

BETWEEN :

JOHN M. FUDGE CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Revenue—Seizure and forfeiture—Customs Act, R.S.C. 1927, c. 42, secs. 2, 151 & 208—Hovering vessel—“Officers”—Three-mile limit—Admissibility of admiralty charts and Light List Book—Pursuit beyond territorial limit—Seizure on high seas—Evidence—“Innocent passage”—Evidence of vessel’s position—Mistake by master.

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Claimant's vessel the *Geneva Ethel*, registered at St. Johns, Newfoundland, was seized by the master of the Canadian revenue cutter *Laurier*, for alleged infraction of the revenue laws of Canada. The boat and liquor and cigarettes found thereon were declared forfeited. On the hearing of a reference by the Minister of National Revenue the Court found that the *Geneva Ethel* hovered in Canadian waters adjacent to Sylvester Point, on the north shore of Prince Edward Island, while having on board alcohol, liquors and cigarettes not included or described in the manifest of the vessel and, upon signals given by the revenue cutter *Laurier*, failed to come to a stop immediately but proceeded toward the high seas, where, after pursuit and shots from the cutter's gun, she hove to and was seized.

Held: That as the *Laurier* was equipped with modern nautical instruments the evidence of the officers on board her touching on the position of the *Geneva Ethel* is more trustworthy and reliable than the uncorroborated testimony of the owner and master of the *Geneva Ethel*, lacking the proper nautical instruments, having kept no record whatever of his course and speaking entirely from memory.

- 2 That admiralty charts prepared and published under governmental authority are admissible in evidence as public documents.
3. That the Light List Book published by the Department of Transport in 1937 showing the height of every lighthouse in Canada is admissible in evidence since it is a work made by officers of the Crown and it is presumed that they acted in accordance with their duty and have stated nothing in the survey contrary to the facts.
4. That the master and second officer of the revenue cutter *Laurier* are "officers" within the meaning of s. 2, ss. 1 (1) of the Customs Act, R.S.C. 1927, c. 42.
5. That the *Geneva Ethel*, having contraband goods on board, and having moved inside the three-mile zone by error, as alleged by her master, could not be considered as having made an "innocent passage" for which her master would not be responsible.
6. That since the *Geneva Ethel* was found violating the revenue laws of Canada within the three-mile limit she could be immediately pursued beyond the three-mile limit and lawfully seized on the high seas.

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

The action was heard before the Honourable Mr. Justice Angers, at Charlottetown, P.E.I.

James J. Johnston, K.C. for claimant.

M. R. MacGuigan, K.C. and *C. St. Clair Trainor* for respondent.

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

ANGERS J., now (April 25, 1940) delivered the following judgment:

The claimant, John M. Fudge, master mariner, of Belleoram, Newfoundland, claims the return of the vessel *Geneva Ethel* and of her equipment, cargo and stores seized on the 27th of August, 1937, at a point approximately three and a half miles off North Lake on the north shore of Prince Edward Island, in the Gulf of St. Lawrence, by Hubert W. Coffin, master of the Canadian revenue cutter *Laurier*, for alleged infraction of the revenue laws of Canada.

The matter comes before this Court on a reference by the Minister of National Revenue under section 176 of the Customs Act (R.S.C. 1927, chap. 42, and amendments). By his decision given on the 15th of March, 1938, the Minister declared the boat and the liquor and cigarettes found thereon forfeited.

[The learned Judge referred to the pleadings and continued.]

The relevant provisions of section 151 of the Customs Act read as follows:

151. The provisions of this section shall extend to vessels hovering in Canadian waters, and in the case of any vessel registered in Canada, or of any unregistered vessel owned by a person resident or domiciled in Canada, or of any other vessels or class of vessels which the Governor in Council may specify or enumerate by proclamation shall also extend to vessels hovering in Canadian customs waters

2. Any vessel which has, in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters,—

(a) hovered;

(d) failed to come to a stop in compliance with the provisions of subsection four of this section,

shall be presumed to be a hovering vessel and to have hovered, provided that such presumption may, save in cases provided for by paragraph (d) of this subsection, be rebutted by evidence establishing that the vessel was engaged in a legitimate occupation not connected, directly or indirectly, with the smuggling into Canada of dutiable or prohibited goods, or the breach of any laws or regulations in force in Canada.

