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*May 22.
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THE SCHOONER "JOHN J. FALLON": HER TACKLE, APPAREL AND CARGO (DEFENDANT)..... } APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DIVISION.

Constitutional law—Illegal fishing—Three mile limit—Island—Coast—Treaty of 1818.

A foreign vessel is liable to seizure for fishing or preparing to fish within three marine miles from the shores of an island part of the Dominion of Canada and situate fifteen miles from the mainland of Nova Scotia.

The term "Coast" in the treaty of 1818 by which the United States renounced the right to fish within three marine miles of the coast of any British territory is not confined to the coast of the mainland.

APPEAL from the judgment of the local judge for the Nova Scotia Admiralty District, of the Exchequer Court of Canada, condemning the appellant schooner to seizure for illegal fishing in Canadian waters.

Two questions were raised by the appeal. First, was the evidence sufficient to establish that the schooner was fishing within the three mile limit; and, secondly, is the limit to be measured from the mainland or is fishing within three miles from the shore of St. Paul's Island, situate fifteen miles from the mainland of Nova Scotia, illegal under the treaty of 1818?

R. G. Code K.C. for the appellant. The evidence that the "Fallon" was fishing or preparing to fish within

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

the three mile limit was far from convincing. As precise measurements cannot be ascertained distances should be calculated liberally. *The "Twee Gebroeders"* (1); *The "Kitty D."* v. *The King* (2).

The marine league must be measured from the coast of the mainland. At all events, if the treaty contemplates the three miles from the coast of an island it must be an island of considerable size and capable of use and cultivation. Ferguson, Manual of International Law, page 399; Twiss, Law of Nations (280), page 292; Pigott's Nationality, Pt. 1, page 40.

Newcombe K.C. for the respondent dealt with the evidence as sufficiently establishing the position of The Fallon within the three mile limit.

The term "coast" in the treaty means the coast of the mainland and its dependencies, even though the latter are incapable of being inhabited or fortified. Wheaton, International Law (4 ed.), page 277; Halleck, International Law, page 174. *Mowat* v. *North Vancouver* (3).

THE CHIEF JUSTICE.—This is an appeal from a judgment of the local Judge in Admiralty decreeing the condemnation and forfeiture of the schooner "John J. Fallon," her tackle, rigging, etc., on the ground that she was fishing or preparing to fish within three marine miles of the "coasts, bays, creeks, or harbours of Canada," namely, St. Paul's Island, N.S.

There are two questions presented by the evidence. First, whether the schooner when arrested was within the three mile limit of the coasts of Canada, and,

(1) 3 C. Rob. 163. (2) 22 Times L.R. 191.
(3) 9 B.C. Rep. 205.

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secondly, whether she was fishing at the time. Mr. Justice Drysdale found that the vessel was, at the time of the seizure, within the three mile limit and no other conclusion is reasonably open upon the evidence. The observations taken by Lieutenant McGuirk, checked and found correct by Captain Webb of the "Hochelaga," shew the "Fallon" and its dories to have been within the three mile belt off of the shore of St. Paul's Island. Captain Stewart of the Government patrol vessel "Canada" also took bearings with an instrument called a pelorus, which measures exact distances, and found that the trawls which had been left in position by the schooner "Fallon" were within the three mile limit. But the most conclusive evidence is to be found in the cross-examination of Capt. Oliver, from which I make the following extract:—

Q. Did you take any bearings? A. No, sir.

Q. Did the officer? A. He said they took bearings aboard his boat.

Q. Did he take bearings aboard your ship? A. He looked at the compass.

Q. Did he take the bearings on board your ship? A. Yes, sir.

Q. Did he shew you you were one and a quarter miles from the shore? A. Two and a quarter, I think he told me. I think he told me we were three-quarters of a mile inside the limits; two and a quarter from shore.

Q. If that was correct that you were two and a quarter miles from shore, could you not by the use of your own compass and instruments have found out you were within the three mile limit? A. I can see how near we are only by the compass; the only instrument we have.

Q. If from what the officer said you were only two and a quarter miles from the shore, could you by using your compass or bearings have known you were within the three mile limit? A. Yes, sir.

