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| 1913<br>{<br>*Oct. 27, 28.<br>{<br>1914<br>{<br>*Feb. 3.<br>{ | PETER CARLSON (DEFENDANT) . . . . . APPELLANT;<br><br>AND<br><br>HIS MAJESTY THE KING (PLAINTIFF) . . . . . }<br>TIEFF) . . . . . } | RESPONDENT. |
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ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

*Fisheries—Seizure of foreign ship—Fishing within territorial waters—Evidence—Jurisdiction of Canadian court—Concurrent findings of fact.*

Where the evidence as to the place of the seizure of a vessel for unlawful fishing within Canadian waters is unsatisfactory, and leaves it doubtful whether or not the vessel seized was, at the time of seizure, within the three-mile limit of the Canadian coast, it would be unsafe and unjust to condemn her.

*Per* Fitzpatrick C.J. and Anglin J.—Where a charge of unlawful fishing within the territorial waters of Canada involves the condemnation of a foreign ship, the evidence must establish with accuracy and certainty the fact that the offence was committed within such territorial waters.

*Per* Duff J.—Where condemnation involves the forfeiture of a ship belonging to an alien friend, as well as the jurisdiction of the trial court to award the condemnation and of the legislature over the locus of the act complained of, the evidence must establish more than a probability barely sufficient to sustain a verdict in any ordinary civil action in which none of these exceptional elements are present.

The judgment appealed from was reversed, Idington and Brodeur JJ. dissenting on the ground that the concurrent findings of both courts below ought not to be disturbed on appeal.

**A**PPEAL from the judgment of the Court of Appeal for British Columbia affirming the judgment of Morrison J., at the trial, by which action, on the informa-

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\*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

tion of the Attorney-General for Canada, was maintained and the launch "Thelma" was condemned to forfeiture for unlawfully fishing within the three-mile limit off the coast of British Columbia.

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The circumstances of the case are stated in the judgments now reported.

*Lafleur K.C.* and *R. M. MacDonald* for the appellant.

*W. B. A. Ritchie K.C.* for the respondent.

THE CHIEF JUSTICE.—I agree, for the reasons given by Mr. Justice Anglin, that this appeal should be allowed with costs.

DAVIES J.—This is an action brought in the name of the King, on the information of the Attorney-General, against the defendant as owner of the gasoline launch "Thelma" for the condemnation of the launch, a foreign vessel, her tackle and apparel, for fishing within the three-mile limit off the coast of British Columbia in contravention of the "Customs and Fisheries Act" of Canada.

It is unnecessary, in the view I take of the case, to deal with the question whether, even if within the limits, the launch when seized was engaged in fishing—the substantial question on which I rest my judgment and which gives rise to so much doubt, and difficulty is whether the "Thelma," when so seized, was or was not within the prohibited limits.

The weather on the day and at the time of the seizure was, by common consent, thick and foggy and the shore or land was not visible until the vessels were

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brought in quite close to it, say about a quarter of a mile.

Fishery-officer Ledwell, who made the seizure, described the weather as

very inclement, very dirty. You could not call it a fog, a heavy misty rain.

He also says that, when he boarded the "Thelma" and charged Captain Carlson with being within the three-mile limit, the latter replied that he was not aware of it. Mr. Ledwell frankly admits that land was not in sight and that you could not form a true estimate of the location of the "Thelma" by the courses and distances followed by the cruiser "Newington" from the time she left port till the seizure took place. What he and the captain of the "Newington" relied upon to fix the true location of the "Thelma," when seized, was the course and distance run towards the shore after the cruiser took the launch in tow and the time and speed of the vessel while so running. These, I agree, are the determining factors and the chief one is the time.

The location of the launch, when seized, was not buoyed for further testing and whether or not it was within the three-mile limits depends entirely upon the distance traversed by the cruiser "Newington" after taking the launch in tow and while she ran at full speed towards the shore.

The contention on the part of the Crown was that the steamer ran straight towards the shore from the time she took the launch in tow for a period of sixteen minutes, running at the speed of about eight miles an hour, and that when the captain stopped at the end of the sixteen minutes he sounded with the

lead and found he was in fifteen fathoms of water, and was then about a quarter of a mile from the shore.

Under the weather conditions there was no other means of judging how far the "Thelma" was from the shore when she was seized than the test made by running the cruiser at full speed towards the shore, determining at what speed she was running, and ascertaining, as nearly as possible, the time taken to make the run.

The whole question depends upon the correctness of this time. If, as the Crown contends, it was sixteen minutes only, and the rate the steamer was running at was eight miles an hour and there were no distances run towards the shore after the cruiser started with the launch in tow and before the log was thrown over and also after it was read and taken in before the fifteen fathoms were sounded when the vessel was judged to be within a quarter of a mile of the shore, then it would be tolerably certain that the Crown's contention was correct and the launch, at the time she was seized, was, at any rate, not more than about two and a quarter or two and a half miles, at the outside, from the shore.

But, if the time during which the cruiser ran at full speed, judged to be at the rate of eight miles an hour, was twenty minutes, and not sixteen, then, making reasonable allowance for the distance the cruiser ran with the launch in tow before the log was thrown over and also after it was taken in and the vessel slowed down and the fifteen fathoms sounding was made, at which moment Captain Halgreen judged himself to be a quarter of a mile from shore, I think the conclusion must be that, when seized, the "Thelma" was not within the three-mile limit.

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In determining whether the cruiser ran with the "Thelma" in tow for sixteen minutes or twenty minutes at full speed towards the land we are not left altogether to the conflicting judgment or memories of the witnesses.