3. If any hovering vessel is found or observed in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters, any officer may go on board such vessel and examine her cargo and may also examine upon oath the master or person in command or any other person on board, touching the vessel, cargo and voyage, and may bring the vessel into port; . . .

4. Any vessel in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters, shall proceed

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to come to a stop when required so to do in the King's name by any officer or upon signal made by any vessel in the service of the government of Canada hoisting the pennant and ensign approved and appointed for the purpose by order of the Governor in Council

5 On any such vessel failing to proceed to come to a stop when required, the captain or master or other person in charge of any vessel in the service of the government of Canada may, after first causing a gun to be fired as a signal, fire at or into such vessel.

8. The evidence of such captain, master or other person that the vessel was within Canadian waters or Canadian customs waters shall be *prima facie* evidence of the fact.

9. Any officer may at any time go on board any vessel at any place in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters, and examine the manifest and inspect, search and examine the vessel and every part thereof, and any person, trunk, package or cargo on board.

10. Any vessel which is a hovering vessel within the meaning of subsection two of this section may be seized and forfeited, together with all stores and cargo which were upon such vessel at the time of the hovering, . . .

12. The powers conferred by subsection three of this section on an officer, may be exercised, and the provisions of subsections four to eleven inclusive, of this section, shall be applicable to a hovering vessel, either at the place where the vessel is found or observed to be hovering, or, elsewhere after pursuit, either within or without Canadian waters or Canadian customs waters as the case may be, or in a Canadian port when such vessel subsequently enters a Canadian port.

The relevant provisions of section 208 read thus:

208. If, upon search by any officer under the authority of this Act, any prohibited or smuggled goods, or goods not included or described in the manifest of the vessel, or goods respecting which there has been any violation of any of the requirements of this Act, are found in any vessel of any description whatsoever, whether proceeding from places beyond or within the limits of Canada, such goods, and the vessel in which the same are found, together with all the sails, rigging, tackle, and all other appurtenances which belong to or are attached to such vessel shall be seized and forfeited. . . .

The expressions "officer," "Canadian waters" and "Canadian customs waters" are defined in paragraphs (1), (u) and (v) of subsection 1 of section 2 as follows:

(1) "Officer" means an officer of Customs and includes in the provisions of this Act which relate to preventive measures, officers, and non-commissioned officers of the Royal Canadian Mounted Police employed in the preventive services of Canada and the captain or master or other person in charge of any vessel in the preventive services of the Government of Canada;

(u) "Canadian waters" shall mean all territorial waters of Canada and all waters forming part of the territory of Canada, including the marginal sea within three marine miles of the base lines on the coast of Canada, determined in accordance with international law and practice; subject, however, to the following specific provisions:—

(i) Canadian waters shall not extend beyond the limits of exclusion recommended in the North Atlantic Fisheries Award, answer to question V, as set forth in the Schedule to this Act;

(v) "Canadian customs waters" shall mean the waters forming that part of the sea which is adjacent to and extends nine marine miles beyond Canadian waters.

The material part of the answer to question V in the North Atlantic Fisheries Award, mentioned in paragraph (u), is worded as follows:

In case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

The case was submitted on the evidence adduced at the preliminary hearing before the magistrate and at the trial before the Honourable Mr. Justice Saunders of the Supreme Court of the Province of Prince Edward Island and a jury in the prosecution of His Majesty the King against John M. Fudge, the claimant herein, master, William Myalls, mate, Charles P. Blagdon, cook, and James Rose, sailor, all of the vessel *Geneva Ethel*, on a charge of having, on or about the 27th of August, 1937, in Canadian waters adjacent to the County of Kings, Province of Prince Edward Island, on board the said vessel 85 gallons of rum, 600 gallons of alcohol and other liquors not included in the manifest of the vessel, contrary to the provisions of section 208 of the Customs Act. I may state incidentally that the notes on the transcript of the evidence at the preliminary hearing are not mine.