Q. The whole trouble arose by not using your compass, if you did, you could have found out? A. Yes, but I thought we were outside the limit. I had no intention of violating the law.

It is denied, however, that St. Paul's Island is part of the coast of Nova Scotia, notwithstanding that by the statutes of that Province it is made part

of the County of Victoria. But whatever may be the effect of that legislation, it can scarcely be contended that the territorial waters of Canada do not extend three miles seaward from St. Paul's Island. Such a contention would, as pointed out by Mr. Newcombe in his argument, be at variance with the position taken by the State Department at Washington so far as concerns the eastern coast of North America, and with the accepted authorities on international law.

Wharton's International Law Digest, pp. 107-109, quotes from letters from Mr. Bayard to Mr. Manning:

> The position of the State Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from high water mark and that the seaward boundary of this line of territorial waters follows the coast of the mainland, *extending where there are islands, so as to place around such islands the same belt.*

The same view of the extent of territorial jurisdiction is held by the British Government and has been supported on various occasions by the decisions of the British courts. *Reg.* v. *Keyn* (1); *The Queen* v. *Dudley* (2), at p. 281; *The "Anna"* (3); see also *The "Frederick Gerring, Jr."* v. *The Queen* (4), per Sedgewick J. at pp. 287 and 288.

The title of Great Britain to St. Paul's Island under the treaty of 1763 and by occupation is made abundantly clear in Mr. Newcombe's admirably prepared factum.

I would dismiss the appeal with costs.

DAVIES J.—This is an appeal from the Nova Scotia Judge in Admiralty, Mr. Justice Drysdale, condemning the defendant schooner, a United States fishing vessel, as forfeited to the King on the ground that

(1) 2 Ex. D. 63.
(2) 14 Q.B.D. 273.
(3) 5 C. Rob. 373.
(4) 27 Can. S.C.R. 271.

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when captured she was fishing within three marine miles of St. Paul's Island, N.S., such island being a part of "the coast" of Canada, in contravention of "The Customs and Fisheries Protection Act," R.S.C. ch. 47, and amending Acts.

Two questions were raised and argued on this appeal. First, that the proof was insufficient to establish the fact of the vessel having been, when captured, "fishing or preparing to fish" within three marine miles of the Island of St. Paul; and, secondly, that even if that fact was proved, the Island of St. Paul, situate some fifteen miles from the mainland, could not be held to be part of the "coasts" of Canada within the meaning of that term as used in the renunciatory clause of the Treaty of 1818 between Great Britain and the United States.

On the question of fact as to the vessel when captured being actually engaged in fishing within three marine miles of the coast of St. Paul's Island, I cannot think under the evidence there can be any doubt and the learned local Judge in Admiralty so found.

The only answer made by the officers of the condemned ship was that they thought they were not within the three mile limit and that they had no intention to break the law. In most of these cases of alleged violation of the treaty of 1818 by fishing vessels, this excuse is generally set up. But even supposing that the excuse of non-intention to fish within the limits was advanced in good faith, the evidence in my judgment places the fact of the vessel being engaged in fishing very much within the limit of three miles beyond any question. The question is one of fact not of intention and dealing with the facts as we find them proved it would require much charity to reach the conclusion that the officers were

not aware that they were violating the law, even if such a conclusion was necessary to reach.

As to the legal question whether St. Paul's Island is to be held as part of the "coast" of Canada within the meaning of that term as used in the renunciation clause of the treaty of 1818, I do not entertain any reasonable doubt.

The admissions of facts in the case state

(a). That St. Paul's Island is an isolated island, covered to some extent by dwarfed spruce and very little of it is fit for cultivation. The island is situate in Cabot Strait 15 miles from Cape North, Nova Scotia, which is the nearest main land. The island is three miles in length and two miles in the widest portion of it. The island consists of gray colored granite.

(b). That St. Paul's Island has no settlers excepting an occasional fisherman in the summer time. The persons located there are the Dominion Government employees, that is to say:—The Superintendent, the keeper of the lights and a government life-saving crew. And when the ice is packed around the Island and navigation is closed about it the lights are not lit.