Captain Ledwell, the fishery-officer, who was, however, aboard the launch, and not in the cruiser "Newington," states that he took the time with his watch in hand and that they ran in sixteen minutes at the rate of eight miles an hour as he judges and, at the close of his examination, says:—

I might say that, when we started to tow the boat in, I took my watch out like that; just as the "Newington" started her propeller, started to go ahead, I took my watch out and I held it in my hand until we got close in to shore then and the captain (Carlson) was standing alongside. I don't know whether he saw it or not, but I told him the time and distance.

Captain Carlson's account differs somewhat. He says that after the tow line was made fast to his launch the cruiser went ahead and got them under a little head-way and then went ahead "a few hundred yards any way," then stopped, and then got the log ready, started again and threw the log overboard. He says, at page 95, that he was at the wheel with Captain Ledwell holding his watch in his hand alongside of him, and he (Carlson) looking at the clock in the pilot-house from the second time they started. He goes on to say:—

That was just exactly half-past eleven. And, when we were going in the neighbourhood of fourteen or fifteen minutes, well, I had pretty near fifteen minutes at the time, somebody asked Mr. Ledwell how long we had been going. He said, "fourteen minutes," and I looked at the pilot-house clock and I had pretty near fifteen minutes. Well, after then it seemed as though the speed of the "Newington" became slackened up, she commenced to go slower, and at the end of seventeen minutes she was going, I should judge, under half-speed, or

something like that, and I says to Mr. Ledwell, I says, "It ought to be three miles now; we have been going nearly twenty minutes." So he simply looked at his watch; he didn't say how many minutes it was, and he kind of smiled, and he went across the deck and he says, "Work under slow bell," and the like, and "We are inside the headland and it would not make any difference whether you are five miles off shore, as we measure a line from headland to headland, and you have got to be three miles outside that line." I said, "I never heard of that before," and he said, "That is the way we are taking measurements."

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He then goes on to speak of the lowering of speed and the throwing out of the lead two or three times and then the turning of the ship towards the eastward parallel with the shore, and that, up to that time when the ship turned eastwards, they had been towing altogether twenty minutes.

Captain Halgreen professes to speak of the time run from a memorandum made at the time. At first I gathered that this memorandum was made by himself, but later on he explains that it was put down by the wheelsman who was in the wheelhouse while the captain was outside on the bridge in his oilskins telling him what to put down, and that the man made a mistake in his entry of the hour the steamer stopped which he, the captain, afterwards corrected.

Exhibit "E" reads as follows:—

Extract from daily journal, 1912, of "Newington."

Wednesday, 24.

Morning, thick fog and rain.

Left 7.7 a.m. and proceeded west under half speed; 9.46 spoke launch "Vera" of U.S.; sighted launch "Emma," U.S., and warned her to keep outside 3 mile limit. Sighted gasoline str. "Thelma" with her seine out, 10.41; was alongside of her from 10.55 to 11.26, then took her in tow towards shore, stopped 11.39 about  $\frac{1}{4}$  of a mile

$\frac{42}{42}$

from shore, at that time the log shewed 2 miles. Tsusiat Village 11.54, log  $2\frac{1}{4}$  Natinat Village 12.04, Owen Point, 1.54 p.m., Gas Buoys 2.00. Dropped anchor in San Juan Hr. 2.31 p.m.

Distance, 44 $\frac{1}{2}$  miles.

Coal consumed, 2 ton.

Coal on board, 28 $\frac{1}{2}$  tons.

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The original sheet was not produced. The copy produced was, as the captain explains, taken from the original sheet, as he says:—

I wrote it down on account of it was so wet and the sheet I would write it on got so soiled I took it from that copy that day. You can see it was so dirty.

The captain put in the figures "42" below the figures "39" which had been entered by the man in the wheelhouse because the entry was wrong, but what time of the day he did this is not explained.

I dwell upon this as shewing that the captain was not relying upon any contemporaneous memorandum or entry made at the time, but upon a corrected entry made some time later in the day, no doubt honestly made, but, possibly, after conference with Captain Ledwell and others. He made the entry conform to what, in his honest belief, it should have been. Captain Halgreen states that he went by his judgment and the log; that, of course, he could not say how the engines were going; that he looked afterwards at the log and it read the ship had run just two miles; that he stopped the engines at the end of sixteen minutes, took soundings, found fifteen fathoms, and then judged himself to be within a quarter of a mile of the coast.

He says, at page 57:—

When I stopped her I stopped her from full speed ahead to stop — see.

He says that when the lead was hove and shewed fifteen fathoms he turned the ship E.S.E. for a quarter of a mile. He does not say how far the ship ran after he gave the order to stop her before the soundings were successfully taken, remarking, however, that the quarter-mile run after he turned her was run while the ship was from full speed to stop,

and that "you can't stop a ship dead still like you stop a waggon."

It is quite plain, however, that, after the ship was stopped from "full speed ahead" to "stop," or as the chief engineer put it, to "half-speed," she continued running on her course towards the shore until the soundings had been successfully taken. James McKay, the seaman who took the soundings, explains that, at the time he took the fifteen-fathoms soundings, the vessel had stopped or slowed down, and that the shore was in sight then and, he judged, about a quarter of a mile away. Later he explains that you could not take soundings while the vessel was going full speed and that he had taken four soundings *before he got bottom*. How far the vessel ran towards the shore between the order which stopped her engines, or put her at half-speed, and the first successful soundings, after three unsuccessful attempts, is not stated, but it obviously must have been some considerable distance.

