1932

June 13.
July 8.

BETWEEN:—

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

THE AUXILIARY FISHING SCHOONER *NATALIE S.*

DEFENDANT.

*Revenue—Customs Act—Seizures—Forfeiture—Fisheries Treaty 1818—Customs and Fisheries Protection Act*

The *Natalie S.* entered the port of North Sydney, from the fishing grounds off Ingonish, N.S., for the alleged purpose of effecting repairs to her engines. On the same day, after effecting certain repairs and after clearing outwards, her master purchased 5½ tons of ice from a local dealer, without licence or permit. The *Natalie S.* was shortly afterwards seized for an infraction of section 10 (*c*) of the Customs and Fisheries Protection Act. (R.S.C., 1927, c. 43.)

*Held,* that though an American vessel may, under the Fisheries Treaty, 1818, enter a Canadian port for the purpose of making repairs therein, this did not render lawful the act of her master in purchasing ice as aforesaid, contrary to the provision of the Customs and Fisheries Act, and that the vessel was lawfully seized and forfeited.

2. That section 10 (*c*) of the Customs and Fisheries Protection Act is *intra vires* of the Parliament of Canada, and is not a violation of the Fisheries Treaty of 1818.

INFORMATION exhibited by the Attorney-General of Canada asking that the forfeiture of the ship *Natalie S.* be declared valid and that the same be forfeited to the Crown.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Sydney, N.S.

*J. W. Maddin, K.C.,* for the plaintiff.

*J. G. Hackett* for the defendant.

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

THE PRESIDENT, now (July 8, 1932), delivered the following judgment.

This is an Information exhibited by the Attorney-General of Canada wherein forfeiture is claimed of the auxiliary fishing schooner *Natalie S.,* a United States fishing schooner, registered at the port of New York, U.S.A., but sailing out of the port of Gloucester, U.S.A., and of 49 tons register. The *Natalie S.* owned by her master Joseph Mello, was seized at the port of North Sydney, N.S., because of an

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alleged infraction of sec. 10 (*c*) of the Customs and Fisheries Protection Act, R.S.C., 1927, Cap. 43.

There is practically no dispute concerning the facts and I find as follows: That on the 13th day of August, 1931, the *Natalie S.* entered the port of North Sydney from the fishing grounds off Ingonish, N.S., for the alleged purpose of effecting repairs to her engine; that the master of the *Natalie S.* when making his entry inwards at Customs, North Sydney, enquired of an Officer of Customs if he might obtain some ice and he was informed that if he required ice to prevent fish, which he had on board, from spoiling, he might obtain permission to do so by wiring the proper authorities at Ottawa, but otherwise he could not purchase ice while in port; the ice was required either for the protection of fish on board or for fish yet to be taken on that fishing voyage. On the same day, the 13th of August, 1931, after effecting repairs to his engine and after clearing outwards at North Sydney, the master purchased about five and a half tons of ice from a local dealer, without a licence or permit, and placed the same on board his schooner, at midnight, and he admitted while giving evidence that he knew this "was against the rules." Shortly afterwards the *Natalie S.* was seized by Customs Officers and is still under detention.

By the Fisheries Treaty of 1818, entered into between Great Britain and the United States, and which received legislative sanction, fishermen of the United States are not permitted to enter the bays or harbours of Canada or Newfoundland except in certain specified areas, but it is therein provided that they may enter such bays and harbours "for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatsoever." The Customs and Fisheries Protection Act, R.S.C., 1927, Cap. 43, sec. 10, provides as follows:

10. Every fishing ship, vessel or boat which is foreign or not navigated according to the laws of Great Britain or of Canada, which

(*a*) not being thereto permitted by any treaty or convention, or by any law of Great Britain, or of Canada for the time being in force, has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks or harbours of Canada, or in or upon the inland waters of Canada;

(*b*) has entered such waters for any purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force; or

(*c*) having entered such waters for a purpose permitted by treaty or convention or by any law of Great Britain or of Canada for the time being in force, and not being thereto permitted by such treaty, convention or law, fishes or prepares to fish, purchases or obtains bait, ice, seines, lines or any other supplies or outfit, or transhipps any supplies, outfit or catch, or ships or discharges any officer, seaman, fisherman or other part of her crew, or ships or lands any passengers; shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited.

The Customs and Fisheries Protection Act empowers the Governor in Council to authorize the issuance of licences to United States fishing vessels, enabling them to enter any port on the Atlantic Coast of Canada, for the purpose, inter alia, of purchasing ice, but no such licence ever issued to the defendant schooner.

Assuming that the *Natalie S.* entered the port of North Sydney for a purpose permitted by the Treaty of 1818, that is to effect repairs to her engine, yet, she as a fishing vessel was not permitted by that Treaty, or by the law of Canada, to purchase ice, within that port, and it seems abundantly clear that the master committed a breach of sec. 10 (*c*) of the Customs and Fisheries Protection Act by the purchase of ice and by placing the same on board his fishing schooner, and I am of the opinion therefore that the seizure of the *Natalie S.* was warranted by the statute. When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; *The Queen* v. *Anderson* (1).