(c). That there are no bays, harbours or creeks in St. Paul's Island and supplies are landed by boats from vessels standing off at sea in fine weather. For Municipal and other purposes St. Paul's Island is deemed part of Victoria County.

Article 1 of the treaty of 1818, after providing that the inhabitants of the United States should have "forever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind" within certain specified limits, went on to provide as follows:

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, harbours of His Britannic Majesty's Dominions in America not included or within the above mentioned limits.

The question therefore resolves itself into one whether St. Paul's Island was a part of His Majesty's Dominions in America not included within the limits provided for common rights of fishing and if so whether its shores were embraced within the words "any of

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the coasts, bays, creeks, harbours" thereof in the renunciation.

The island is clearly not within the limits provided for a common right of fishing and in my judgment is embraced within the words of the renunciatory clause "any of the coasts, etc." of His Majesty's Dominions in America not included within the limits providing for a common right of fishing.

The argument for the appellant at bar, as I understand it, was an elaboration of that stated in the factum as follows:—

> It is submitted that the very fact that the treaty of 1818 uses the words "*coasts, bays, harbours and creeks*" together indicates by all the rules of construction, that the land contemplated as that from which the three mile limit extends is such land as has coasts, bays, harbours and creeks, that is, the mainland and such islands as have these characteristics.

I am not able to accept such an argument. It practically amounts to this, that because in the treaty the word "coast" was followed by the words "bays, harbours and creeks" the renunciation only extended to such islands off the main coasts as have these latter characteristics.

Why such a limitation should be read into the words "any of the coasts, bays, creeks, harbours, etc." I cannot understand.

In my judgment, "any of the coasts" is large enough and definite enough to embrace such an island lying off the mainland as St. Paul's is admitted to be.

It has always been claimed, treated and utilized as part of the King's Dominions in America and so far as I have been able to find no trace exists of any claim to the contrary having been set up since the treaty by any foreign nation.

Long before the Confederation of the Dominion of Canada, the island was by express legislation of

the Province of Nova Scotia made part of the County of Victoria in that Province and has for a great many years been used as a lighthouse and a station for a government life-saving crew.

If the argument advanced by the appellant was tenable it would apply to other islands, such as Prince Edward Island, Anticosti, Sable Island, etc., and would practically nullify the renunciatory clauses of the treaty.

The terms of the cession of territory made by France to Great Britain by the Treaty of Paris, 1763, clearly embrace St. Paul's Island, the islands of St. Pierre and Miquelon in the Gulf of St. Lawrence being alone retained by France. The occupation of St. Paul's Island by Great Britain since that treaty has never at any time, so far as I know, been questioned by any foreign power and it must be taken to be part of the Dominion of Canada, and its shores part of the coasts of the Dominion.

IDINGTON J.—I find no reason in fact or the relevant law for disturbing the judgment appealed from and hence am of the opinion that this appeal should be dismissed with costs.

DUFF J.—First, as to the sufficiency of the evidence to support the finding of Drysdale J. that the appellant ship was found fishing within three marine miles of the Island of St. Paul's. I see no reason to disturb the finding. I accept the contention of the appellant ship that something more than a mere preponderance of probability is necessary to establish this. (See *Carlson* v. *The King* (1).) It cannot be said that the evidence in this "case is in an uncertain and unsatisfactory state." (*The Kitty D.* v. *The King* (2).)

(1) 49 Can. S.C.R. 180. (2) 22 Times L.R. 191.

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I proceed to consider the questions of law raised by the appeal. The factum of the Attorney-General contains an argument conclusively shewing that St. Paul's Island is British territory, and that it is *de facto* and *de jure* part of Canada, and that being so, the only remaining subjects for consideration are, first: Is St. Paul's Island included within the phrase "coasts, bays, creeks and harbours of Canada?" And secondly, whether any treaty or convention is in force permitting the inhabitants of the United States to fish in the locality where the appellant ship was found. To sustain the judgment of the court below it is necessary, by reason of the provisions of the first section of ch. 14 of the Statutes of Canada, 1913, amending ch. 47 R.S.C. 1906, that the first of these questions should be answered in the affirmative and the second in the negative.

