BETWEEN:

LAWRENCE V. CASHIN AND GERALD LEWIS ..... } CLAIMANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1934
Jun. 19.
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Customs—Customs Act ss. 11, 185, 207—Seizure—Foreign Ship—No exemption from local law for foreign ship putting into port under constraint—Untrue report—Merchant Shipping Act—Constitutional law—Revenue laws.

The *Apockmaouchea*, a ship owned by the claimant, Cashin, of St. John's, Newfoundland, the port of registry, cleared from Halifax, N.S., unladen, took on a cargo at St. Pierre and unloaded that cargo on to another vessel at a point some fourteen or fifteen miles off the coast

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of Nova Scotia. The ship then put into Halifax on account of engine trouble; the claimant, Lewis, master of the ship, in reporting to the Collector of Customs at Halifax, as required by s. 11 of the Customs Act, c. 42, R.S.C. 1927, made an untrue report. Later the ship was seized by the Royal Canadian Mounted Police for an alleged violation of s. 185 of the Customs Act. On appeal from the decision of the Minister of National Revenue, confirming the seizure, claimants contended *inter alia* that s. 11 of the Customs Act was *ultra vires*.

Held: That for customs purposes, a vessel which is not registered in a Canadian port, even though a British vessel, must be considered a foreign vessel.

2. That putting into port under constraint does not carry any legal right to exemption from local law or local jurisdiction.

3. That the report required by s. 11 of the Customs Act is required to be made only after the vessel has entered a Canadian port, and the fact that disclosure is required of acts which may have occurred during the course of the voyage, outside of the territorial waters of Canada, does not render the enactment extra-territorial in its operation.

3. That the offence charged herein under s. 185 of the Customs Act is that of having made an untrue report.

4. That the Parliament of Canada, for the protection of the revenue, has the right to require a master coming into a Canadian port, to make a full and complete statement, in his report, of the dealings in cargo which he had during the voyage which immediately preceded his arrival at the port.

REFERENCE by the Crown under s. 176 of the Customs Act.

The action was heard before the Honourable Mr. Justice Angers, at Halifax.

F. W. Bissett for claimants.
Ronald McInnes, K.C., for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (February 15, 1935) delivered the following judgment:

This matter comes before me on a reference by the Minister of National Revenue under section 176 of the Customs Act (R.S.C., 1927, ch. 42), which reads as follows:

176. If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within thirty days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the court.

On Sunday, October 15, 1933, the *Apockmaouchea*, a vessel of approximately 67 tons, owned by Lawrence V. Cashin, one of the claimants, in charge of Gerald Lewis, the other claimant, as master, docked at Halifax, N.S., in ballast.

The following day, the master, Gerald Lewis, went to the Customs House at Halifax and made a report to the collector or his assistant in the following terms (leaving out the part of the printed matter immaterial herein):

Report No. 6492.

REPORT INWARDS—PORT OF HALIFAX, N.S.

In the ss. *M. V. Apockmaouchea.* Registered tonnage, 67. Registered at the Port of St. John's, Nfld., with 8 men. Gerald Lewis, Master for this present voyage from Halifax, N.S., to Sea and returned to Halifax, N.S.

In Ballast.

In on account of engine trouble.

Sgd. I, Gerald Lewis, Master of the Ship or Vessel called the *Apockmaouchea* of 67 tons measurement or thereabouts, last cleared from the Port of Halifax, N.S., to Sea and return to Halifax, N.S., do solemnly swear that since the said vessel was so cleared I have not broken bulk, nor has any part of her cargo been discharged or landed or moved from the said vessel *Apockmaouchea* except as shown above and I do further swear that the Manifest now exhibited by me, and hereto annexed, doth to the best of my knowledge and belief, contain a full, true and correct account of all goods, wares and merchandise laden on board such vessel at the Port of Halifax, N.S., to Sea and return to Halifax, N.S., or at any other port or place during her present voyage. So help me God.

Sworn to at Halifax, N.S., this 16th day of October, 1933, before me

Sgd. J. H. BARNSTEAD, for Collector. Sgd. GERALD LEWIS, Master.

