

THE SHIP "NORTH," HER GOODS,	} APPELLANT;	1906
BOATS, TACKLE, RIGGING, APPAREL,		*March. 14.
FURNITURE. STORES AND CARGO (DE-		*April 6.
FENDANT)		

AND

HIS MAJESTY THE KING, EX REL.	} RESPONDENT;
THE ATTORNEY GENERAL	
FOR THE DOMINION OF CAN-	
ADA (PLAINTIFF)	

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

*Canadian waters—Three-mile-zone—Fishing by foreign vessels—
Legislative jurisdiction—Seizure on high seas—Pursuit beyond
territorial limit—International law—Constitutional law—
B.N.A. Act, 1867, s. 91, s-s 12—Sea-coast fisheries—R.S.C. 94,
ss. 2, 3, 4.*

Under the provisions of the British North American Act, 1867, sec. 91, sub-section 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile-zone off the sea-coasts of Canada.

A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion may be immediately pursued beyond the three-mile-zone and lawfully seized on the high seas. Girouard J. dissenting.

The judgment appealed from, (11 B.C. Rep. 473) was affirmed.

APPEAL from the decree of Mr. Justice Archer Martin, local judge in admiralty for the British Columbia Admiralty District, in the Exchequer Court of Canada(1), condemning the ship "North," her

*PRESENT:—Sedgewick, Girouard, Davies, Idington and Mac-
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goods, boats, tackle, rigging, apparel, furniture, stores and cargo as forfeited to His Majesty for violation of the "Act respecting Fishing by Foreign Vessels," (1) with costs.

On the 8th of July, 1905, the Dominion Government cruiser "Kestrel" sighted the American schooner "North" on the fishing grounds in Quatsino Sound within the three-mile-zone off the coast of British Columbia, having four dories out and evidently engaged in fishing for halibut contrary to the provisions of the Act, R.S.C. ch. 94. On being chased by the cruiser, the schooner picked up two of her dories and stood out to sea. The cruiser kept up a continuous chase (picking up one of the dories on the way) overhauled and seized the schooner on the high seas, some distance outside the three-mile-zone, and towed her into port at Winter Harbour, B.C., where she was properly attached and libelled in the Admiralty Division of the Exchequer Court of Canada. At the time of seizure freshly caught halibut were lying upon the deck of the schooner and there were other evidences present shewing that she had been recently engaged in fishing.

The action was brought on the information of the Attorney General for Canada and the present appeal is from the above mentioned decree made on the 25th of August, 1905.

The questions raised on the appeal are discussed in the judgments not reported.

Wilson K.C. (Attorney General for British Columbia) for the appellant. The ship "North" was, at the time of the seizure, on the high seas and was part of the territory of the United States of America. See

Reg. v. Anderson (1), *per* Blackburn J. at page 163; *Reg. v. Lesley* (2); *Reg. v. Carr* (3); *Marshall v. Murgatroyd* (4); *Cranstoun v. Bird* (5). Consequently, she could not be lawfully seized there by the officers of a foreign state for violation of a municipal regulation. In any case, the territorial waters known as the "three-mile-limit" off the sea-coast of British Columbia form part of that province and are not subject to the legislative jurisdiction of the Dominion of Canada nor can the present controversy come within the jurisdiction of a Dominion court.

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The doctrine of pursuit rests on the opinion of Mr. Hall and other writers on international law, and is contrary to the law of England, which maintains the territoriality of the ship. The doctrines of international law are only to be applied as between nations. Even if the doctrines of international law are to be applied, then they must be expressed in some proclamation or statute of the nation desiring to give effect to them. No statutory authority exists in Canada to pursue or to seize beyond the three-mile-limit. If the right to pursue beyond the territorial limits of a state exists without statute, then it is the exercise of sovereign power pursuant to international law, and this power has not been conferred on Canada. Canada has no jurisdiction beyond her territorial boundaries—in this case, the three-mile-limit. See *Low v. Routledge* (6); *Reg. v. Brierly* (7), at page 534; *Reg. v. Keyn* (8); *Re Smith* (9); *McLeod v. Attorney General*

(1) L.R. 1 C.C.R. 161.

