between Lanz and West Haycock Islands, till a quarter past eleven when the vessel started again, on a N.W. course and ran on it for about fifteen minutes when the master took soundings; then ran on again for ten minutes and sounded again; then ran on for eight minutes more and sounded again; and he had, he says, just satisfied himself that he had reached the fishing bank when the *William Joliffe* was observed coming up just as the dories were being set out. Up to this time the master affirms that no fishing had been done or attempted, and if his story is true he is not guilty of this charge because he was at the time of over-hauling and preparing to fish well outside the three-mile limit. It will consequently be seen that if the contention of the Crown is correct that the fish were caught that morning his story cannot be true,

and the fish must have been caught within the three mile limit. It is not asserted by the Crown that the vessel fished outside the limit but that being, or having been, engaged in fishing within the limit, she stood out to sea to escape from the approaching Government ship which, being much larger, was visible to her a long way off. This fact of the time of the catching of the fish must then be determined and is of the first consequence. I have deliberated longer than usual over the facts of this case because the seizure of a vessel is an unusually serious matter, and because of the forcible manner in which Mr. MacNeill has presented his client's case, and the result is that I find I can reach only one conclusion which is that the fish were caught that morning within said limit. The evidence of Captain Newcombe of the state of the three halibut which he took out of the ice in the hold is that "They were all alive, everyone I handed up; they were good lively fish, all flapping on deck," and this is confirmed by Moore who says they "were alive—quite lively" and "wriggled on the deck" close by the feet of the master of the *Valiant*. To meet this testimony there is the denial of the master, and of his cousin Mark Courage and Peter Sunds, that there had been any fish caught that day, and evidence was also given by various witnesses as to the length of time halibut will live or show signs of life out of water on ice, or otherwise, under varying conditions. No evidence however, was adduced that could reasonably explain the degree of vitality exhibited by these fish on the theory that they had been caught the previous night before 9.15 and since kept on ice, and the testimony of Captain Newcombe, who is the most experienced and reliable of all the witnesses on the subject, is opposed to it. Moreover, this view is further supported by the fact that certain of

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the dories and skates of gear "had every appearance of being just hauled out of the water." And lastly, I am more inclined to reject the story of Captain Courage because I regret to say the answers he gave to Captain Newcombe were unquestionably untrue both as regards his statement that there was nothing but bait and ice in the hold and that he had not been inside three-mile limit that day; and also, later, after he had admitted that he had been inside, that he had gone inside only for the purpose of getting his position. In view of these deliberate misstatements no court could give credence to his evidence, as against that of witnesses of unimpeached veracity, and since the facts on vital points are irreconcilably in conflict I have no other course open to me than to find them against the defendant. It would now be unprofitable to go into other features of the case, and express my opinions thereon, so I shall content myself with saying, generally, that they have not escaped my attention.

The result is that judgment will be entered against the *Valiant*, and she is, together with her tackle, rigging, apparel, furniture, stores and cargo, hereby forfeited to the Crown.

Judgment accordingly.