On December 11, 1933, the *Apockmaouchea* was seized by the Royal Canadian Mounted Police for alleged violation of section 185 of the Customs Act. The first paragraph of section 185, which is the only one relevant herein, reads as follows:

185. If any goods are unladen from any vessel or vehicle or put out of the custody of the master or person in charge of the same, before report is made as required by this Act, or if such master or person fails to make such report, or to produce such goods, or makes an untrue report or does not truly answer the questions demanded of him, he shall for each such offence incur a penalty of four hundred dollars; and the vessel or vehicle and the animals drawing the same shall be detained until such amount is paid; and, unless payment is made within thirty days, such vessel or vehicle and any animals drawing the same may, after the expiration of such delay, be sold to pay such penalty and any expenses incurred in detaining and selling such vessel or vehicle.

On January 5, 1934, in compliance with the requirements of section 172 of the said Act, a notice of seizure on the usual departmental form (K. 30) was sent by the Commissioner of Customs to Lawrence V. Cashin, St. John's,

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Nfld., registered owner of the vessel, containing, *inter alia*, the following statements:

> The Commissioner, R.C.M. Police, Ottawa, Ont., having reported that a seizure has been made from you on the 11th day of December, 1933, of the following goods, viz:—
>
> Motor Vessel
> *Apockmaouchea,*
>
> valued at $4,500 more or less; and the following charges for infractions of the Customs laws having been made against you, viz:—
>
> That on or about the 16th day of October, 1933, the Master of the said vessel made an untrue report inwards at Customs, Halifax, N.S.
>
> Wherefore take notice that if such seizure or charges be maintained, the said vessel or moneys, if accepted on deposit in respect thereof, become liable to forfeiture, and each party concerned in such infraction of the law subject to penalties under the provisions thereof.

The notice further states that any evidence which may be presented within thirty days, by affidavit or affirmation, in rebuttal of the charge preferred, will be considered and that, at the end of the said delay or sooner if so desired by the person notified, the Commissioner of Customs will, in accordance with the provisions of section 173 of the said Act, report upon the merits of the seizure and the evidence, if any, so furnished, to the Minister for his decision and that such decision will be final, unless, within thirty days after receiving notification thereof, the party so notified gives notice in writing to the Minister, in conformity with section 175, that the decision will not be accepted.

On the 30th of January the solicitor for the claimants wrote to the Commissioner of Customs, saying that he was sending him a statutory declaration made by the Master of the *Apockmaouchea,* Gerald Lewis, in answer to the notice of seizure. The declaration was either omitted from the letter or mislaid in the Department of National Revenue; on the 5th of February the chief clerk, acting for the Commissioner of Customs, acknowledged receipt of the letter, stating that the statutory declaration therein referred to had not been received.

On the 8th of February claimants' solicitor sent to the chief clerk a copy of this statutory declaration; it reads, in part, as follows:

> I, Gerald Lewis, of Lunenburg, in the county of Lunenburg, Master of the motor vessel *Apockmaouchea,* do solemnly declare that the report Inwards I made on or about the 16th day of October, A.D. 1933, at the Customs, Halifax, Nova Scotia, was true and correct and that I did come into Halifax in ballast on account of engine trouble . . . . .

The Commissioner of Customs, in due course, made a report recommending

> that the motor vessel *Apockmaouchea* be released on payment of $400, together with expenses of seizure and subsequent keep, to be forfeited, and in default of such payment within thirty days that the vessel be sold to realize such penalty, together with expenses of seizing, keeping and selling same.

On the 14th of March, 1934, the Minister of National Revenue rendered his decision in the terms of the recommendation aforesaid and, on the same day, claimants' solicitor was notified accordingly.

Pursuant to section 176 of the Customs Act, the latter wrote to the Commissioner of Customs notifying him that his clients did not accept the Minister's decision and wished the matter referred to the Court. The reference was made on the 4th of April.

The claimants, in their statement of claim, allege that the report inwards made by the master of the *Apockmaouchea* was true and that the vessel should not be condemned to pay the sum of $400 and they ask that the ship be released and the penalty remitted.