Apart, however, from the evidence of the chief engineer, to which I will refer later and which seems to have been entirely overlooked by the trial judge in his oral judgment, I confess that, while entertaining much doubt, I would not have felt justified in interfering with his finding, confirmed as it was on appeal, as to the launch having been captured within the three miles from the shore.

But, unless this evidence of the chief engineer is to be entirely disbelieved, and there has not been a word said to throw discredit upon this officer, I cannot see how we can affirm such a finding.

Chief Engineer Wilson was in the discharge of his duty in the boiler-room all the morning of the day of

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the seizure, and up to 12 o'clock. It was his watch. It was his duty to make correct entries in his log kept there of the speed at which the engines were, from time to time, running, and of the moment when any changes were made in that speed, pursuant to orders from the captain. He swears he never left the engine-room at all during the whole of his watch and that he had made the entries in his log as produced by him. The custom was to make the entries on a slip kept for the purpose and copy them into the official log-book each evening. He says he did so with respect to these entries on the day in question. He knows, of course, nothing of what is taking place on deck, or can be seen from the deck, but whether his vessel is going at "full speed," or "half-speed" or "slow," or his engines are "stopped" altogether, it is his duty not only to know, but to record.

I make the following extract from his evidence. After asking permission to refer to his log and saying that

all the movements in the engine-room were placed on this paper by myself,

he says, in response to the question:—

Q. Give us your movements that morning?

A. Then I can give you the whole thing. We ran full speed until five minutes past ten o'clock. At 40 past 10, we stopped to speak to the launch "Emma."

Q. What does that mean?

A. I am referring to this because it will have some bearing upon the pressure of steam I was carrying at the time of the seizure. At 10.44 we were running at half-speed; at 11 we were running at full speed, and to orders. The orders came so quickly between 11 and five minutes past 11 it was almost impossible to give the variation of time, there were so many orders. At five minutes past 11, we were running at full speed and stopped at 11.20. At 11.25 we were running at full speed again, and at 11.45 at half-speed. We ran at half-speed until 1.45.

Later, replying to the vital question:—

Q. Then, tell us how your engines were from 11.25 to 11.45 ?

he answered:—

We were moving at full speed.

Q. And from 11.45 to 1.45 ?

A. Half speed.

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In reply to Mr. Ritchie, he further said that he had more than 185 head of steam on between 11.25 and 11.45, and that his highest was 195.

Now, the entry in the captain's log is that at 11.26 he took the vessel in tow and stopped at 11.39. But <sup>42.</sup> it is somewhat indefinite as to the precise moment he meant when he "took her in tow." The captain's starting time in taking her in tow is one minute later than the engineer's time when the engines were started at full speed, while the time when he says he "stopped" — 11.42 — is three minutes before the chief engineer says he stopped the engines at full speed. One or the other has made a grave mistake. The chief engineer is speaking of the actual movements of the engine and the screw and the moments of each and every change as recorded by him in his engine-room at the time. The captain speaks from a memorandum entered by the wheelsman and, some time afterwards, corrected by himself.

Full speed for twenty minutes, from 11.25 to 11.45, would mean, at the rate the officers estimated the steamer's speed, two and a half miles. Making reasonable allowance for the distance the cruiser with the launch in tow sailed before the patent log was thrown out and began to record, and also for the distance she sailed after the "stop" order was given, and while the three unsuccessful attempts in throwing the lead to

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get bottom were being made, and the fourth successful one was made and announced, after which only the course of the vessel was changed, and adding to these distances the estimated distance of one-third of a mile from the shore, I would conclude that the "Thelma" was, at least, three miles from the shore when she was taken, or, at least, so very near to the three miles that it would be unsafe and unjust to condemn her.

For these reasons, I would allow the appeal and dismiss the information with costs.

IDINGTON J. (dissenting).—I think the officer directing the seizure in question was acting in good faith and took the proper attitude to be taken in all such cases; that, if there should be found a doubt as to the distance of the fishing-vessel from the shore, the owner thereof should get the benefit of the doubt.

All parties concerned knew what was involved in starting for the shore to measure the distance, and, if the appellant did not take more care than he seems to have done to guard against mistakes in doing so, it must be because he assumed due and proper methods were, before his eyes, being adopted.

Loose expressions are used which might, if standing alone, cast a doubt on the accuracy of the test applied, but the officer directing the proceedings, if in good faith, could hardly be mistaken with watch in hand, and experienced in the use of the appliances, in the result.

The questions involved are merely of fact, and I do not see how, if even I had great doubt, to reverse such findings.

The appeal should be dismissed with costs.

DUFF J.—In such a case as this, where condemnation involves the forfeiture of the property of an alien friend and the fundamental question, though a question of fact, is that upon the answer to which depends not only the conclusion as to the acts alleged to constitute the offence charged, but the jurisdiction of the court to award the condemnation and of the legislature over the locus of the defendant's acts, I think the judgment against the defendant ought to rest upon something more solid than a measure of probability barely sufficient to sustain a verdict in an ordinary civil action in which none of these exceptional elements of controversy are present. I think, with respect, that this principle has not been kept in view; and I am constrained to the conclusion, after an examination of the evidence, that the allegations of the Crown have not been satisfactorily established.

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I agree with the judgment of my brother Davies.

