

THE NOVA SCOTIA ADMIRALTY DISTRICT.

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HER MAJESTY THE QUEEN ..... PLAINTIFF ;

April 17.

AGAINST

THE SHIP *HENRY L. PHILLIPS*.

*Fishing by foreign vessel in British Waters within three marine miles of the coast of Canada—Forfeiture for want of license to fish—R. S. C. c. 94, sec. 3—Burden of proof.*

By section 3 of R. S. C. c. 94 (*An Act respecting fishing by Foreign Vessels*) fishing by a foreign vessel in certain British waters within three marine miles of the coasts of Canada, without a license from the Governor in Council, renders such vessel liable to forfeiture. Where the Crown alleged in its petition, in an action *in rem* for condemnation and forfeiture, that a certain vessel had violated the provisions of the Act by fishing in prohibited waters without a license, but offered no evidence in support of such allegation, *Held*, that the burden of proving the license to fish was upon the defendant.

THIS was an action *in rem* for the condemnation of a ship for an infraction of the provisions of *An Act respecting fishing by Foreign Vessels* (R. S. C. c. 94).

The facts are stated in the reasons for judgment.

The case was heard before the Honourable James McDonald, C. J., Local Judge for the Admiralty District of Nova Scotia, commencing on the 12th day of November, 1894.

*W. B. A. Ritchie* and *J. A. Chisholm* for the plaintiff ;

*W. Ross*, Q.C., *F. G. Forbes* and *W. H. Covert* for the ship.

MCDONALD, C. J., L. J. now (April 17th, 1895) delivered judgment.

This is an action by the Attorney-General for Canada, in which he claims, on behalf of Her Majesty the Queen, the condemnation of the United States schooner *Henry*

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*L. Phillips*, her cargo, stores, &c., for violation of the Fishery laws of Canada. The statement of claim sets out the several grounds of complaint, in some fourteen or fifteen paragraphs which I need not repeat, because substantially the complaint is founded on two specific violations of the statute relating to fishing by foreign vessels in prohibited waters, namely, fishing and taking fish on the north side of the Island of Anticosti, in the mouth of the Gulf of St. Lawrence, within three miles of the coast, and buying bait in Fox Harbour, in the same Island, and preparing to fish within the prohibited distance.

The facts as disclosed by the evidence are substantially as follows :

The *Henry L. Phillips*, on or about the 5th May, 1894, with a crew of ten or twelve men, and commanded by George Leonard Cross, left Rockland, in the State of Maine, United States of America, on a fishing voyage to the Straits of Belle Isle, and the Gulf of St. Lawrence. After calling at several ports on the voyage, on or about the ninth day of June, 1894, the *Henry L. Phillips* came to anchor on the north coast of the Island of Anticosti, at some point between Cape Observation and Charlton Point on that coast. Whether or not the place at which the vessel then anchored is within three miles of the shore, is really the only point of inquiry as to this part of the case; because it is admitted by all the witnesses for the defence that, while anchored there, the crew of the schooner caught fish and continued to fish for several days, without changing the vessel's berth. The defendants, however, deny that they fished within the three-mile limit or that they fished on the 13th June, the day specially alleged in the statement of claim as the time when the offence was committed and to which the evidence of the prosecution was specially directed. The defend-

ants allege that they did not fish or catch fish within the prohibited limits at any time and, especially, that they did not do so, on the 13th of June. It appears that a schooner, called the *Kate*, was last year employed by the Government of Canada to carry the mails during the summer months, twice a month from Gaspé to Fox Bay, at the eastern end of Anticosti, calling, on her way to Fox Bay, at several places on the south shore of the mainland,—the last in that direction being Natasquan Point—then crossing to Fox Bay, and thence westerly along the north shore on her way back to Gaspé. Richard Miller, the master of the schooner *Kate*, testified that on the 13th June, 1894, while on his voyage west to Gaspé, from Fox Bay, and while making for his next place of call at McDonald's Cove, he was passing a place called Cow's Point, situated between Cape Observation and Charlton Point. That the wind was ahead and he was beating up against it. That he saw a fishing schooner, called the *Henry L. Phillips*, at the east end of Cow Point, a little east of Cow Point. He first saw her about noon of the 13th June, and she was then at anchor. The *Henry L. Phillips* was headed to the west, and, in tacking, the *Kate* passed under her stern coming towards the shore, and crossed her bow going out within a quarter of a mile or less. He says the *Henry L. Phillips* was anchored on or near a line drawn from Cape Observation to Charlton Point—at any rate, she was not more than half a mile at most off that line; but, in his opinion, she was nearer to the line referred to than half a mile, and, in his judgment, was at the most two miles from the shore and, in his opinion, not more than a mile and a half, as a line drawn from the point of Cape Observation to the head of Charlton Point would not be more than a mile and a half from the shore. The *Henry L. Phillips*, when he passed her,

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had trawls out, which were within two and a half miles from the shore, that the men attending the trawls came to the *Kate* as she was passing them, were taken opposite the *Henry L. Phillips* when they left in their dories and went on board of her, one of the trawls being between the *Henry L. Phillips* and the land. He states distinctly that this was on Wednesday the 13th June. This witness says he has been sailing around the shores of Anticosti for the last fifteen years, making two trips a month carrying the mails.