The case was heard on the 19th of June. Early in July I received a letter from claimants' solicitor saying that he wished to raise the question as to whether the Parliament of Canada, by section 11 of the Customs Act, can compel the captain of a ship to disclose transactions taking place outside of Canadian territory or, in other words, as to whether or not this section is *ultra vires*. Nothing had been said at the trial on the subject, counsel on both sides confining their observations to the facts and the meaning and scope of section 11 of the Customs Act. It seemed to me expedient that the whole issue should be dealt with at once and I advised counsel that they should produce written arguments dealing with this aspect of the case. The last brief was filed and the record completed sometime in November.

The facts are simple and undisputed. The mate of the *Apockmaouchea* was called as witness. He said his boat came into Halifax during the afternoon of the 16th of October; as far as he remembers it was a Sunday. The port engine was in very bad condition and was repaired in Halifax. In cross-examination the witness stated that, before coming to Halifax, the cargo of the *Apockmaouchea,*

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taken at St. Pierre, had been unloaded onto the *Ganneff* at a point 14 or 15 miles off the land.

James Fultz, a machinist, testified that he had examined the engine of the *Apockmaouchea* about the middle of October and had put a new bearing in it. He added that, in the condition in which the engine was when the vessel came in, it would not function properly.

Recalled, the mate swore that he had left Halifax without any cargo and that he had come back in the same condition. The only dealing witness said he had in cargo was on the high seas, between 6 and 8 miles southeast of the Halifax lightship.

The only other evidence adduced on behalf of claimants consists of the two exhibits previously referred to, viz., the report inwards and the notice of seizure, filed respectively as exhibits 1 and 2.

The respondent did not put in any evidence.

Notwithstanding the almost invariable practice of masters, whose vessels hover in territorial waters or come into a harbour unexpectedly, to put the blame on some mechanical trouble, I think that, in the present instance, the proof discloses that the *Apockmaouchea* came into the port of Halifax on account of a defective engine, for the purpose of having it repaired.

It is further established that the *Apockmaouchea* took a cargo at St. Pierre and that she transhipped it onto the *Ganneff* at a distance of approximately 14 or 15 miles from the coast of Nova Scotia; that she had left Halifax on her previous call unladen and that she returned on the 16th of October in the same condition.

In addition to this, there is the fact previously alluded to that, the day after the arrival of *Apockmaouchea* in Halifax, her master made a report inwards stating, *inter alia,* that, since his vessel had last cleared from the port of Halifax, he had not broken bulk and that no part of the cargo had been discharged or landed or moved from the vessel.

It seems clear to me that the *Apockmaouchea* was not forced to come into Halifax harbour on the 16th of October, but that she came in voluntarily. The engine in question undoubtedly needed repairs; it did not work properly and it took a long time to put it in motion. I doubt very much

however if these repairs were so urgent as to necessitate calling at Halifax. The evidence does not disclose any reason compelling the master of the *Apockmaouchea* to put in at Halifax, as he did, on the 16th of October.

The general rule of the law of nations is that a merchant or private vessel entering a foreign port subjects herself to the local jurisdiction and territorial law of the place; Phillimore, Commentaries upon International Law, 3rd Ed., Vol. I, p. 483; Oppenheim, International Law, 3rd Ed., Vol. I (Peace), p. 339; Halleck's International Law, 4th Ed., Vol. I, p. 245; Travers Twiss, Law of Nations, pp. 272 and 273; *The Queen* v. *Kayn* (1); *The Schooner Exchange* v. *McFadden* (2); *Cunard Steamship Co.* v. *Mellon* (3); *United States* v. *Diekelman* (4); *Wildenhuz's Case* (5); *Manchester* v. *Massachusetts* (6).

Even if the master of the *Apockmaouchea* had been compelled to enter the port of Halifax in distress, I do not think that he could have dispensed with making a report to the Customs authorities. It is a well recognized principle, supported by the jurisprudence as well as by the opinions of authors on international law, that a ship, compelled through stress of weather, duress or other unavoidable cause to put into a foreign port, is, on grounds of comity, exempt from liability to the penalties or forfeitures which, had she entered the port voluntarily, she would have incurred. This principle however must not be too widely interpreted. It does not carry any right of exemption from local laws, especially revenue laws. Such exemption would require express legislation.