ANGLIN J.—Although I entertained little doubt at the close of the argument that if I had been presiding at the trial of this action I should have felt obliged to hold that the Crown had not sufficiently established its case, I was not then satisfied that the conclusion of the trial judge, affirmed by the British Columbia Court of Appeal, should be reversed here. But, on further reflection and study of the evidence, I have become convinced that the judgment of condemnation should not be sustained.

The provincial courts held that the defendant had incurred the penalty of confiscation of his 15-ton gasoline fishing-boat, the "Thelma," his nets, etc., on the ground that, when the boat was arrested, he was illegally engaged in fishing within three miles of the

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Canadian shore. That the defendant was engaged in fishing, was, I think, a proper conclusion from the evidence under the authorities. The "*Frederick Ger-ring, Jr.*" v. *The Queen*(1). But that the boat was, when seized, within the three-mile limit has not, in my opinion, been established with that accuracy "and complete certainty" which is properly required in cases where such a penalty as confiscation is the result of an adverse judgment. *The "Kitty D."* v. *The King*(2).

To discharge the burden of establishing the location of the defendant's boat at the time of the seizure, counsel for the Crown adduced evidence on three distinct lines. First, he sought to trace the route of the Government boat, the "Newington," which made the seizure, from her departure from the harbour of San Juan to the point of seizure; secondly, he endeavoured to prove the distance of the point of seizure from the coast by shewing the time taken to tow the "Thelma" in to a point which the Crown witnesses estimate to have been a quarter of a mile from the shore and the speed at which the run towards the shore was made; thirdly, he relied upon the record made by the patent log used on the "Newington" while towing the "Thelma" in.

At the outset of the trial, counsel for the Crown, in his examination of the first witness, fishery officer Ledwell, endeavoured to establish the course which the Government vessel had taken in reaching the point of seizure. He must have very soon realized that in that effort he would not succeed. But, as a result of his examination of this witness and of the cross-examination both of this witness and of the next witness,

(1) 27 Can. S.C.R. 271.

(2) 22 Times L.R. 191.

Captain Halgreen of the "Newington," we have laid down upon a chart what purport to be approximately the courses taken by the "Newington" and the point of seizure. According to what is thus laid down the Government vessel would, at the time of the seizure, have been more than three miles distant from the shore. For the Crown it is now said that the laying down of these courses is quite unreliable. Although the trial judge states that Captain Halgreen figured them out deliberately, there is no doubt that both the witnesses spoke of them as being only approximate at best, and stated their inability to locate on the chart the precise position of the Government vessel either at the time when they sighted the "Thelma" or when they came up with her and arrested her. I would regard this evidence as of little value in itself and something to which no attention should be paid were it not for the fact that the point of seizure thus shewn on the chart agrees with what the defendant's witnesses maintain to have been the location of the point of seizure and also, approximately, with what the log of the engineer of the "Newington" and other evidence in the record indicate to have been the distance of that point from the shore as will be presently explained.

The weather at the time of the seizure and during the shoreward run which followed was foggy or misty. The "Thelma" was sighted when about half a mile from the "Newington." Fishery officer Ledwell says that on that morning

you could not distinguish anything more than about half a mile.

Captain Halgreen says,

Just about three-quarters of a mile, that is about all you could see ahead.

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Of course, neither the shore nor any landmark was visible from the place at which the seizure was made. There could be nothing in the nature of cross-bearings to assist in locating it. The spot was not buoyed as was done in the caes of the "*Kitty D.*"(1). Perhaps it was not practicable to do so in this case. But that is not shewn: and, since the failure to buoy the spot precludes all possibility of subsequently ascertaining it, the necessity for absolute accuracy and precision in making the test to determine the distance by running in to the shore was all the greater.

When confronted with the difficulty that the point of seizure, as marked by him, is over  $3\frac{1}{2}$  miles from the shore, Captain Halgreen endeavoured to meet it by stating that the "*Newington*," when the "*Thelma*" was sighted, in order to come up with her had run in towards the shore about  $\frac{3}{4}$  of a mile. He evidently forgot that both he and officer Ledwell had already said that when sighted the "*Thelma*" was only *half a mile off the "Newington's" starboard bow*, and that she had not moved while the "*Newington*" was bearing down on her. The course of the "*Newington*" until the "*Thelma*" was sighted had been about parallel to the shore-line. This discrepancy rather shakes one's faith either in the reliability of Captain Halgreen's estimates of distances, on which so much depends in this case, or in his trustworthiness as a witness. Then again, in the particulars delivered on behalf of the Crown the point of seizure is stated to have been

about  $2\frac{1}{4}$  miles off shore from the mouth of the Nattinat River and about seven miles in shore from the Swift Shore light ship.

The point of seizure, as marked by officer Ledwell on the chart, is  $4\frac{1}{2}$  miles from the mouth of the Nattinat.

(1) 22 Times L.R. 191.

At the trial Ledwell thought the Swift Shore light ship was about seven miles from the shore. He said he had often measured it. It is shewn by the chart, however, to be  $8\frac{1}{2}$  miles from the shore. Yet the Crown case largely depends on the testimony of these witnesses as to distances measured by the eye.

