BRITISH COLUMBIA ADMIRALTY DISTRICT

HIS MAJESTY THE KING .... PLAINTIFF;

1929

July 15-16-17
July 18.

v.

THE *MARY C. FISCHER* .... DEFENDANT.

Shipping—Seizure—Customs Act, c. 42, R.S.C. (1927), Sec. 183—"Unavoidable cause"—"Probable cause for seizure"—R.S.C. (1927), c. 43, Sec. 27

The defendant ship was seized by the Customs Authorities under sec. 183, ch. 42 of R.S.C. (1927), as being in Canadian waters contrary to its provision. The defence alleged that the entry into Canadian waters was due to the fact that the sole man in command, during the illness of the Master believed himself without the three mile limit. The anchorage was made in the dark and this man had been battling with the elements for two days alone, had only had three hours sleep in 72 and was exhausted.

Held:—That, in the circumstances, he could not be regarded as a mariner in ordinary conditions, and could not be called upon to take such precautions as would in other circumstances be required by this Court, and that the entry was due to "unavoidable causes."

2. That the phrase "unavoidable cause" as found in sec. 183 aforesaid, is a very wide one, and depends upon the circumstances of each particular case, and no definition should be attempted, or could, in ever varying circumstances, be given of it.

3. That the word "probable" in the 4th line of sec. 27 of c. 43, R.S.C. (1927), means the same as "reasonable."

ACTION to have the seizure of the *Mary F. Fischer* declared good and valid.

The action was tried before the Honourable Mr. Justice Martin at Vancouver.

C. H. O'Halloran for plaintiff.

Wm. Savage for defendant ship.

(1) (1929) 45 T.L.R. 389.

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At the conclusion of the trial and argument on the 17th of July, 1929, his Lordship took the case on advisement and on the next day (July 18), delivered the following oral judgment in which the material facts are stated.

PER CURIAM. This case presents some features which are quite different from those in the other cases in which judgment has been given, in that there is no question here about the intention of the vessel to come within Canadian waters because of stress of weather, or for any cause at all. The position taken by the defence is that the entry into Canadian waters was occasioned by the fact that in anchoring where the vessel did, the crew, or the one man who was in temporary command during the illness of the master, thought that he was without the three-mile limit and anchored at a place which in the dark he believed was without the territorial waters of Canada. In this I think that he was genuinely mistaken. The evidence leads me to believe that as a matter of fact the place of anchorage that was chosen was really within the waters of Canada, and that he had by misadventure "entered" wrongfully and contrary to the Statute—sec. 183, cap. 42, R.S.C. But the question is, was such entry in the circumstances an "unavoidable cause" within sec. 183 of the Customs Act? And that is the turning point of the case.

As I have before pointed out in the cases that have been decided at the present sitting of this Court, that phrase is a very wide one, and depends upon the circumstances of each particular case, and no definition should be attempted, or could, in ever varying circumstances, be given of it.

It is apparent that what the vessel (registered at Ketchikan, Alaska) was endeavouring to do was to return to Alaskan waters and refit at the Hutchison Station at Noyes Island, where there were special opportunities for so doing, and at a very small expense, and where it would be most convenient for her to do so. Having that object in view, which was a proper object, that explains the reason why she did not go to Prince Rupert. And there is also this other very substantial reason, viz., that the owners who were on board did not have the money to refit at Prince Rupert, or to obtain medical advice or assistance there.

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The disturbing point of the case is as to whether or not a certain anchor was on deck, the larger anchor, as Captain Sheppard deposed, at the time the arrest was made by him. It is a difficult situation when these extraordinary conflicts of evidence arise in the testimony of witnesses who seem to be respectable and truthful men. And it is the more unfortunate that a conflict should have arisen on this point, because it has turned out to be a question of very considerable importance. I must find, without the slightest reflection upon Captain Sheppard, that he was mistaken in regard to that anchor. What finally induces me to come to that decision is the uncontradicted fact that before the two men, the owners, left Prince Rupert to come here, they went on board the ship, by permission, they say, of the Customs authorities, and removed or shifted two anchors from below the remaining tons of ice on board the vessel. Now I pause here to say that it seems to me a very odd thing, and to me an inexplicable thing that these two men were allowed by the authorities who were in the custody of the vessel—not the Marshal of this Court at that time, but the local Customs authority at Prince Rupert—they say they got the permit from—to go on board without anybody accompanying them to see what they were doing. I do not wish to say for one moment that what they were endeavouring to do was not perfectly proper, i.e., to put the vessel in order before coming down to attend the trial. But at the same time I feel impelled to say that common precaution should have suggested to those in charge, the local Customs authority, that when those two men were allowed to go on that vessel that was then under seizure, some officer should have gone with them so as to have seen exactly what happened, and then this whole question as to the anchors would have been cleared up. But the fact remains that the uncontradicted testimony of these two men is that they did go aboard the day before they started to come here, and removed those two anchors from beneath the ice; bringing one up on deck and leaving the larger below. Now if the authorities in charge of a seized vessel permit people to go on board of it without any one accompanying them to keep the Crown advised, so to speak, as to what is being done upon the vessel under seizure, this court is really left in a very awkward position, an unsatisfactory position, I

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may say; the result being that I must find that there was no anchor practically available for the vessel other than the small one, the 25-pound one, then on deck and which was put out that night.