The doctrine is clearly laid down in Pitt Cobbett's Leading Cases on International Law, 4th Ed., Part I (Peace), p. 294:

> It is sometimes asserted that private vessels putting into a foreign port in consequence of duress or under stress of weather are by that fact alone exempted from the local law and local jurisdiction. Such a contention was put forward by the United States Government in the case of the *Creole*. The latter was an American vessel, carrying a cargo of slaves, and bound for New Orleans. In the course of the voyage the slaves rose in revolt, murdered a passenger, and wounded the captain and several of

(1) (1876) L.R. 2 Ex. D., 63, at 82.
(2) (1812) 7 Cranch's Rep., 116, at 144.
(3) (1923) 262 U.S. Rep., 100, at 124.
(4) (1875) 92 U.S. Rep., 520.
(5) (1886) 120 U.S. Rep., 1.
(6) (1890) 139 U.S. Rep., 240, at 258.

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the crew, and then forced the latter to put into the British port of Nassau. The British authorities, whilst imprisoning those concerned in the murder, refused to interfere with the freedom of the others, on the ground that the moment they came into British terriory they became free. On appeal by the owners to their Government, the Attorney-General of the United States gave an opinion to the effect that "if a vessel were driven by stress of weather, or forced by *vis major*, or, in short, compelled by any overruling necessity, to take refuge in the ports of another nation, she was not to be considered as subject to the municipal law of the latter, so far as related to any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering such port, provided she did nothing to violate the municipal law during her stay"; and this principle, it was contended, was not only a principle of the law of nations, but had also been recognized by English law. In the result the matter was submitted to arbitration, and an award given against the British Government. In the case of the *Industria* the British law officers also expressed the view that a foreign vessel carrying slaves which had put into a British port in distress was exempt from seizure by the local authorities; even though she might have been seized by a British cruiser on the sea, under the treaty with Spain. But despite these opinions, and notwithstanding that this principle is frequently cited with approval, it would seem that such an immunity is not well founded, or in any sense obligatory; and that whilst putting into port under constraint might be a good ground in comity for excusing such infringements of local regulations as were due to the exigencies of her position (such as harbour or quarantine rules), it would certainly not carry any legal right to exemption from the local law or local jurisdiction. Nor would such an excuse, in any case, serve to exempt a vessel from the consequences of offences previously committed in violation of the law of nations.

The reports in the cases of the *Creole* and of the *Industria* referred to in the above citation are to be found in Forsyth, Cases and Opinions on International Law at pages 399 and 400.

Piggott on Nationality, Part 2 (English Law on the High Seas and beyond the Realm), p. 32, after commenting upon the cases of the *Industria* and of the *Creole,* adds (p. 33):

> With deference, too wide a doctrine seems to be here laid down. Undoubtedly, if, by the manner of her coming, the ship had neglected to observe some formalities required by the law of the port—as non-observance of quarantine regulations—stress of weather would be a good defence. But exemption to local laws, more especially revenue laws, requires, it is suggested, express legislation. There does not seem to be any such exemption in the English Customs Acts.

In this connection the following authors may be consulted profitably: Halleck's International Law, 4th Ed., Vol. I, p. 245, parag. 26; Travers Twiss, Law of Nations, 2nd Ed., Vol. I (Rights and Duties of Nations in time of peace), p. 272, parag. 166; Oppenheim, International Law, 3rd Ed., Vol. I (Peace), 340.

In entering the port of Halifax, even under constraint or in distress, the *Apockmaouchea,* in my opinion, became

subject to the laws of Canada and her master was bound to make a report to the collector of customs, in compliance with the requirements of section 11 of the Customs Act.

Be that as it may, the master, apparently acting under this apprehension, made a report and the only question now arising is whether this report is, in the sense of section 11, untrue.

It is quite obvious that, if the provisions of section 11 dealing with the contents of the report inwards, particularly those concerning the cargo and its disposal, apply to whatever may have happened outside of the territorial waters of Canada, the report is untrue. It states that bulk was not broken and that no part of the cargo was discharged or landed or moved from the vessel, whilst the evidence, adduced by the claimants themselves, is to the effect that at a distance of 14 or 15 miles off the land a full cargo picked up at St. Pierre was transferred onto the *Ganneff*. It would be idle to insist on the absolute inconsistency between the two versions.