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According to the log of the captain of the "Newington," after she came up to the "Thelma" both boats lay to for 31 minutes (10.55 to 11.26) before the "Newington" started to tow the "Thelma" in towards the shore. During the first part of this period the net or seine of the "Thelma" was at least partly out and the current would affect the boat more on that account. The oral testimony also establishes that the boats lay to for about 30 minutes while the crew of the "Newington" were making preparations for the towing. Captain Halgreen makes this period 36 minutes or possibly 41 minutes. While the tide was slack at this time, according to the evidence of Captain Churchill (which is uncontradicted), there was a current at the place of seizure of which the general tendency was towards the shore, and Captain Carlson says that about the time of the seizure the wind was also blowing towards the shore, though not strongly or steadily. This evidence is also uncontradicted, although both officer Ledwell and Captain Halgreen were called in rebuttal. The "Thelma" was drifting shoreward during all this time. The defendants claim that there should be an allowance of three-quarters of a mile for this drifting. In the calculations of the Crown no allowance whatever is made for it. Upon the whole evidence I should be disposed to think that an allow-



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ance for drifting, during this 31 minutes, of one-third of a mile would not be excessive.

The "Newington" started in towards the shore with her tow-line slack. She tightened it and ran, the defendants' witnesses say, for a few minutes, and then stopped to adjust the line — all this before the real start for the shore was made — before the 16 minutes run in at full speed of which the Crown witnesses speak, had begun, and, of course, also before the patent log had been put out. The defendants' witnesses estimate the distance covered during this preparatory movement variously — Captain Carlson at several hundred yards, Torrisdal at one-quarter of a mile, and Tideman at from 1,500 to 2,000 feet. The two latter witnesses probably include in their estimate the distance covered after the second or true start for the shore was made and before the patent log was thrown out. The Crown witnesses do not dispute that the "Newington" stopped to adjust the tow-line, but they maintain that no appreciable headway was made as a result of the first start. On the whole evidence the Crown cannot, I think, complain of an allowance being made for the distance covered in this way of about 120 yards, say one-fifteenth or .066 of a mile. Indeed, that is probably considerably under-estimating it.

After the tow-line had been adjusted the "Newington" made her real start for the run towards shore. The Crown's evidence is that, after this second start, she ran in towards shore under full speed for 16 minutes and then stopped. There is some question, however, whether the 16 minutes was not counted from the moment when the patent log was thrown into the water, which was not until the vessel was well

under way. It is noteworthy that on this crucial point as to the length of time occupied in the full speed run in, on which the oral evidence is conflicting, the wheel-house log of the "Newington" is unreliable. The original entry is not produced. In explanation Captain Halgreen says that it was wet and soiled. What is produced purports to be a copy of the log made by the captain from notes, he says at a later hour on the day of the seizure. It shews that the towing in began at 11.26 and ended at 11.39. The original entry made

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by the man in the wheel-house<sup>42</sup> was 11.39. The captain in his evidence says that he did not write the notes himself because he was out on the bridge, that the man in the wheel-house made a mistake in putting down 11.39 instead of 11.42, which he (the captain) told him to enter. It is a little difficult to understand how such a mistake could be made. The captain adds that he himself afterwards corrected the entry by putting the 42 below the 39. He also states that the figures "11.26," as they now appear in the log, were written "11.36."

This is a little mistake here, I think that is 36. It should be 26 though.

This evidence requires no comment. Asked by counsel for the Crown as to the rate of speed maintained during the run in at full speed, fishery officer Ledwell says "about 8 miles an hour, *I guess*," and Captain Halgreen, "Well, I should judge about 8 miles an hour." Assistant-engineer Morrison, in answer to a question by counsel for the Crown, "Well, give us a minimum?" says,

Well, I should say she ought to make 8 knots on that run.

According to the evidence of inspector Ledwell, during a run on the following day, while towing the

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"Thelma" to Victoria, they made a test to determine the rate of speed which the "Newington" would make with the "Thelma" in tow. But the head of steam during the test is not given nor is there any evidence that the conditions of tide, wind and current were the same. Captain Halgreen bases his estimate of the speed, while towing the "Thelma," on his experience in towing scows; Tideman, a seaman for twenty-nine years, and Torrisdal, who had been seventeen years fishing, think the "Newington" made 10 miles an hour while towing the "Thelma." The evidence of Wilson, the chief engineer of the "Newington," who was called as a Crown witness and gave his statement after making a careful scientific estimate, is that, allowing for a slightly reduced head of steam and for the drag of the tow, the "Newington" went towards the shore during the full speed run at the rate of 9 miles per hour. On all this evidence it would not seem to be unfair to fix the rate of speed at  $8\frac{1}{2}$  miles per hour. At 9 miles per hour the vessel would cover 2.4 miles in 16 minutes, at 8 miles per hour, 2.133 miles, and at  $8\frac{1}{2}$  miles per hour, 2.266 miles. McKay, a Crown witness, says in his direct examination that the towing in of the "Thelma" lasted "about half an hour as near as I can say." The engine-room log, produced and vouched for by chief engineer Wilson, who made the entries himself, contains this item:—

At 11.25 we were running full speed again, and at 11.45 half-speed.