The next witness, John Suddard, says he was one of the crew and mate of the schooner *Kate*. Had been going to sea for six years and for the last two years of these in the schooner *Kate*, on the north shore of Anticosti. In passing the bows of the *Henry L. Phillips*, this witness read the name with a glass. He also says she was anchored on a rear line drawn from Cape Observation to Charlton Point, and he saw one boat playing out a trawl about two and a half miles from the shore. It would serve no useful purpose to copy this evidence at length, it is sufficient to say that he substantially corroborated the former witness, Miller, as did the next witness, William Patterson, also a member of the crew of the schooner *Kate*. The next witness, Arthur Holland, is a fisherman who resides at Gaspé and fishes in summer on the north shore of Anticosti, off Cow Point, and has fished there for fifteen years. This witness corroborates the other witnesses as to the position of the vessel and says he saw the crew fishing and catching fish on the thirteenth of June, and hauling their trawls on the fourteenth.

William Holland, brother of the above, who fished at Cow Point for twenty years and is thoroughly familiar with the place, saw the *Henry L. Phillips* at anchor on the 13th June, 1894, while anchored. When he first saw her, was not more than one mile and three-quarters

from the shore. He saw the crew of the *Henry L. Phillips* fishing within three miles of the shore and generally corroborates the other witnesses.

Captain Spain, of the Fishery Protection Ship *Acadia*, testified that a line drawn from Cape Observation to Charlton Point would be a mile and a half from the shore. The sounding at 31 fathoms would be a little over two and a half miles from the shore, under three miles. The soundings on the line between Cape Observation and Charlton Point are from twenty to thirty fathoms. This is the testimony on this point of the complaint on the part of the prosecution.

The first witness for the defence, Wilber V. Coulson, appeared to be a man of some intelligence. He kept a record of the voyage which he called his private log, which appeared, on general details, to be correct enough; but on the all-important point of the position of the vessel it appeared to be defective in some important particulars. He says they were fishing on the 13th June off Cape Observation. He says from where the *Henry L. Phillips* was anchored, Cape Observation bore south half west and Cow Point bore north-west half west. He says he took that bearing of the land when he set his gear that afternoon, and that his vessel was five miles off the land, and that they were fishing in 70 fathoms on the 13th June. The crew he says did not set trawls on the fifteenth. He says he took the compass's bearing of Cape Observation and Cow Point. He did not know about Charlton Point. Anchored in the same place from the 9th to the 15th June. Knows the distance from Cape Observation by measuring on the chart. This witness directly contradicts the witnesses for the prosecution as to the position of the *Henry L. Phillips*, on the days referred to. This was his first visit to that locality. The next witness, Frank E. Carroll, is the charterer of the *Henry*

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*L. Phillips* for the season 1894. He was not on board the schooner on the voyage. He was asked "Suppose a vessel to be between Cape Observation and Charlton Point, and Cape Observation bearing south half west and Charlton Point west by north, will you place where a vessel anchored with those bearings would be?" A. "She would be at the point marked "P. J. M. G." on the chart, and that is five miles from land. It is difficult to fix distances with the high land behind."

George L. Cross, the master of the *Henry L. Phillips*, says: "The day the *Kate* passed we were anchored, —Cape Observation bore south half west and Charlton Point bore west by north. We anchored there on the night of the 9th and remained there till the 15th, when we went in within two miles of the land and anchored. We went in for water. He says it was on Friday, the 15th, that the *Kate* passed under his stern. He fixes the point "P" on the chart from the same bearings as last witness, where they had ninety fathoms of water, and he denies that they fished within three miles. The next witness, Stanton, did not appear to recollect anything of importance to the inquiry, except that they did not fish within three miles of the land. The witness Coulson was recalled and fixed the bearings of Cape Observation and Point Charlton, as the preceding witnesses for the defence had done. Although I understood him in his direct and cross-examination to decline to speak of Point Charlton, confining his statement of bearings to Cape Observation and Cow Point, on recall, he says that when he said in his direct examination that Cow Point bore N.W. half W., he meant not from where they were anchored on the 13th, but from where they were anchored when getting water or ice on the 15th. This is significant when we are told by this witness, immediately afterwards, that he took bearings wherever