It was submitted on behalf of claimants that the provisions of the Customs Act do not apply beyond the territorial limits of Canada, that Canada cannot legislate and attach penalty for the actions of a foreign ship upon the high seas and that, if she did, such legislation would be *ultra vires*.

The *Apockmaouchea*, as I have already said, is owned by Lawrence V. Cashin, of St. John's, Nfld., one of the claimants herein. The vessel is registered in St. John's.

The register in Newfoundland, as the register in Canada, is a branch of one and the same register, viz., the British register. The provisions concerning the registry of ships are contained in Part I of the Merchant Shipping Act, 1894, chapter 60. Section 91 of the Act, which deals with the application of Part I, reads as follows:

> This part of this Act shall apply to the whole of Her Majesty's Dominions, and to all places where Her Majesty has jurisdiction.

There is no occasion to go minutely into the several provisions of Part I of the Act; reference however may be had particularly to sections 4 (1) (*e*) and 89 which contain the following stipulations:

> 4. (1) The following persons shall be registrars of British ships:—
> (*a*) . . . . . .
> (*b*) . . . . . .
> (*c*) . . . . . .

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(*d*) . . . . . .

(*e*) At any other port in any British possession approved by the governor of the possession for the registry of ships, the chief officer of customs, or, if there is no such officer there resident, the governor of the possession in which the port is situate, or any officer appointed for the purpose by the governor;

89. In every British possession the governor of the possession shall occupy the place of the Commissioners of Customs with regard to the performance of anything relating to the registry of a ship or of any interest in a ship registered in that possession, and shall have power to approve a port within the possession for the registry of ships.

Section 10 of the Canada Shipping Act (R.S.C., 1927, chapter 186) enacts as follows:

10. The Governor in Council may appoint at and for every port at which he deems it expedient to authorize the registry of ships, the collector or other principal officer of Customs as registrar for all the purposes of the Merchant Shipping Act 1894, and amending Acts, and of this part.

There is no such thing as an independent Canadian register; the certificate of registry wherever issued within the British Empire confers the same rights and carries with it the same obligations: *Algoma Central Railway Co.* v. *The King* (1). The *Apockmaouchea* has the status of a British ship; she is in fact a British ship registered in Newfoundland.

Reference was made by counsel for the respondent to the British Commonwealth Merchant Shipping Agreement signed at London on December 10, 1931, to which participated, among others, His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, His Majesty's Government in Canada and His Majesty's Government in Newfoundland. Counsel submitted that the principles laid down in this agreement which until now are merely of conventional significance, inasmuch as new merchant shipping acts have not yet been passed in all parts of the British Commonwealth, indicate that the character of the *Apockmaouchea* may, from the conventional, though not the legal, standpoint, be assimilated to that of a foreign ship. Counsel added that, while the Court is not bound to apply the principles of an agreement which has not been given legal effect, it would be assumed, for the purposes of argument, that the vessel occupies, in relation to Canadian laws and jurisdiction, a position analogous to that of a foreign ship.

(1) (1903) A.C. 478, at 481; (1902) 32 S.C.R., 277, at 290; (1901) 7 Ex. C.R. 230, at 258 and 261.

I think that, for customs purposes, a vessel which is not registered in a Canadian port, even though a British vessel, must be considered a foreign vessel.

The respondent's contention being that the provisions of the Customs Act do not exist beyond the territorial limits of Canada, it may be apposite to indicate briefly what are the territorial limits of a country bordering on the sea.

The national territory of a state consists of land and water. The maritime territory includes, *inter alia,* harbours, ports, mouths of rivers and estuaries, bays and parts of the sea enclosed by headlands. It is the general, although not the universal, usage of nations to recognize to a littoral state an exclusive territorial jurisdiction over the sea for a distance of one marine league (or three miles) along all its coasts, subject however to the right of innocent passage: Halleck's International Law, Vol. I, p. 167, parag. 13; Twiss, The Law of Nations, Rights and Duties in Time of Peace, p. 293; Oppenheim, International Law, 3rd Ed., pp. 334 *et seq.;* Phillimore, Commentaries upon International Law, 3rd Ed., Vol. I, p. 274; Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 7.