(2) Bell C.C. 220.

(3) 10 Q.B.D. 76.

(4) L.R. 6 Q.B. 31.

(5) 4 B.C. Rep. 569.

(6) 1 Ch. App. 42.

(7) 14 O.R. 525.

(8) 2 Ex. D. 63.

(9) 1 P.D. 300.

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for *New South Wales* (1); and *The Lord Advocate v. Weymss* (2), per Watson L.J., at page 66.

The attention of the court is directed to an article entitled: "Is International Law part of the Law of England?" in the January number of the current *Law Quarterly Review*, (3) by J. Westlake K.C.

Newcombe K.C. (Deputy Minister of Justice) for the respondent. In the case of a crime a seizure may be made where the pursuit is continuous. This case involves a violation of the law which constitutes a crime, and as such it would be regarded by the law, not only of this country but by that of England and by that of the United States of America. This is no question of municipal or local laws or regulations, but involves the rights of the Crown particularly in international relations. It is essentially sovereign legislation and the jurisdiction of the Crown is not limited to a distance of three miles from the coast.

The statute, R.S.C. ch. 94, does not absolutely prohibit fishing by foreigners, but only provides that they shall not do so without a license. The exclusive rights in fisheries within the territorial waters of the sea-coast are not strictly property, but are interests respected by foreign nations and form an appanage of the state. These rights, whether territorial or of jurisdiction, cannot be vested in the province the authority of which is confined to the bounds of the province. There is, however, no question of property involved in the present case.

The Dominion alone represents the country *quoad* transactions with parties outside the state. This

(1) (1891) A.C. 455.

(2) [1900] A.C. 48.

(3) 22 L.Q.R. 14.

is particularly the case so far as the territorial waters are concerned, the principle of the recognition of which is the need for provision for the security of the state. All matters affecting defence belong to the Dominion.

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The Dominion, under the express provisions of the British North America Act, 1867, has alone the power to legislate with regard to sea-coast fisheries, and to prescribe the terms, if at all, on which foreigners shall be permitted to fish therein.

The court is referred to the following authorities: *The "Appollon"* (1); Woolsey on International Law, pp. 27, 69, 71, 365; 5 *Revue de droit international* (2 ser.), 82; Moore on Extradition, pp. 292 to 302; Westlake International Law, pp. 172-4; The "Interpretation Act," R.S.C. ch. 1, sec. 7, par. 37; *The "Marianna Flora"* (2); 59 Geo. III. ch. 38, sec. 2; Oppenheim International Law, p. 321; Hall International Law (5 ed.) 256; Cobbett's Leading Cases on International Law, p. 344; *Reg. v. Scott* (3).

SEDGEWICK J.—For the reasons given in the court below, I am of the opinion that this appeal should be dismissed.

The appeal is dismissed with costs.

GIROUARD J. (dissenting).—I have had the advantage of carefully perusing the opinion of my brother Davies, and were it not for our own statute in the matter, An Act respecting Fishing by Foreign Vessels, R.S.C. ch. 94, I do not think I would have dissented.

(1) 9 Wheaton, 362.

11 Wheaton 1.

(2) Scott Cas. Int. Law, 874;

(3) 9 B. & C. 446.

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I cannot agree with him that section 4 alone determines the jurisdiction of the court. I think sections 2, 3 and 4 must be considered together. True, section 4 refers to seizure, that is to say, I presume, the warrant of the Admiralty Court served on a vessel; if that section stood alone the conclusions arrived at by the majority of the court would undoubtedly be correct.

Sections 2 and 3, although not referring to seizure, mention certain steps which are conditions precedent to the seizure and the jurisdiction of the court. Section 2 declares that the officer in charge of the government cruiser

may go on board of any ship * * * within any harbour in Canada, or hovering in British waters within three marine miles of any coast;

and then section 3 adds that the said officer

may *bring* any ship * * * within any harbour in Canada or hovering within British waters within three marine miles of any of the coasts * * * into port, etc.