It was contended by Mr. Hackett, for the defendant schooner, that having entered port for a purpose permitted by treaty or by law, and that having completed her fishing voyage and being en route to Gloucester her home port (which may or may not be true), it was lawful for the master to purchase ice for the purpose stated. I do not think this contention is one of substance. The purpose of the statutory provision, said to be violated by the defendant schooner, was intended no doubt to prevent Canadian Atlantic Ports being used as a base by foreign vessels in prosecuting the fisheries. The purpose of the ice purchased in this case is admitted to have been to preserve the fish already on board, but it might well be used to preserve fish yet to be taken on the same fishing voyage, but in any event the ice was obtained by a United States fish-

(1) (1868) L.R. 1 C.C., 161 at p. 166.

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ing vessel, on a fishing voyage, to be used in protecting the catch of that fishing voyage. If the contention made is sound then all sorts of expedients might be resorted to to evade the prohibition of the statute and its purpose would be utterly nullified. Being excluded by treaty, and by law, from the privilege of obtaining ice for fishing purposes in a Canadian port, the *Natalie S.* cannot, I think, be heard to say that because she lawfully entered port for a purpose permitted by treaty, that she was thereby entitled to other privileges which by treaty, and by law, she was barred from enjoying. I do not think that such a contention can prevail. Nor can it be argued, as it was, that because it is permissible for a United States fishing vessel to enter a Canadian port for " water," that therefore she may obtain frozen water, ice. The distinction is, that ice is intended to be used in the prosecution of the fisheries, just as bait, nets, etc., are used, and the purchase of the same in a Canadian port is prohibited by statute unless under licence, while the obtaining of water is permitted by treaty and is to be used for other purposes. I do not think that this contention can prevail either.

It is pleaded by the defendant that sec. 10 (*c*) of the Customs and Fisheries Act, supra, is ultra vires of the Parliament of Canada, and it was urged that this statute is in violation of the spirit of the Treaty of 1818, and as I understood Mr. Hackett's argument, that it virtually abrogates privileges accorded foreign ships under commercial treaties and by international law. It is a fundamental principle of international law that the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. This is the logical corollary of the principle of the sovereignty of nations which has long been recognized at international law. Furthermore, it is equally well recognized that a State's territorial jurisdiction includes the sea within a three mile limit of its shores. Accordingly, the Parliament of Canada has an absolute right to exclude foreign vessels from any of its ports, and foreign fishing vessels possess no inherent right to enter Canadian ports for any purpose. There is however a general practice to admit foreign seagoing vessels to ports and to give them, on admission, equal treatment. This international practice is based, in part, on treaties, and in part upon a general

and tacit permission of access by countries concerned. It is, however, clearly recognized in international matters that a distinction may properly be drawn between fishing vessels and ordinary vessels of commerce. For example, in the Convention and Statute on the International Regime of Maritime Ports and Protocol of Signature, signed at Geneva on September 9, 1923, Article 14 provides: "This Statute does not in any way apply to fishing vessels, or to their catches." The general right of exclusion is qualified by the recognized principle of affording shelter in stress of weather and possibly a refuge for replenishing food and water under special circumstances. Is there, therefore, any treaty in force between Great Britain and the United States, or any law of Great Britain or Canada which qualifies this right of sovereignty? The Treaty of 1818 specifically defines the privileges which United States fishermen may enjoy within the territorial waters of Canada, and these privileges have been already mentioned and require no discussion. The particular statute in question is not in conflict with the Treaty of 1818. Under the Convention of Commerce and Navigation of 1815, entered into between Great Britain and the United States, no privileges are granted to foreign fishing vessels to carry on the fisheries, but permission is given to the inhabitants of either country " to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come . . . but subject always to the laws and statutes of the two countries, respectively." This convention relates only, I think, to trading or commercial ships. I entertain no doubt that as a result of the Treaty of 1818, and even upon the authorities cited by defendant's counsel, it was within the competence of the Dominion to enact in its entirety sec. 10 of the Customs and Fisheries Protection Act. See also Martin L.J.A. in the case of *The King* v. *The Ship North* (1).

I am of the opinion therefore that the *Natalie S.* purchased a quantity of ice at the port of North Sydney for a purpose not permitted by treaty or by law, and that she committed a breach of sec. 10 (*c*) of the Customs and Fisheries Protection Act and is therefore liable to seizure and forfeiture as by that statute provided.

(1) (1905) 11 B.C.R. at p. 479.

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Upon reference to the Customs and Fisheries Protection Act since the trial, it appears to me that this Information should have been exhibited in the Admiralty side of the Exchequer Court of Canada, but no objection to this was raised in the pleadings or at the trial. I assume that I have the power to direct that the cause be transferred to and intituled in the Nova Scotia Admiralty District, Exchequer Court of Canada, and that the pleadings be so amended that it will appear that this proceeding was launched in the Nova Scotia Admiralty District of the Exchequer Court of Canada, and I shall consider such amendments as having been made.

It was urged by Mr. Hackett for the defendant, that I should recommend a remission of the penalty of forfeiture, in the event of my finding the defendant schooner guilty of the offence alleged against her, chiefly on the ground that the magnitude of the penalty was entirely out of proportion to the gravity of the offence. The Court is without discretion in this matter and can only affirm or set aside the seizure. It is only the Governor in Council who can grant any relief from any penalty exacted, and any appeal for modification or remission of the penalty should be made to the Governor in Council before whom all the facts may be presented more fully perhaps than they were presented to me. I do not think this is a case where I should intervene with a recommendation for the remission or modification of the penalty.

Judgment will therefore be entered against the *Natalie S.*, and she together with her tackle, rigging, apparel, furniture, stores and cargo, are condemned and declared forfeited to the Crown, and with the usual consequences as to costs.

*Judgment accordingly.*