Whatever may be the limits of territorial waters, it has long been recognized that for purposes of police, revenue, public health, etc., a state may adopt laws affecting the seas surrounding its coasts to a distance exceeding the limits of its territory. It was so held recently by the Judicial Committee of the Privy Council in the case of *Croft* v. *Dunphy* (1) In this case a schooner registered in Nova Scotia, belonging to the respondent, a resident of Nova Scotia, sailed from the island of St. Pierre with a cargo of liquors. When at a distance of $11\frac{1}{2}$ miles from the coast of Nova Scotia she was boarded by the appellant, a customs officer. The goods on board having been found to be dutiable, the vessel and the cargo were seized, taken into port and forfeited.

The seizure was effected in virtue of the provisions of sections 151 and 207 of the Customs Act dealing with vessels hovering in territorial waters. The owner of the vessel brought an action in the Supreme Court of Nova Scotia against the officer of the Crown who had made the seizure, challenging the validity of the seizure on the ground that the Parliament of Canada had exceeded its

(1) (1933) A.C. 156.

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legislative competence in conferring the powers provided in said sections and claiming the return of the vessel and of the cargo. The trial judge upheld the validity of the legislation and consequently of the seizure. His decision was confirmed by a unanimous judgment of the Supreme Court of Nova Scotia *en banc*. On an appeal to the Supreme Court of Canada this judgment was reversed by a majority (Duff, Newcombe (dissenting), Rinfret, Lamont and Cannon (dissenting) JJ.). The Judicial Committee of the Privy Council reversed the decision of the Supreme Court of Canada and restored the judgment of the Supreme Court of Nova Scotia. Lord MacMillan, delivering the judgment of the Judicial Committee, said (at page 162):

> It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in *The Le Louis* (1817, 2 Dod. Adm. 210, 245): "Maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination." This special latitude of legislation in such matters is a familiar topic in the text-books on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says at p. 265 (1) that a state in matters of revenue and health "exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports." In Halleck's "International Law," 4th ed., vol. i, p. 168, it is pointed out that beyond the generally accepted limits of territorial waters "states may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts'." Again, in Hall's "Foreign Powers and Jurisdiction of the British Crown," it is stated in para. 108, p. 244, that "the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested." Without further multiplyng quotations it may be sufficient to add references to Phillimore's "International Law," vol. I, para. 198, and Wheaton's "International Law," 6th ed., vol. i, p. 367.

(1) The citation is also found in Sir Travers Twiss' The Law of Nations, Edition of 1884, at p. 311.

Phillimore (op. cit.), at page 274, says:

197. Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to certain portions of the sea.

198. And first with respect to that portion of the sea which washes the coast of an independent state. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot, from the shore at low tide:—"quousque a terra imperari potest,"—"quousque tormenta exploduntur,"—"terrae dominum finitur ubi finitur armorum vis,"—is the language of Bynkershock. "In the sea, out of the reach of cannon-shot" (says Lord Stowell), "universal use is presumed." This is the limit fixed to absolute property and jurisdiction; but the rights of independence and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practised on their revenues, by prohibiting foreign goods to be transhipped within the distance of four leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the Hovering Acts.

Nevertheless, it cannot be maintained as a sound proposition of International Law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these hovering cases judgments have been given in favour of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by International Law. Such a judgment, however, could not have been sustained if the Foreign State whose subject's property had been seized had thought proper to interfere. Unless, indeed, perhaps, in a particular case, where a State had put in force, or at least enacted, a municipal law of its own, like that of the Foreign State under which its subject's property had been seized.

I may add to these quotations and references the following authorities: Oppenheim, International Law, 3rd Ed., Vol. I (Peace), p. 340, parag. 190; Piggott on Nationality, Part II (English Law on the High Seas and beyond the Realm), pp. 49 *et seq.*; Taylor, International Public Law, p. 294, parag. 248; *Hyde*, International Law, Vol. I, p. 417, parag. 235; *The Queen* v. *Keyn* (1); *Church* v. *Hubbart* (2); *Le Louis* (3); Masterson, Jurisdiction in Marginal Seas, pp. 380 *et seq.*

Before closing this already long, though incomplete, review of the doctrine and jurisprudence, I wish to quote

(1) (1876) L.R. 2 Ex. D., 63, at 214.