It seems evident to me that the government officer cannot go on board of any ship violating our fishery laws except within three marine miles of any coast, and that, likewise, he cannot bring any such ship into port except within the three-mile-limit. Of course, I understand that if the officer boarding any such ship within the three-mile-limit is taken outside of it by force of circumstances, in such a case he would probably have the right to pursue, but this is not the case before us. The seizure, properly so called, was made in port and is not generally executed otherwise, for it is done by issuing a warrant out of the Admiralty Court and serving it on board the vessel in default after she has been brought into port.

But whether it be so or not, I look upon the board-

ing of a vessel and taking it into port within the three-mile-limit as conditions precedent which must be complied with to give jurisdiction to the court and make the seizure legal. I think the language of section 4 has made that proposition still more clear, for it declares that

all goods, ships * * * liable to forfeiture *under this Act* may be seized, etc.

This forfeiture cannot take place except as provided for in sections 2 and 3, and, without complying with the requirements of these sections, I say again that the court had no jurisdiction.

Much reliance has been placed on the decision of the Queen's Bench Division in *The Queen v. Hughes* (1), and on a late decision of the Court of Appeal for Ontario, *In re Walton* (2), but in both these cases the courts had not before them a statute like the Act respecting Fishing by Foreign Vessels, R.S.C. ch. 94, and which to my mind affects the very jurisdiction of the court. Had the jurisdiction of the court been involved in these cases, I am inclined to think that the conclusion would have been very different. Lopes J., speaking with the majority in *The Queen v. Hughes* (1), said:

I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices.

Hawkins J., quoting Erle C.J. with approbation, said:

In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step.

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(2) 11 Ont. L.R. 94.

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As I have already remarked, our Canadian statute has imposed the necessity of boarding the fishing vessel and taking her into port within the three-mile-limit before the seizure can be made, and for that reason, and only for that one, I believe the appeal ought to be allowed with costs, and the seizure quashed, except as to the two small boats actually caught within the three-mile-limit.

DAVIES J.—The "North" was an American Fishing schooner and was found by the Dominion fishing cruiser "Kestrel" on the 8th July, 1905, fishing off the coast of British Columbia within the three-mile-limit or zone.

On being discovered the poaching schooner immediately endeavoured to escape into the high seas beyond the three-mile-limit. She was at once pursued by the "Kestrel" and two of her boats, which were out fishing and which she was unable to pick up while endeavouring herself to escape, were captured. The schooner was not overtaken till she had passed out beyond the three-mile-limit into the high seas. She was, when overtaken, taken possession of for illegal fishing, brought into port, libelled in the Admiralty Court and after trial condemned.

Some questions were raised on this appeal by Mr. Wilson as to the legality of the condemnation on the ground that the fisheries along the coast belonged to the province and not to the Dominion and that the legislation for their protection should have been provincial and not Dominion. The simple answer to such objections is that the British North America Act, 1867, conferred upon the Dominion the exclusive power of legislation with respect to seacoast and inland fisheries and that the judgment of the Judicial

Committee in the case of *Attorney General of Canada v. Attorney-General of Ontario* (1), determines affirmatively the exclusive right of the Dominion Parliament to make or authorize the making of regulations and restrictions respecting the fisheries of Canada.

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The "North" being a foreign schooner was charged with the offence of fishing within three miles from the sea coast without a license, against the provisions of the Dominion statute, R.S.C. ch. 94. Though not formally abandoned on the appeal it was not contended that the evidence of the vessel's guilt was defective or insufficient. The appeal was rested solely on the ground that when the schooner was actually overtaken and seized she had passed out of the three-mile-limit on to the high seas and that the officers had no right under the statute, under the circumstances, to make the seizure and bring her into port and that the subsequent condemnation of the schooner was, therefore, illegal.