As to the first question, the argument on behalf of the appellant is expressed thus in his factum: That "coast" means the general coast line of the mainland at low water and that by the operation of the rule *noscitur a sociis* the word "coast" should be held in this context to have no application to a shore of such limited magnitude as to have no bays, harbours or creeks. I have no hesitation in rejecting this contention. I have no doubt the word "coasts" in this statute embraces the coast of any part of the territory of Canada.

As to the second question. The principal contention was that by the treaty of 1783, the right was granted to the inhabitants of the United States to fish on the "coasts, bays and creeks" of all British Dominions in America, and that the renunciation by the United States expressed in article 1 of the treaty of 1818, by which the United States renounced forever

any right enjoyed or claimed by its inhabitants to fish within three marine miles of British coasts in America, with certain exceptions, not at present material, must be restricted in its application to those localities over which, by the accepted doctrines of international law, the British sovereignty prevailed; and it is argued that the extension of territorial sovereignty over the marginal seas (the three mile distance from the shore) is not recognized in the case of small unoccupied and unproductive islands such as St. Paul's Island.

This contention is quite without foundation. The international recognition of sovereignty in respect of marginal seas rests upon very easily intelligible and well settled principles. The grounds of the doctrine are very lucidly explained by Mr. Hall (6th ed., pp. 150, 151). *Imperium* over these waters is necessary for the safety of the state and over them control can be effectively exercised.

In the judgments in *Reg.* v. *Keyn* (1), a vast number of authorities is collected in which this is accepted with unanimity. The passage in Grotius, which is the beginning of them, is cited by Cockburn C.J. at page 176, and is in the following words:—

> Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia; id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat; ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam so in ipsa terra reperirentur.

A power possessing a barren island is entitled to protect its property; and control over the marginal seas is just as essential for this purpose in the case of a barren island as in the case of a small highly productive

(1) 2 Ex. Div. 63.

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one. With regard to the possibility of control, Mr. Westlake, at page 190 of the first part of his book on International Law, discusses the subject in this way:—

> The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighboring water, carries the sovereignty over the same width of the latter all around it as a piece of mainland belonging to the same state would carry. But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in the Behring Sea arbitration, "a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes so far as that lighthouse is concerned part of the territory of the nation which has erected it, and as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less." It is doubtful from the context whether the eminent advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its state. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might, however, be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable.

Further discussion seems superfluous. I may add, however, that I prefer to rest my judgment upon grounds of principle independently of Lord Stowell's decision in *"The Anna"* (1), the exact application of which may, I think, be open to argument.

The appeal should be dismissed with costs.

ANGLIN J.—Upon the evidence before him Mr. Justice Drysdale could not, in my opinion, have come to any other conclusion than that the schooner "Fallon" was fishing within three miles of the shore of St. Paul's Island when arrested.

I have heard no good reason advanced in support of the other ground of appeal, that the renunciation

(1) 5 C. Rob. 373.

by the Government of the United States in the Treaty of 1818 of the liberty of American citizens to fish within three miles of the coasts of British Dominions in America does not apply to a three mile belt around St. Paul's Island because it is comparatively small and lies more than three miles from the mainland. That the island is a British possession and forms part of the Dominion of Canada does not admit of question. Two lighthouses are erected on it which are under the control of the Government of Canada. I can conceive of no reasonable ground on which it could be held that the territorial rights of the Dominion do not extend over the waters lying within three miles of the island. In *The King* v. *Chlopeck Fish Co.* (1), cited by counsel for the Attorney-General, it was assumed, I think rightly, that the waters within the three marine miles of the shores of Cox Island, which lies about seven miles off the coast of the mainland, were subject to the prohibition against fishing by Americans within territorial waters of Canada. Authority on such a point seems to be superfluous. Some however may be found in the cases of *The "Anna"* (2), and of *The "Vrow Anna Catharina"* (3), cited in the factum filed on behalf of the Attorney-General.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *G. A. R. Rowlings.*
Solicitor for the respondent: *John A. McDonald.*

(1) 17 B.C.Rep. 50.
(2) 5 C. Rob. 373.
(3) 5 C. Rob. 15.