(2) (1802) 2 Cranch, 187, at 234.

(3) (1817) 2 Dodson Adm. Rep., 210, at 245.

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an extract from the opinion of Dr. Lushington in *The Annapolis* (1), which Cockburn, L.J. cited with approval in re *The Queen* v. *Keyn* (loc. cit., 220):

> The Parliament of Great Britain, it is true, has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction; though, if Parliament thought fit so to do, this Court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction has been accordingly. Within, however, British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers intra fauces, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate. I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with the requisitions ordained by the British Parliament: whether those requisitions be, as in former times, certificates of origin, or clearances of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters.

The extent within which a littoral state may exercise jurisdiction on the sea surrounding its coasts for the enforcement of its revenue laws does not appear to have ever been limited within any definite boundaries; it first formed the subject of legislation in Great Britain in the so-called Hovering Acts: 9 Geo. II, chap. 35, and 47 Geo. III, 2nd Session, chap. 66.

Section XXII of the Act 9 Geo. II, chap, 35, renders liable to forfeiture certain goods (as tea, foreign brandy, rum, etc.) found on vessel at anchor or hovering within the limits of a port or within two leagues of the shore.

Section XXIII provides for the forfeiture of any foreign goods taken in or put out of any vessel within four leagues of any of the coasts of the United Kingdom without payment of customs and other duties and for the forfeiture of the vessel if not above 100 tons.

All the provisions contained in 9 Geo. II, chap. 35, concerning hovering vessels were in virtue of 47 Geo. III, 2nd Session, chap. 66, extended to vessels within 100 leagues from said coasts. Both these Statutes were repealed but some of their provisions, with a limitation however of three leagues, were re-enacted in the Customs Consolidation Act, 1876 (39-40 Victoria, chap. 36).

(1) (1861) 1 Lush. Adm. Rep., 295, at 306.

Somewhat similar provisions were adopted in the United States: see Laws, U.S., Vol 4, p. 320, paragraphs 25, 26 and 27, and p. 437, paragraph 99; see also *Church* v. *Hubbart* (loc. cit.).

The provisions in our law dealing with hovering are to be found in sections 151 and 207 of the Customs Act, R.S.C., 1927, chap. 42, and amendments, which were held to be *intra vires* and valid in the case of *Croft* v. *Dunphy* (loc. cit.).

Among the provisions contained in section 151 is one empowering an officer of customs to board a vessel hovering in territorial waters of Canada, to examine her cargo and also to examine the master or person in command upon oath touching the cargo and voyage.

Section 207 renders liable to seizure and forfeiture a vessel hovering in territorial waters of Canada, together with her apparel, rigging, tackle, furniture, stores and cargo, if, upon examination by an officer of customs of the cargo, dutiable goods or goods the importation whereof into Canada is prohibited are found on board.

Subsection 7 of section 151 defines the words "territorial waters" for the purposes of these two sections; it reads as follows:

(7) For the purposes of this section and section two hundred and seven of this Act, "Territorial waters of Canada" shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada, or any other vessel which is owned by any person domiciled in Canada.

Subsection 8 is another section extending the jurisdiction on the marginal sea beyond the three-mile limit. It enacts, *inter alia,* that no goods shall be unladen from a vessel arriving at a port in Canada from any place out of Canada or from a vessel having dutiable goods on board brought coastwise nor bulk broken within three leagues of the coast until due entry has been made.

The distance seaward from any coast of Canada within which a vessel hovering in territorial waters may be boarded by an officer of customs for purposes of examination or within which goods may not be unladen from a vessel arriving at a port in Canada from any place out of Canada or from a vessel having dutiable goods on board brought

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Angers J.

coastwise is fixed, in the first case at twelve miles and, in the second one, at three leagues.

It seems to me, in the circumstances, that the transhipment by the *Apockmaouchea* onto the *Ganeff* of her cargo at a distance of fourteen or fifteen miles from the coast of Nova Scotia does not come within the scope of section 8 of the Act and that it was accordingly not prohibited thereunder.