The ground taken by Mr. Wilson was that a true construction of the Dominion statute did not authorize any of the officers clothed with authority to seize fishing vessels poaching in the territorial waters of Canada to follow such vessels outside of the three-mile-limit, although found committing the offence within that limit, and that any seizure made outside of such limit, even when made in hot pursuit of the offender, was without authority and illegal.

To confer such a power Mr. Wilson contended that two things must exist: a treaty between the nation whose ship was charged with the offence and the nation whose ship seized the offender authorizing the seizure on the high seas beyond territorial waters

(1) [1898] A.C. 700.

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and municipal legislation in furtherance of that treaty.

I am quite unable to agree with these contentions. 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. As Mr. Hall observes in the Book upon International Law (4 ed.) at page 267:

It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun or which but for the accident of immediate escape would have been begun within the territory itself and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.

This clear-terse statement of the law and the reason for it is amply sustained by the array of authorities cited by Martin J. the local judge in admiralty in his judgment. The right of hot pursuit of a vessel found illegally fishing within the territorial waters of another nation being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.

The language of our statute does not limit the powers of the officers entrusted with the protection of our seacoast fisheries to their exercise within the three-mile-limit. That language is, I think, quite broad enough to cover such a case as the one before us, and the fourth section of the statute, so far from negating the doctrine of immediate or hot pursuit of a poacher by its broad and general language, may

be said impliedly to adopt it. I do not agree that any special treaty is necessary to enable a nation to protect its fisheries within the zone prescribed by the law of nations or that unless such a treaty exists embodying the doctrine of hot pursuit of a vessel found illegally fishing within territorial waters such vessel is immune from seizure once she passes beyond those waters into the high seas.

The laws of a state can only, as Mr. Hall says, run outside its territorial waters against the vessels or subjects of another state with the express or tacit consent of the latter. Municipal legislation embodying the doctrine of the law of nations with respect to seizure of foreign vessels beyond territorial jurisdiction would not confer any additional authority as against a foreign ship to that embodied in international law from which alone the right to seize a foreign vessel beyond territorial waters for infraction of municipal law within these waters can be obtained. No such legislation as that contended for as necessary by Mr. Wilson exists, as far as I am aware, in the British dominions, nor did he cite any precedent from the legislation of any foreign country. I am quite satisfied that the existing legislation of the Dominion is sufficient and that the seizure of the "North" under the facts of this case as practically admitted was legal.

But even if there was a reasonable doubt as to the power of the officers of the cruiser to seize the schooner on the high seas beyond the three-mile-limit, under the circumstances before us, I am of the opinion that such irregularity could not affect the jurisdiction of the Admiralty Court to hear and determine the offence charged against the schooner. That offence being within the jurisdiction of the court and the vessel being also within such jurisdiction and pro-

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perly attached and libelled could not plead an alleged irregularity in the mode of her being taken on the high seas as a defence.

The manner in which she was brought into port and within the jurisdiction of the court was, if wrong or irregular, matter for diplomatic protest at the instance of the country to which she belonged or for civil action by the owners of the ship. If that country does not complain of any offence against its honour and dignity the ship libelled cannot do so. If the poaching schooner had escaped into the territorial waters of her own country and had been chased there, captured and brought back the government of that country might well justify intervention. But short of such intervention I think the ship charged with illegal fishing within the three-mile-limit being within the jurisdiction of the Admiralty Court and properly libelled there for an offence committed within its jurisdiction proceedings cannot be defeated or the jurisdiction of the court ousted merely by an irregularity in the taking of the ship.

The principle underlying the decisions relating to persons kidnapped and brought before magistrates having jurisdiction over the offence with which they are charged are, I think, in point. These cases shew that the remedy for the illegal arrest and the kidnapping of the prisoner is by proceedings at the instance of the government of the foreign country whose laws or territory has been violated or at the suit of the injured party against the trespasser.

See *In re Walton* (1) where many cases in point are cited. See also *The Queen v. Hughes* (2), where a very strong court of ten judges held, with one dissent alone, that a person being before justices and

(1) 11 Ont. L.R. 94.

