BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING *v.* THE SHIP "*NORTH.*"

1905
August 25.

Illegal fishing by foreign vessels—R. S. C. (1886) *c.* 95—*Three mile limit—Jurisdiction of Dominion and Provinces over fisheries—Constitutional law.*

The American schooner *North* was discovered by the fisheries protection cruiser *Kestrel* fishing for halibut in Quatsino Sound, Vancouver Island, within the three mile limit, having all her boats out. On observing the *Kestrel* the schooner picked up two of her boats and stood out to sea. The *Kestrel* picked up one of the schoonor's boats within the three mile limit and then overhauled the schooner and seized her about a mile and three-quarters outside of the three mile limit. There were freshly canght halibut on the schooner at the time of the seizure.

Held, that seizure was lawful, the pursuit having commenced within the three mile limit and having been continuous.

Observations on jurisdiction of Dominion and Provinces over fisheries.

THE trial took place in Vancouver, B.C., before Mr. Justice Martin, Local Judge, on 27th and 28th July, 1905.

C. Wilson, K.C., for owners of schooner, objected to seizure as unlawful as vessel was beyond the territorial jurisdiction of Canada. No crime has been committed; there is no property in the fish, and in any event only a breach of regulations *re* foreigner fishing in Canadian waters without a license. A British ship within territorial jurisdiction of a foreign state is subject to that jurisdiction, but when beyond it the ship is British territory. Cites *Lesley's case* (1); *The Queen* v. *Carr* (2); *Marshall* v. *Murgatroyd* (3); *The Queen* v. *Keyn* (4); *The Queen* v. *Anderson* (5); *Cranstoun* v. *Bird* (6). As

(1) [1860] Bell's, C. C. 220.
(2) [1882] 10 Q. B. D. 76.
(3) [1870] L. R. 6 Q. B. 31.
(4) [1876] 2 Ex. D. 63.
(5) [1868] L. R. 1 C. C. 161.
(6) [1896] 4 B. C.R. 569.

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the Dominion Statute does not provide any punishment for men infringing fishery regulations, their detention on cruiser was unlawful.

D. G. Macdonell for Crown: A ship found committing an offence within the jurisdiction may be followed beyond it provided pursuit continuous. Cites *Hudson* v. *Guestier* (1); *Church* v. *Hubbart* (2); and *The Alexander* (3).

Wilson, in reply: Judgment in *Hudson* v. *Guestier* is *obiter* on point that a vessel may be seized without the jurisdiction for an offence committed within. Cites *Rose* v. *Himely* (4).

On the 25th August, 1905, the following judgment was delivered by:

MARTIN, L. J. This case raises important questions relating to the fisheries of this province in general and to the extensive and valuable halibut banks of Vancouver Island in particular.

There is, and can be from the evidence, very little dispute about the facts, which are clear, and I find as follows:—That on the morning of the 8th of July last the foreign schooner *North* alleged in its statement of defence to be "navigated according to the laws of the United States of America," was hove-to and unlawfully engaged in halibut fishing in Quatsino Sound, Vancouver Island, within the three-mile limit, having all its four fishing boats, dories, out for the purpose; that on observing the approach in obvious pursuit, within the three-mile limit and approximately four or five miles off, of the Canadian Fisheries Protection Cruiser *Kestrel*, she picked up two of her dories and stood out to sea; that the *Kestrel* continued in pursuit at her highest speed in the attempt to intercept the *North*; that in the course of that pursuit the *Kestrel* observed another dory close to and pulling hard from the land towards the schooner,

(1) [1810] 6 Cranch, 283.
(2) [1804] 2 Cranch, 187.
(3) [1894] 60 Fed. 914.
(4) [1808] 4 Cranch, 240.

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which dory the *Kestrel*, after slightly deviating from her course, picked up and seized within the three-mile limit, and, after fixing her position by cross-bearings, continued her pursuit of the *North*, which she overhauled in about ten to twelve minutes and seized, with the two first-mentioned dories about one and three-quarter miles outside the three-mile limit. There were freshly caught halibut lying on the *North's* deck at the time of seizure, which in all the circumstances must be held to have been caught within the limit. There were also several tons of halibut in her hold, but it cannot be said where they were taken. The schooner and the three dories were towed to Winter Harbour, Quatsino Sound, where the fourth dory was afterwards taken when it came in.

I may say that quite apart from the admission of the master of the *North* of his knowledge of wrong-doing, no difficulty is experienced here in regard to fixing the various positions in issue, as was the case in *The King* v. *The Kitty D.* (1), because they were exactly established by cross-bearings.

So far as the two dories taken within the limit and their tackle, gear and equipment are concerned, it was not argued that they were improperly seized, but as to the schooner and the other dories, it is contended on several grounds that the seizure thereof cannot be justified.