and the word "Thelma" is written under the figures 11.25, which Wilson says means "we have taken the 'Thelma' in tow," as was reported to him by a man whom he had sent on deck to ascertain that fact, which indicates that he was aware of the necessity for ac-

curate and careful observation. He also says that from 11.25 to 11.45 the engines were running at full speed. This evidence is given in direct examination by counsel for the Crown. If the chief engineer's entry and testimony are reliable and if his estimate of the rate of speed should be taken, the "Newington" towed the "Thelma" three miles in towards the shore before she changed from full speed to half-speed. It should be observed, however, that according to the engine-room log there was no stop of 31 minutes (10.55 to 11.26) during which, according to the captain's log and the oral testimony, the "Newington" lay to beside the "Thelma." The engine-room log says "full speed, and to orders 11.05 stopped 11.20." But the defendant has a right to expect, where so much depends upon it, that the Crown case shall be borne out by the engine-room log as well as by the captain's log and shall not rest merely upon unrecorded statements of witnesses' recollection of events and periods of time as to which there is a conflict of evidence. Both logs are in this case unreliable. One of them confirms the defendant's version of the time occupied in the run in. Captain Carlson of the "Thelma" says his boat was towed in towards shore for 20 minutes; and he adds that he said so to fishery officer Ledwell at the time. Earlier in his evidence he had stated that the "Newington" had slackened speed, after 15 minutes and, at 17 minutes, was running at half-speed. Peter Tideman, cook on the "Thelma," says that he kept watch during the run in by the clock in the pilot-house; that they went at full speed for 16 minutes and then at slackened speed for between five and six minutes, at the expiration of which they could see the shore, and he adds that the 16 minutes at full speed elapsed after the

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patent log was thrown out. The log was not thrown out, he says, until four or five minutes after the "Newington" had started, when she was from 1,500 to 2,000 feet from her starting point. Torrisdal, a seaman, corroborating Captain Carlson, says that when the "Newington" stopped towing the "Thelma" in towards the shore, Captain Carlson remarked to inspector Ledwell, who was standing beside him, "We have been towing 20 minutes now." Upon all this evidence it is, I think, not possible to say that the time occupied in towing the "Thelma" in to shore at full speed was established with the precision and accuracy requisite in penal proceedings at the 16 minutes claimed by the Crown. There is the further uncertainty whether the 16 minutes, if accepted, should be computed from the moment when the "Newington" started shorewards the second time; or from the time when the patent log was thrown overboard. The Crown certainly cannot complain if the distance covered under full speed is calculated on the basis of a 16 minutes run at  $8\frac{1}{2}$  miles per hour — 2.266 miles. Making a deduction for loss in getting up speed, and no addition for the interval which elapsed between the start and the throwing out of the patent log, if the 16 minutes should be computed from the latter moment, it would seem that the distance covered in the full speed run may be fairly fixed at 2.15 miles.

It is also reasonably clear that, after the run in at full speed, whether it occupied 16 minutes as sworn by Carlson and stated by Ledwell and Halgreen, or 20 minutes as shewn by the engineer's log, the "Newington" continued to move towards the shore for several minutes at slower speed. If she ran in for from four to six minutes at half speed,

as Tideman says, she would cover in that time about one-third of a mile. He says she went "about close to half a mile." Officer Ledwell says that, after running under full speed for the 16 minutes, the "Newington" stopped and the lead was then cast. McKay, the man who cast the lead, called by the Crown, says he cast it four times before he got bottom and that on the fourth cast he got it at 15 fathoms. Of course, the vessel was moving in towards shore while these soundings were being taken, though at a reduced rate of speed. Up to the time of the soundings McKay says she had been going at full speed. Captain Halgreen says that in slowing down from "full speed" to "stop" the vessel would cover a quarter of a mile. McKay, who cast the lead, says that when he got 15 fathoms on the fourth sounding the "Newington" had stopped. Ledwell says that after the soundings were taken the "Newington" again started to go ahead and that he then told the captain to stop because he thought it dangerous to take the "Thelma" any further towards shore. This was clearly after the 16 minutes had elapsed. Ledwell and Tideman both say so, and Captain Halgreen also says the lead was cast after the 16 minutes had expired. Taking into account what McKay says as to the four soundings made after the full speed run had been completed and while the vessel was proceeding under slow speed, what Captain Carlson says on the same point, and what officer Ledwell says as to the start to go ahead towards the shore after the soundings had been made, a movement which continued until he called out to go in no further, I would be disposed to make an allowance of one-quarter of a mile for the distance thus covered at reduced speed after the 16 minutes, or

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whatever longer period the full speed run occupied, had expired.

How far was the "Newington" from shore when, in obedience to officer Ledwell's order, she ceased towing the "Thelma" in and turned east? This point was not buoyed and no cross-bearings were taken to fix it. Nor was the distance measured accurately as might have been done by sending a small boat in to the shore. No reason is given why these measures were not taken. No suggestion is made that it was not practicable to have thus ascertained with certainty and precision at what distance from the shore the towing in of the "Thelma" ceased. On this very important point the Crown case depends on eye measurements made in a fog by Captains Ledwell and Halgreen, assistant-engineer Morrison and sailors Kraemer and McKay; who all agree (*mirabile dictu*) in stating that the distance was "about a quarter of a mile" — modifying that statement, however, by such expressions as "as nearly as I can judge." Tideman says that at the end of the full speed run he could "see the high land" on the shore. Kraemer, a Crown witness, says that when the "Newington" "stopped," when they "read the log, the two miles" they "could just make out the shore line"; and he adds that they could only see a quarter of a mile that day. Now the evidence of other Crown witnesses is that they could see half a mile. They saw the "Thelma" at that distance. Captain Halgreen says he could see three-quarters of a mile ahead. This evidence casts grave doubt on the reliability of the estimate of a quarter of a mile as the distance from the shore — made by "optic observation," to quote officer Ledwell. Captain Halgreen says that, after running in, the "New-