(2) 4 Q.B.D. 614.

charged with an offence over which they had jurisdiction in respect of time and place no irregularity in his arrest or bringing before the court could avail to impeach their jurisdiction to try him.

The remedies of the prisoner for illegal arrest or detention remained unimpaired, but the jurisdiction of the court was unquestionable and unaffected by the manner in which the prisoner was brought before it.

I think the appeal should be dismissed with costs.

IDINGTON J.—This is an appeal from the condemnation of the appellant in the Exchequer Court. The learned trial judge, Mr. Justice Martin, sitting in the British Columbia Admiralty district found that the appellant ship had become liable to forfeiture under the provisions of the "Act respecting Fishing by Foreign Vessels," ch. 94 of the Revised Statutes of Canada.

The ship was fishing within the three-mile-zone on the coast of British Columbia. When observed and pursued she fled and was captured outside the three-mile-zone.

There seems to be no real contention about the findings of fact though not admitted to be absolutely correct. The appeal raises several questions of interest and some of them of considerable importance.

The appellant's counsel did not rest the appeal upon a contestation of the facts, but upon a denial of the right of pursuit according to international law and claimed that

even if the doctrines of international law are to be applied then they must be expressed in some proclamation or statute of the nature desiring to give effect to them.

Without assenting to this proposition as being one of universal application I assume that for the pur-

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poses of this case the judgment must be rested upon the statute.

Whether or not this was present to the mind of the learned trial judge does not appear.

The general, though not universal, principle that municipal legislation is necessary to give effect to the doctrines of international law may have been assumed by him, and I think probably was assumed. These principles would not in themselves be effective or become operative in cases of this kind without municipal legislation.

Paradoxical as it may seem, the recognition of a right that international law gives should precede the municipal legislation. No prudent sovereign power would willingly, in these modern times, invite conflict with a neighbour by enacting a statute directing that to be done which international law had clearly forbidden or that which had been denied as an inherent right.

This statute now in question must be read in light of the well known, recognized, customary or international law that has preceded it, and is yet in force, and receive interpretation thereby.

The meaning of this statute when so read seems to be beyond all doubt.

The right of search is first given in the case of vessels in Canadian waters.

Then section 3 describes what may be done, or so done as to cause a forfeiture of the vessel.

Then section 4 enacts that vessels so liable to forfeiture may be seized and secured by any officers mentioned in the second section.

The right to seize must have originated and the attempt to seize must have begun in Canadian waters.

There is nothing in the statute itself expressly

limiting the attempt to seize or seizure to the Canadian waters. Where is the limitation to be found? Certainly not in the words of the statute.

In the absence of words of limitation it might be urged that power was intended to be given to seize on the high seas wherever the offending vessel might be found, so long as no other state was invaded.

It would be unsafe to assume, that any such intention existed in the mind of Parliament in using such comprehensive and unlimited language as used here.

Why so? Clearly because by the customary law or international law or established usage, call it which you will, the right to rove anywhere and everywhere over the ocean and make seizure of vessels is not recognized by the general opinion of civilized men or by the sovereign powers of later times as a thing that should be done or permitted to be done in cases such as this.

The wide, general nature of the words used must, by observing these considerations, therefore, be restricted within what all men, having to do with such matters, understand as reasonable.

This understanding we find in the expositions of text writers, the judgments of courts, and the treaties of nations. We must assume it was present to the minds of the legislators using this wide language, and intended by them to lend it a reasonable meaning.

It seems to be conceded by counsel that such is the almost universal modern understanding, derived from such sources, that what is known as the three-mile-limit might be considered as within these words relative to seizure, if they mean anything, but not beyond.

I am unable to comprehend why we should adopt

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the one part of this recognized, customary, or international law and discard all else.

The sole question raised here seems to be whether or not the authority given by section 4 does not imply that the seizure may be made where and under such circumstances as international law would permit.