The first is, that no seizure can be made on the high seas for an offence committed within the three-mile limit, which is merely an infringement of municipal or local laws or regulations and not a crime in the proper sense of that word, in which case it is admitted a seizure may be made where the pursuit is continuous. Here the pursuit was begun within the three-mile limit and was clearly continuous, which in fact was not nor could be seriously disputed, for it would be unreasonable to contend that its continuity was broken by stopping to

(1) [1904] 34 S. C. R. 673.

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pick up within the limit one of the best evidences of the commission of the offence, as it would be in the case of a constable in pursuit of a thief stopping to pick up the stolen article which the pursued threw away in the course of his flight. Indeed the inference is stronger and the act more advisable in the case of a poaching vessel with her boats out in the ordinary course of fishing operations, because the boats are manned by members of her crew who are a living and active part and parcel of her engaged in breaking the law. See on the wide meaning of "fishing" and "preparing to fish," the case of *The Queen* v. *The Ship Frederick Gerring, Jr.* (1); the cases reported and cited in Stockton's Admiralty Digest (1894) on pp. 200 and 598-600: those on the Behring Sea Seal Fishery in this court; and on the same subject in the United States Court of Admiralty, *The James G. Swan* (2); *The Kodiak* (3); and *The Alexander* (4).

As regards the rights of merchant vessels in foreign ports, it was said in the leading case of *The Queen* v. *Anderson* (5), that "when vessels go into a foreign port they must respect the laws of that nation to which the port belongs," though they may there be still subject to the laws of their own country as though they were on the high seas. And see *The Queen* v. *Carr* (6); *Marshall* v. *Murgatroyd* (7).

It has likewise been repeatedly laid down by the Supreme Court of the United States, adopting the language of Chief Justice Marshall in the celebrated case of *The Exchange* (8), that :—

"When merchant vessels enter (foreign ports) for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to con-

(1) [1896] 5 Ex. C. R. 164; [1897] 27 S. C. R. 271.
(2) [1892] 50 Fed. 108.
(3) [1892] 53 Fed. 126.
(4) [1894] 60 Fed. 914.
(5) [1868] L. R. 1 C. C. 161 at p. 166.
(6) [1882] 10 Q. B. D. 76.
(7) [1870] L. R. 6 Q. B. 31.
(8) [1812] 7 Cranch, 116, at p. 144.

tinual 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."

Followed in *United States* v. *Diekelman* (1), and *Wildenhus's Case* (2).

There is no case in English or Canadian reports on this first point, but it has been dealt with by American courts. *Church* v. *Hubbart* (3), is a case where an American ship was seized by the Portuguese Government outside of the three-mile limit for a violation of the prohibition of the Crown of Portugal against all trade by foreigners with its colonies, or hovering off their coast for that purpose. [The learned Judge here quoted the language of Chief Justice Marshall at pp. 234-5-6.]

In *Rose* v. *Himely* (4), the majority of the judges of the same court gave a decision which, it is true, cannot be reconciled with that just cited, but I draw attention to the fact that three of the judges, Livingston, Cushing and Chase, JJ., did not express themselves on the present point, and Mr. Justice Johnson dissented. But the matter must, in my opinion, be considered as settled by the subsequent case of *Hudson* v. *Guestier* (5), decided by the same court, wherein *Rose* v. *Himely* is overruled, all the judges concurring, with the exception of Chief Justice Marshall, who gives an explanation (p. 285) of his misapprehension in regard to his former view being shared by certain of his colleagues. In that case it was held that a ship may be seized on the high seas for a breach of municipal regulations committed within the territorial jurisdiction. The court said:

"If the *res* can be proceeded against, when not in the possession or under the control of the court, I am not

(1) [1875] 92 U. S. 520.
(2) [1886] 120 U. S. 1.
(3) [1804] 2 Cranch, 187.
(4) [1908] 4 Cranch, 240.
(5) [1810] 6 Cranch, 283.

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able to perceive, how it can be material, whether the capture was made within or beyond the jurisdictional limits of France, or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she (France) interfered with the jurisdiction of no other nation, the authority of each being there concurrent."

There the capture was more than two leagues at sea, and the ship was condemned for trading to the revolted parts of the Island of Hispaniola contrary to the ordinances of France.

The Supreme Court of Louisiana in *Cucullu* v. *Louisiana Insurance Co.* (1), followed the principle laid down in *Church* v. *Hubbart*, *supra*.

And, *a fortiori*, the right would exist after the territorial waters had been actually entered and violated.

This view is, as would be expected, to be found in the text books on the subject, and I proceed to give extracts from the latest of them*

The case of *Church* v. *Hubbart* is referred to in the American note to Philimore's International Law, but the editor does not seem to have been aware of the later and broader decision in *Hudson* v. *Guestier*.

This distinction between seizures made upon the high seas which are the exclusive property of no nation, and the general property of all nations, and the seizures made within the territory of another state is, I find, illustrated in a striking manner by *Lee on Captures in War* (1803) 123, wherein he lays it down in the case of war, though it is said to be "the most that can be allowed" that—

"During the engagement, it is lawful to pursue the flying enemy into another government; for the same

(1) [1827] 16 Am. Dec. 199. See p. 297.