On the 27th of August, 1937, about noon, the *Laurier* was on the north side of Prince Edward Island, near East Point, in an endeavour to locate the vessel *Geneva Ethel*, reported to be hovering off the coast. The *Laurier* was then cruising in a north northeasterly direction, when Robert MacNeill, second officer on board, sighted a vessel at a distance of about six miles. Wishing to intercept her, the *Laurier* altered her course to northwest. The *Laurier* passed this vessel, which turned out to be the *Geneva Ethel*, at a distance of between 50 and 100 yards. The *Geneva Ethel* at the time was stopped and two or three men of her crew were fishing; she was then approximately six miles off shore. The *Laurier* proceeded on her course in

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the same direction. She kept a check on the *Geneva Ethel's* position by bearings; as the vessel appeared to be nearing the coast, the *Laurier* stopped. At the time the cutter was at a distance of about seven or eight miles from the schooner. The *Laurier* remained stopped for forty minutes. The *Geneva Ethel* was kept under observation; she could easily be distinguished by her tan sails. The course followed by the *Laurier* is shown on the chart exhibit B by a line in pencil, three small circles and the figures 80·7, 87 and 95 (the latter with the word "stop") and the position of the *Geneva Ethel*, when the *Laurier* passed her, is indicated with the schooner's name. When Coffin considered that the *Geneva Ethel* was within three miles from the coast, in order to ascertain her position he had the log set and the *Laurier* ran a southwesterly course towards Shipwreck Point for a distance of about six miles; the course pursued is indicated on the chart exhibit B by a line in pencil from the point marked "stop 95" to the one marked "log 101." A bearing of the *Geneva Ethel* was taken; the line of bearing placed the *Geneva Ethel* within three miles from the shore. The *Laurier* proceeded further until her echo sounding machine registered a depth of eleven fathoms, that is to the spot marked "log 104" on the chart exhibit B. At that point Shipwreck Point lighthouse bore from the *Laurier* southwest by west one-half west; the sextant was used and a vertical angle of the lighthouse was taken; the angle indicated was 21 minutes, which meant a distance of 2·3 miles from the *Laurier* to the lighthouse. The above data correspond with the entries in the cutter's log-book, an extract whereof was filed as exhibit K.

I do not deem it expedient to relate in detail the operation of the sextant explained at some length in the testimonies of Coffin and MacNeill. Both concluded that the *Geneva Ethel* was well within three miles from the coast; in fact between two and two and a half miles.

Stress was laid by counsel for claimant on the fact that the sextant was not properly checked before it was used on the occasion in question. The evidence shows that Coffin made one check, while MacNeill made three. It may be convenient to quote an extract from the version of each of these two witnesses in relation to the check of the sextant.

At page 83 MacNeill says:

Q. Before you took the vertical angle with the sextant, what was done?

A. It was checked for error.

Q. Checked for error?

A. Yes, sir.

Q. What checking was made?

A. Well, there were three common checks, one puts on the sextant; index error—

Mr. Johnston: Q. Is that on the log there?

A. It is not on the log, no. Sight error, perpendicularity.

Q. (Mr. Trainor): What check did you make?

A. Well, I put those three checks on the sextant and found it to be without error and I then took the observation of the light with the sextant.

Coffin's version on the subject is found at pages 61 (in fine) and 62:

Q. So then the proper thing would be to check all errors?

A. Oh, no, that has nothing to do with it.

Q. You take your chance, then?

A. You check your index error, if that is correct—

Q. Can you assert, then, there is only one error?

A. If you have an index error you check your sextant, then you use all other three.

Q. What does Skipper MacNeill mean by saying you checked all three errors?

A. I don't know; if you check one—then you need not check the other errors.

Q. If you check one error, then these four others you need not correct them at all?

A. Yes, if your index is correct.

From the evidence it appears that the important check is for "index error" and that check was made both by Coffin and MacNeill. Assuming it was necessary that the three checks be applied to ascertain that the sextant was in proper condition, MacNeill applied them and found the sextant to be without error. There being no evidence to the contrary, I must conclude that the sextant was correct.