I think clearly that this is the meaning of the statute. It gives the widest authority that international law, or in other words, established usage, may justify.

It is just as if a statute authorized in like words a sheriff to seize goods or person. That would be read as meaning, though not expressly saying so, within his county.

The case of *McLeod v. The Attorney-General of New South Wales* (1), I think, well illustrates what I am trying to explain as my view of this statute.

The interpretation of the Act in question there, in which the words used were capable of an unlimited sense, was held to be that it must be read as meaning, and only in force, so far as the legislature of New South Wales had power to legislate.

The authority to seize here is to be restricted as within the limits that international law recognizes, a seizure can be made.

The seizure is not to be frustrated by the wrongdoer's attempt to escape. The right of pursuit is recognized by international law. It springs from the necessity of the case. It rests upon what in the last analysis is the base of so much international law in many analogous cases, the necessities of self-defence and protection.

The growth of that body of custom known as international law has, only in modern times, found re-

(1) (1891) A.C. 455.

cognition of hard and fast lines in some cases. In its still growing condition it must be tested in regard to the questions here raised by what appeals to all men as reasonable, where the occasion arises for the protection of the coast-line of the land, the three-mile-zone recognized as quasi appurtenant thereto, and the fish therein. This implies all else that demands the exercise of sovereign power, beyond the land, to make that protecting power efficient within it.

The counsel for appellant took three other points which may be looked upon as subsidiary and are covered perhaps by what I have said, but summed up in the last one taken by him, which is thus stated:

Canada has no jurisdiction beyond her territorial boundaries, in this case the three-mile-limit,

and which I should perhaps briefly notice.

In so far as this objection rests upon the absence of special statutory enactment relative to that part of the ocean beyond the three-mile-limit, it is answered by the interpretation already given the statute. If, however, the objection is intended to distinguish between the authority that may exist in the Imperial Parliament and that more limited authority that the Canadian Parliament as a mere colonial legislature may possess, different considerations may arise. In this way of putting the objection it seems to be covered by section 91, sub-section 12 of the British North America Act, 1867, and the case of "*The Fisheries Act*" (1). This section 91 was intended to and does, I think, confer upon Canada as full power in every respect in relation to the sea-coast and inland fisheries of Canada as was possessed by the Imperial Parliament itself. It seems to be beyond doubt that

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such delegated authority would carry with it the right to pass such an Act as that now in question. The Act was upheld in the case just referred to.

The right to legislate in respect of the right of pursuit so far as it existed, in relation to the necessity for protecting the sea-coast and fisheries thereon, would be thus impliedly if not explicitly conferred.

The right of pursuit is expressly recognized by such eminent authority as the late Mr. Hall and others. The exact points involved in the case now in hand have not been passed upon by any of the decisions cited to us or any that I can find. But clearly the principles underlying the decision in the case of *Hudson v. Guestier* (1) support a seizure on the high seas, even for breach of a municipal regulation, though the seizure took place beyond the three-mile-limit and even beyond the two leagues that the regulation there in question specified for a seizure to be made. If taken as authority for us here it would support: First, the case of the forfeiture by reason of a breach of our municipal law: and; Secondly, the adjudication by reason of the vessel having been brought when seized within the jurisdiction of the court which had to adjudicate upon the offence, and determine whether forfeiture had taken place or not.

The decision in the case of *Church v. Hubbard* (2) did not turn upon the principles asserted by Chief Justice Marshall as quoted by the learned trial judge in his judgment. The case turned upon the reception of what was held to have been inadmissible evidence and for that reason a new trial was granted.

But clearly the principles enunciated by Chief Justice Marshall and the holding in *Hudson v.*

(1) 6 Cranch 281.

(2) 2 Cranch 187.

Guestier (1), if correct, shew that 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. In each case the reasonable necessity seems to have been the basis for such legislation and the reason for its recognition in international law.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree in the reasons stated by my brother Davies.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Senkler.*

Solicitor for the respondent: *D. G. Macdonell.*

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