*REPORTER'S NOTE.—The learned Judge here quoted from Woolsey on International Law, 6th Ed., 1898, p. 71, par. 58; p. 365, par. 212; Taylor on Public International Law (1901) p. 307, par. 262; p. 310, par. 267; Hall's International Law, 4th ed. ed. pp. 213, 215, 263, 266; Phillimore's Commentaries on International Law, Am. Ed., 1854, Vol. 1, p. 179.)

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reasons as Philip the Second, King of Spain, in an edict he published relating to criminals in the year 1570, par. 76, permitted the delinquent to be pursued into the territories of another. But it is one thing to begin force, and another to press forward with force in the heat of action. In a word, the very being in the port of a friend forbids us to commence any force there; but it does not prohibit the use of any force which was begun without the bounds of his territoy, while the matter is warm; for we may then pursue it into the very territory of our friend. And, though this is a question little noticed by writers on public justice, yet this distinction appears quite reasonable."

Over the waters within the three-mile limit the chief heads of jurisdiction generally asserted by nations are four:—(1) The prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling; and (4) the policing of fisheries; and this last, involving the assertion and protection of the exclusive right of its subjects to fish within said limit, is certainly not the least important duty of a State. So far as this continent is concerned, it is of much consequence in view of the great value of the fisheries; and this "police jurisdiction" by the two nations chiefly concerned (Canada and the United States) has been acquiesced in for a long period, and is admitted, so it is unnecessary to discuss it. As regards the North Atlantic fishery, its history is given by Wharton in his International Law Digest (1886) vol. 3, pars. 300-1; and see Hall's International Law, *supra*, 99 and 154 on British American fisheries generally. Though poaching on the fisheries of a friendly nation is not essentially a crime, yet, as was said by the Supreme Court of Canada in *The Queen* v. *The Frederick Gerring, Jr.*, *supra*, it is a "nefarious business" and one which "so far as Canadian waters are concerned has been prohibited and criminalized," and the cases hereinbefore

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cited shew that the governments of Canada and the United States have endeavoured rigidly to suppress the depredation of their waters by foreigners.

It follows from all the foregoing that the seizure herein was lawful. Such being the case, it becomes unnecessary to consider the question of the alleged extent of Quatsino Sound from Cape Cook to Topknot Point, on the "headland to headland" theory, which raises a very involved question which I see has been in recent years considered by the Supreme Court of Newfoundland in *Rhodes* v. *Fairweather* (1); see also an appeal from that court on the same question in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (2); and *Mowat* v. *McPhee* (3).

The remaining question is that the government of Canada, as a result of the *Fisheries Case* (4), is not vested with the authority to prevent any one from fishing, and has no status except for revenue purposes; in other words, that while it has the right to control, it has not the right to absolutely prohibit foreign nations, and that it is the Province of British Columbia and not Canada that has, if any one has it, the right of property in the fish and therefore the Federal government has no police jurisdiction. In view of the long continued undisputed exercises of this right by the Federal power, as shewn by a perusal of the cases already cited, and others such as *The Grace* (5), and the *The Queen* v. *The Henry L. Phillips* (6), it would seem to be somewhat late to raise the point. Indeed it has been laid down in the former case, p. 288, as follows:—

"Now it is also an axiom of International law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects and therefore the

(1) [1888] Newf. Dec. 321.
(2) [1877] 2 App. Cas. 394.
(3) [1880] 5 S. C. R. 66.
(4) [1898] A. C. 700.
(5) [1894] 4 Ex. C. R. 283.
(6) [1895] *ib.* 419, [1896] 25 S.C.R. 691.

Act respecting fishing by foreign vessels is strictly within the powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights."

And then follows the reference to the statute shewing that it does in its first section provide for the issue of a license to a foreign ship, and the onus is upon such ship when fishing in our waters to prove its possession of a license. *The Queen* v. *The Henry L. Phillips*, *supra*. Here there is no evidence of a license, nor of the nationality of the owners; all before the court on that point is that the vessel was navigated according to the laws of the United States. It was laid down in the *Fisheries Case*, (1) that—

"It is impossible to exclude as not within this power (raising money) the provision imposing a tax by way of licence as a condition of the right to fish. It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention."

And further, that (2).

"The enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures."

While these rights are not proprietary, they are manifestly of a such a nature that it is within the competence of the Federal power to exercise the sovereign rights which have been delegated to it by the British North America Act, and protect, in the interest of the nation at large, those fisheries which it is authorized to

(1) [1898] A. C. at page 713. (2) *Ibid.* at p. 716.

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regulate and license. I can find nothing in the *Fisheries case* which goes to support a contrary view.

The judgment of the court is that the schooner *North*, her boats, tackle, rigging, apparel, furniture, stores and cargo are condemned and declared forfeited to His Majesty.

Judgment accordingly.