ington" turned along the coast at 11.42 and ran easterly for 12 minutes during which, he maintains, she covered only one-quarter of a mile ! His story is that the "Newington" turned east immediately upon the expiry of the 16 minutes. He excludes from consideration the four or five minutes that Tideman and Carlson say the course shoreward continued at slow speed. He ignores, if he does not contradict, Ledwell's statement that after taking the soundings they again started towards the shore and turned east only when he, Ledwell, called out an order not to go further in. The log shews that the "Newington" stopped abreast of Tsusiat Village at 11.54. Twelve minutes — from 11.42, when the 16 minutes expired, to 11.54 — are, therefore, to be accounted for as well as the admitted registration of  $2\frac{1}{4}$  miles on the patent log when it was taken in, the captain says abreast of Tsusiat Village. He maintains that during that 12 minutes his boat made this quarter of a mile, at a speed of  $1\frac{1}{4}$  miles an hour, and suggests that the additional quarter of a mile shewn by the patent log was registered during this eastward run, although his own evidence shews that the patent log will probably not *register* when the speed is under  $2\frac{1}{2}$  miles an hour. In explanation of thus moving along the coast only at the rate of  $1\frac{1}{4}$  miles per hour Captain Halgreen says,

this quarter of a mile run (was) while the ship was from "full speed" to "stop." You can't stop a ship dead like a waggon.

That is quite inconsistent with officer Ledwell's evidence, confirmed by Tideman, and it scarcely accords with Kraemer's evidence. The four soundings were taken after the "stop" order was given and while the speed was lessening. Captain Halgreen himself says that it was after the taking of these soundings that

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he turned the "Newington" east. To take these soundings must have required several minutes — no doubt the four or five minutes to which Tideman deposes — the three or four minutes of which Carlson speaks — during which the vessel made headway towards the shore. Then there was the third start of which Ledwell tells. All this occupied part of the 12 minutes period from 11.42 to 11.54 — probably nearly half of it — leaving about seven minutes for the quarter of a mile run down the shore to Tsusiat. Much the greater part, if not the whole of the last quarter of a mile of the  $2\frac{1}{4}$  miles shewn by the patent log when it was taken in would appear to have been recorded before the "Newington" turned eastward.

Speaking of the position of the "Newington" when, after going this quarter of a mile, she had reached a point abreast of the village of Tsusiat, Captain Halgreen says:—

That is the nearest we got to the coast \* \* \* just about a quarter of a mile, I should judge, from shore.

How much farther out had the "Newington" been when she turned east? Pressed by Crown counsel on re-examination, Captain Halgreen says they were as close to the shore at the beginning of the quarter mile run to the east as they were at the end of it. He thus seeks to avoid the effect of the statement that "the nearest point we got to the coast" was at the end of that quarter of a mile. Captain Carlson estimates the distance from the shore when the towing in ceased at one-third of a mile. He says the shore line was visible only for a half mile, but the woods up high on the mountain in the rear could be seen a mile off. Torrisdal and

Tideman say that when the "Newington" stopped her shoreward course they were still three-quarters of a mile from the shore. Tideman had seen the high land at the end of the full speed run. It was at the end of the run of four or five minutes at reduced speed that these witnesses say the shore was still three-quarters of a mile off. It was then that the captain said they were close enough in. It was then they turned down the coast to the east. On all this evidence it can scarcely be said to have been satisfactorily established that the "Thelma" was towed on a course at right-angles to the coast to within a quarter of a mile from the shore. On the story of Kraemer that they could just make out the shore line, taken with Captain Halgreen's statement that they could see three-quarters of a mile and the statement of Halgreen and Ledwell that they saw the "Thelma" when half a mile away, and on Captain Halgreen's admission that they were nearest the shore after making the quarter of a mile easterly run, the defendants would seem to be entitled to claim that half a mile, or, at all events, the one-third of a mile which Captain Carlson estimates, should be fixed as the distance from the "Newington" to the shore when the run in at right-angles to the coast ended. But for the purpose of estimating the distance of the "Thelma" from the shore at the time of seizure I place this distance at the quarter of a mile claimed by the Crown.

To sum up the result of all the evidence in a manner of which I think the Crown cannot reasonably complain we have as the outcome of the time and speed test the following:—

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| 1914      | Miles.   |
|-----------|--|
| CARLSON   | Drifting allowance while boats lay to for 31 minutes..... .333 |
| v.        | Preliminary movement adjusting the towing line, etc..... .066  |
| THE KING. | Full speed run — 16 minutes at 8½ miles per hour, 2,266, less  |
|           | allowance for loss in getting up speed ..... 2.150             |
| Anglin J. | Run at slow speed during soundings, etc. .... .250             |
|           | Distance from shore at stop ..... .250                         |
|           | <hr/>  |
|           | Distance from shore of point of seizure..... 3.049             |

Indeed, the defendant may have reason to complain that none of these allowances is made on a sufficiently liberal scale. For instance, he may well claim that the distance from the shore when the “Newington” turned east should be placed at one-third of a mile at least; that engineer Wilson’s estimate of the rate of speed during the tow should be taken; and that the allowance for distance covered in preliminary movements before the 16 minutes’ run began should have been at least one-eighth of a mile instead of one-fifteenth.

The learned trial judge did not base his judgment on the time and speed test, but he held himself bound to accept as conclusive the record of the patent log. He could “see no evidence to offset it.” As already stated, the patent log was put out only after the “Newington” had made her second start towards the shore. The allowances for drifting during the 31 minutes that the vessels lay to and for the distance covered as a result of the first start and during the adjusting movements must, of course, be made in considering the result of the patent log records as in the case of the time and speed test. To these must be added something for the distance covered from the moment of the second start until the log was thrown over. Crown counsel speaks of this as “a short distance on”; Captain Halgreen as an interval which “*might have been the time of 45 seconds*”; Torisdal

“about a quarter of a mile”; and Tideman four or five minutes — 1,500 to 2,000 feet. (These two latter witnesses may be including the distance covered as the result of the first start.) Tideman, however, adds:

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They did not throw out the log until after we got a good speed.