This however is not the question with which we are concerned. The question I have to determine is whether the Act, in requiring the master of a vessel coming into a port in Canada to declare in his report to the Collector of Customs if he has unladen any goods or broken bulk during his voyage, wherever this may have occurred, is *ultra vires*.

Section 11, which requires the master of a vessel coming from any port out of Canada or coastwise and entering any port in Canada, whether laden or in ballast, to go, as soon as his vessel is moored or anchored, to the custom house and there make a report in writing to the Collector of the arrival and voyage of his vessel, stating, so far as they are or can be known to him, the particulars specified in subsection 2 and especially what goods, if any, have been laden or unladen, or if bulk has been broken, during the voyage, is a precautionary measure which, it is to be assumed, was deemed by the Parliament of Canada to be essential for the protection of the revenue.

Section 185 enacts that if any goods are unladen before report is made in compliance with section 11, or if the master fails to make such report or to produce the goods or if he makes an untrue report, the master shall for each offence incur a penalty of $400. Section 185 adds that the vessel shall be detained until such amount is paid and that, unless payment is made within 30 days, such vessel, after the expiry of such delay, shall be sold to pay the penalty and the expenses incurred in detaining and selling the vessel.

In my opinion, sections 11 and 185 are intra-territorial in their operation. The report which they require to be made is only required to be made after the vessel has entered a Canadian port. The report is accordingly made within the territorial limits of Canada. The fact that section 11 requires the disclosure of acts which may have

occurred during the course of the voyage, outside of the territorial waters of Canada, does not, in my judgment, render the enactment extra-territorial in its operation. No penalty is imposed on the master or person in charge of the vessel in respect of any such acts. Their commission is not, under the statute, an offence.

The substance or gravamen of the offence created under section 185, in so far as the report is concerned, is not that the cargo was unladen at sea but that, having entered a Canadian port and made a report inwards, the master did not make a true report of the voyage of the vessel in compliance with the requirements of section 11.

If the master of the *Apockmaouchea* had declared in his report that he had transhipped his cargo onto the *Ganneff* at 14 or 15 miles from the coast, as the evidence shows is what happened, he would not have been subject to any penalty. The offence with which he is charged and which is created by section 185 is of having made an untrue report.

After having given the matter due consideration, I have reached the conclusion that the Canadian Parliament, for the protection of the revenue, has the right to require that, in the report which a master coming into a Canadian port has to make, a full and correct statement be included regarding the dealings in cargo which the master had during his last voyage, i.e., the voyage which immediately preceded his arrival at the port.

The decision of the Minister, in the circumstances, must be confirmed. The *Apockmaouchea* or the sum of $400 deposited with the Minister of National Revenue to obtain the release of the vessel, as the case may be—it was not clear at the trial whether or not the sum of $400 had been deposited and the *Apockmaouchea* released—is accordingly declared forfeited.

The respondent is entitled to his costs against the claimants.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1934
Nov. 20.

BETWEEN:

DELMA C. OUTHOUSE AND ERNEST H. HIMMELMAN ..... } PLAINTIFFS;

AND

STEAMER *THORSHAVN*..... DEFENDANT.

Admiralty—Jurisdiction—Action in rem—Oil pumped overboard by a ship causing damage—Damage done by a ship.

Plaintiffs were the owners of a large number of live lobsters lying in crates in the waters of the Strait of Canso, N.S., for refreshment purposes, while being transferred from Magdalene Islands, P.Q., to Gloucester, Mass. Defendant steamer ran aground in the Strait of Canso and in order to lighten the ship a large part of its cargo of oil was pumped into the waters of the strait. Plaintiff claimed this was carried by the winds and tide to the resting place of the lobsters, causing damage to the lobsters, crates and connecting lines. Plaintiff Outhouse also claimed for loss of freight.

Defendant contended that the court was without jurisdiction to entertain the action.

Held: That damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument.

(1) (1884) 111 U.S. Rep., 335, at 345.
(2) (1920) 36 T.L.R., 815.
(3) (1863) 3 B. & S., 917 at 929.
(4) (1900) 188 Ill., 133, at 138.
(5) (1903) L.R. 1 Ch. D., 586.
(6) (1900) L.R. 1 Ch. D., 421.
(7) (1904) App. Cas., 342.
(8) (1905) 42 Sc.L.R., 762.