they anchored, and it is especially significant when we learn from Capt. Spain that this bearing of Coulson, namely, Cape Observation bearing S. half W. and Cow Point N.W. half W., would put the vessel at "X" on the chart, or about  $1\frac{1}{2}$  or  $1\frac{3}{4}$  miles from the nearest land. It is impossible to reconcile the testimony of these witnesses. The witnesses for the defence seek to do so by suggesting that the crew of the schooner *Kate* and the fishermen at Cow Point are mistaken as to the day the *Kate* passed the *Henry L. Phillips*. That she passed on Friday, the 15th June, instead of Wednesday, the 13th, and that therefore they saw her within three miles of the shore, but that they were mistaken in saying she was fishing there, as she had run in only to get water. To accept this theory, however, is to reject the positive testimony of all these witnesses on the crucial point of the case. Are we justified in doing so? The witnesses Miller, Suddard, Patterson, and the two Hollands appear to be respectable men. They have been thoroughly familiar with the locality in question for years. Some of them as sailors passing and repassing the coast at this place for years, while the Hollands have fished off Cow Point every year for fifteen and twenty years, respectively. They all agree as to the date when the *Kate* passed the Point, and as to the position of the *Henry L. Phillips* and the employment of her crew on that day. The only testimony for the defence worthy of consideration as to the distance of the vessel from the shore, is that of Coulson and the master of the *Henry L. Phillips*. They both declare that they rely solely on the observations and bearings taken from the schooner, and the chart measurements from these bearings, to place the position of the vessel; and they say that they could not pretend to fix the distance within reliable limits from a view of the land without such measurements. This is reasonable when

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we consider that Coulson had never been in that place before, and Cross had been there only once before, and I cannot exclude from my consideration the attempt of Coulson when recalled, after the court had adjourned over the night, to make the terms of his evidence more applicable to actual conditions, as these conditions appeared to be. When he was recalled, he was asked: "Now, on the 13th June can you tell us where the vessel was? A. We were fishing, on the 13th June, off Cape Observation. Q. What does the log say? A. It does not give the place, except that I caught 240 fish; we were off Cape Observation and Cow Point. Q. Where were you anchored? A. Cape Observation bore south half west and Cow Point north-west half west, that is the course I took from the land, when I set my gear that day; I should judge about five miles from the land." There would appear to be no mistake about what he intended to say as to this, or no confusion in his mind as to the points on which he relied for his bearings, and yet, when recalled, he says these bearings did not apply to the place of anchorage on the 13th June, but to that nearer the shore on the 15th; and when we learn from Capt. Spain that the bearings which Coulson gave, as fixing the position on the 13th, would place the vessel at the place marked "X" on the chart, and within two miles of the shore, we cannot help suspecting the motive for the explanation he sought to give when recalled. Then, in seeking to ascertain the comparative reliability of the evidence on both sides, we cannot waive the element of interest. The witnesses for the Crown have no interest whatever in the result, while the witnesses for the defence have each of them a large personal interest. Their season's work is at stake. I should be sorry to say that such a result would induce them wilfully to pervert the truth; but in considering the probabilities



of conflicting evidence, this element cannot be left out of consideration, and finally I cannot understand the contention of the defendants' witnesses that those seamen and fishermen who were examined for the Crown, must be looked upon with suspicion, because they undertook to swear to the distance of the *Henry L. Phillips* from the shore. I should have supposed that nothing was more likely than that people accustomed to all the features of a particular coast for years, whose safety depended to a large extent on their knowledge of distances and the various changes of weather and atmospheric action, should be as competent to estimate the distance of a particular object on the water, as an intelligent surveyor or engineer would be to make a similar estimate on the land. On the whole, I have come to the conclusion, after the most careful consideration I can give the subject, that the evidence of the witnesses for the prosecution should be received in preference to that of the witnesses for the defence, where the parties are in conflict. It was agreed at the trial that the complaint of buying bait should stand over for argument till judgment on the point of fishing within prohibited waters had been delivered. In the result, I find as follows:—

1. The vessel seized has been fully identified as the same vessel proved to be fishing off Cow Point on 13th June, 1894.

2. The allegation of fishing within the prohibited limits has been proven.

3. The burden of proving the license to fish is on the defendants.

There will be judgment of condemnation and forfeiture against the vessel, her furniture and cargo, with costs.

*Judgment accordingly.*

Solicitor for the plaintiff: *J. A. Chisholm.*

Solicitor for the ship: *F. G. Forbes.*

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