The learned trial judge says that he does not discredit the evidence of the defence witnesses as untruthful, but deems it unsatisfactory because they had not the necessary skill and information to give reliable testimony. The latter part of that observation is scarcely applicable on this point. Then Captain Halgreen says:—

You cannot count on the patent log registering when the speed is under  $2\frac{1}{2}$  to 3 miles an hour. \* \* \* At four miles it will register true, but under three miles I would not be very positive of it.

Kraemer, the man in charge of the patent log, says that

when the vessel is going under five or six miles, you cannot say it is registering accurately.

The log evidently cannot be relied upon to register fairly either while the vessel is getting up speed in starting or while it is slowing down in stopping. It would seem to be proper, therefore, to make an allowance, either for distance covered during the interval between the second start and the moment when the log was cast over, or for distance covered before a registering speed was obtained, or partly for one and partly for the other; and one-tenth of a mile would seem to be reasonable.

The Crown evidence is that at the end of the 16 minutes full speed run the patent log registered two miles. The accuracy of this registration is challenged. The line of the log appears to have been long enough

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to bring the fan or rotator at times under the "Thelma" and at times alongside her. There is evidence that this would make the registration slower. But I shall assume that, while the vessel was running at full speed, the log recorded accurately. When it was taken in it registered  $2\frac{1}{4}$  miles. Captain Halgreen says that this was after he had run one-quarter of a mile along the coast, but he also says that to run that quarter of a mile took twelve minutes — that is, at the rate of  $1\frac{1}{4}$  miles an hour, and at that speed, according to his own evidence and that of Kraemer the log cannot be relied on and probably would not register at all. Kraemer says that the reading of  $2\frac{1}{4}$  miles was "very shortly after the reading at two miles." Captain Carlson says that only ten seconds elapsed between the announcement of the reading of two miles and that of  $2\frac{1}{4}$  miles. Kraemer says that the log was taken in after the "Newington" turned east, but he does not say that it was when she had stopped opposite Tsusiat. Upon all the evidence there is not the slightest doubt that after the order to slow down or stop had been given at the expiration of the 16 minutes, when the log was read and shewed two miles, the "Newington" continued to move shoreward slowing down. During this time the soundings were taken. During at least part of it the log was recording. This fact goes far to substantiate the defendant's claim that an addition must be made to the distance covered during the 16 minutes and recorded on the patent log at 2 miles, for the further run in at slow speed. The same allowance should be made as in the previous test, viz., one-quarter of a mile. On the patent log test, therefore, we have the following result:—

|   | Miles. | 1914  |
|---|--------|---|
| Allowance for 31 minutes drifting .....                     | .333   | CARLSON<br>v.<br>THE KING.<br>—<br>Anglin J.<br>— |
| Preliminary movement .....                                  | .066   |   |
| While log not in water, or not registering .....            | .100   |   |
| Log record during full speed run .....                      | 2.000  |   |
| Run in at slow speed during sounding and start after before |        |   |
| Ledwell called far enough in .....                          | .250   |   |
| Distance from shore at stop, or turn .....                  | .250   |   |
|   | <hr/>  |   |
|   | 2.999  |   |

In regard to these allowances the defendant, as already pointed out, may well claim that some of them are not made on a sufficiently liberal scale.

I do not wish to be understood as expressing the opinion that the evidence clearly establishes that the "Thelma" when seized was outside the three mile limit. That is not proved, although the balance of probability seems to be in favour of that view. On the other hand, I think it is satisfactorily demonstrated that the evidence does not establish that the "Thelma" was clearly within the three mile limit when seized, certainly that it fails to do so with that precision and conclusiveness which are properly demanded in a penal proceeding such as this. It may be said that the various allowances which I suggest are mere guesses. As to the quantum of each allowance that is no doubt the case. But that some such allowances should be made seems to be quite clear and the Crown has left matters in such uncertainty that I do not think it possible to say that those which I suggest are excessive. For these reasons I think judgment of condemnation should not have been pronounced. I would allow this appeal with costs in this court and in the British Columbia Court of Appeal and would direct the entry of judgment dismissing the action with costs.

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BRODEUR J. (dissenting).—This is an appeal from a judgment of the Court of Appeal for British Columbia confirming the decision of the trial judge.

The questions at issue are questions of fact on which we have the unanimous findings of the courts below.

The contention of the respondent is that the appellant, who is a United States citizen, was fishing contrary to law within the three-mile limit of Vancouver Island.

The appellant claims that his vessel was outside of territorial waters. The evidence shews that, in order to ascertain which of those claims were right, the Canadian Government vessel towed the fishing launch straight to a point as close to the nearest shore as it could safely get, and measured the distance by a patent log.

The evidence is somewhat conflicting as to what then occurred. The learned trial judge's finding was that the "Thelma," the seized vessel, was within the three-mile limit at the time she was apprehended.

That finding having been concurred in unanimously by the Court of Appeal, I feel that, relying on the constant jurisprudence of this court, those decisions of two courts below on a question of fact should not be disturbed.

*Appeal allowed with costs.*

Solicitors for the appellant: *MacNeill, Bird, MacDonald & Darling.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*