Such being the case, the only question remains as to whether or no the putting out of that anchor in that position, that mistaken position, can be deemed to be under the circumstances an "unavoidable cause"? I have come to the conclusion that in the special circumstances of this case it must be held to be so. For this reason, that the sole man in charge had after two days battling with the elements, with a very sick comrade below, in a very courageous and pertinacious manner, for which I must praise him, become exhausted, having had only a few hours sleep—two or three hours sleep in seventy-two hours. And I must say that both common sense and humanity suggest that in the circumstances, such dire circumstances, it would be a harsh, and to my mind an unconscionable stand to take that he must then be regarded as a mariner in ordinary conditions and be called upon to take such precautions as would in other circumstances be required by this court. In other words, he was prevented from doing what he otherwise would have done, or should otherwise have done, by the exhaustion of his natural forces, and it was not possible for him to remove the ice that was necessary to move in order to get one of the larger anchors below it; it was, in short, not physically possible for him to do more in the circumstances than he did. Just to illustrate—suppose, for instance, in attempting to put out the anchor, he had after that long period of stress and trial fallen into a faint, succumbed, and the ship had drifted ashore, under such circumstances it would be perfectly apparent to everybody that such inshore drift would be an "unavoidable cause." It then comes to the question of degree; and the degree in the circumstances here is such that he has, in my opinion, established what is really within the true meaning of section 183 of the Customs Act, an "unavoidable cause" for being where he was upon that night and the next morning in question.

The ship, then, must be released, as it comes within the "permission" given by sec. 10 (*b*) of cap. 43, R.S.C. The circumstances of the whole case are such, as I said fifteen

years ago in the case of the *Valiant* (1), that this Court will look upon them with (as the historical expression is) " a lenient eye " as being the misfortunes of innocent and much distressed mariners.

The ship, then, as I have said, will be released. But that does not dispose of the other question, as to whether or no in the circumstances the seizure was made in pursuance of section 27 of cap. 43—that is to say, was there a " probable cause " for it? That point I must decide—the authority being given by that section to this Court to certify to " probable cause " with regard to costs; it is a special direction outside the ordinary jurisdiction of this court; and by that direction of Parliament I must be governed. Have you anything to say, then, Mr. O'Halloran, upon section 27, which says if I certify there was " probable cause for seizure the claimant shall not be entitled to costs?"

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The COURT: You see, the difficulty is there, Mr. Savage, and this is a very difficult case upon that point, it is the most difficult of all of them that I have had at these sittings, to determine that question, because the circumstances of the case are such as to preclude, really, the seizing officer having an opportunity to go into all these facts. At the time that officer saw those men that morning, one of them had by then practically recovered, and the other man seemed to him to be in good health. Of course the physical effects of a sound sleep of that length are very marked. And then he found them in that position and was told something that was really untrue, that is that the vessel had anchored five miles out, his nautical knowledge convinced him, and properly convinced him, that that was a mistake, and with the set of the tides, and the local conditions, it could not be so. So therefore he was faced with a knowledge of something that he knew from his own nautical experience could not be the fact, and I have found that he was right in that.

Mr. SAVAGE: Yes, I have to regard that finding, My Lord.

The COURT: You see, it is the turning point; because if I were to find, for example, that there was not " probable," that is to say " reasonable " cause (Salmond on Torts, 1928,

(1) (1914) 19 B.C.R. 521, at p. 525.

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p. 619*n*) for this seizure, I would have to hold in the circumstances, in effect, that Captain Sheppard did something which was really not part of his duty, or exceeded his duty.

Mr. SAVAGE: I can only urge, my Lord, that he had sufficient knowledge; he had knowledge of the previous days' distresses, and should have had knowledge of the anchor, according to the finding of the court this morning—the insufficiency of the anchor. He did have knowledge of the engine trouble to such an extent that before he reached Prince Rupert he had to put his own engineer aboard to remedy that.

The COURT: But it was so quickly repaired, you see, that he would infer from that that perhaps it was not a genuine claim.

Mr. SAVAGE: Well, I cannot submit more, My Lord.

The COURT: No. I realize it is a hard position, Mr. Savage, and all I can say is that if it was within the ordinary jurisdiction of this Court it would give me no trouble whatever, but I am compelled to make a decision which is special in its nature.

Mr. SAVAGE: I think a further inquiry, under the statute, which is provided under section 6, would have brought out all the facts which have been brought out to-day. I cannot urge further than that.

The COURT: I think, in the complicated circumstances of this case, the unusual elements that it presents, that it would be impossible for me to say that the seizing officer here, Captain Sheppard, did not have as the statute says, "probable cause" for seizure, and it therefore becomes my duty to certify to that effect. The consequence will be that the claimant will be deprived of the costs which he otherwise would have had in the ordinary practice of this Court.