It may be noted that, at the time the position of the *Geneva Ethel* was ascertained and found to be within three miles from the coast, she was still heading towards Prince Edward Island, thereby shortening the distance between her and the coast.

Against the evidence of Coffin and MacNeill with reference to the position of the *Geneva Ethel* from the time she started on a southeasterly course shortly after three o'clock to the time when she altered her direction to north

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northeasterly presumably after noticing that the *Laurier* was heading towards her, we have the testimony of the claimant himself. This testimony or at least the part thereof referring to the movements and position of the *Geneva Ethel* between 1 and 4 o'clock on the 27th of August, 1937, is rather vague and indefinite; the witness was obviously reticent and evasive.

When the *Laurier* passed the schooner at about half-past twelve, the latter was, according to Fudge, at a distance of about eight miles from the coast.

Around one o'clock, the *Geneva Ethel* started to proceed in a southeasterly direction towards East Point; in the witness' opinion, she travelled for a distance of eight miles. The schooner stopped and her crew fished for a period of forty minutes. In Fudge's estimate the *Geneva Ethel* was then $4\frac{1}{2}$ miles from the coast.

Fudge says that the weather commenced to get dark and squally—on this point his testimony is in conflict with that of MacNeill—and that a strong tide was running in to the southwest; the *Geneva Ethel* seemed to be going in towards the land and he told the crew to loosen the jibs and hoist them and he steered a course north north-east, as he did not want to get too close to the coast.

The *Geneva Ethel* was not anchored and she drifted towards the land with the tide and the wind. Fudge could not tell her exact position and his estimate would at the best be a mere conjecture.

On behalf of the respondent we have the evidence of men equipped with modern nautical instruments who were in a position to fix, if perhaps not exactly, at least with a sufficient degree of precision, the location of the *Geneva Ethel* after the *Laurier* had passed her and the schooner had proceeded on a southeasterly course; on the other side there is the uncorroborated testimony of the owner and master of the schooner, lacking the proper nautical instruments, having kept no record whatever of his course and speaking entirely from memory.

After carefully perusing the evidence, I feel disposed to accept that adduced on behalf of the Crown; it seems to me more trustworthy and more reliable.

The observations of Mr. Justice Nesbitt of the Supreme Court of Canada in the case of *The King v. The Vessel Kitty D.* (1) seem to me applicable to the present case:

I concur in the judgment of Mr. Justice Davies which I have read, and would only add that it appears to me the case is another illustration of the clash of scientific accuracy with human guesswork. Either ships can be and are run by the improvements of modern science so that a captain can tell where he is without the sun, or all our boasted advances are naught. If compasses and logs, etc., are to be defeated by the judgment or estimate or guess of interested fishermen, poaching is made easy.

The judgment of the Supreme Court of Canada was reversed by the Judicial Committee of the Privy Council (2) on a question of fact, but not against the principle laid down by Mr. Justice Nesbitt.

Objections were raised by counsel for claimant: 1st against the production and use of the chart filed as exhibit B; 2nd against the use by the master of the *Laurier* of the vessel's log-book to refresh his memory; the objections were dismissed by Mr. Justice Saunders and I may say, with deference, that in so doing I believe he was right.

In connection with the admissibility of admiralty charts prepared and published under governmental authority, see *Rex v. The Bellman* (3).

As regards the log-book the evidence shows that the entries were not made by Coffin, but that he was familiar with them, as he inspected the log-book three or four times a day; in this respect reference may be had to Halsbury's Laws of England, 2nd ed., vol. 13, p. 683, No. 752.

Counsel for claimant further objected to the use by the master of the *Laurier* of the Light List Book published by the Department of Transport in 1937 showing the height of every lighthouse in Canada and mentioning the height of Shipwreck Point lighthouse as being 86 feet, exactly the same figure as that appearing on the chart, exhibit B. The objection is, in my opinion, unfounded. This light list issued by the Department of Transport is a work made by officers of the Crown and it is presumed that they acted in accordance with their duty and have stated nothing in their survey contrary to the facts. This proposition was

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(1) (1904) 34 S.C.R. 673, 697.

(2) (1905) 22 T.L.R. 191.

(3) (1938) 3 D.L.R. 548.

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laid down by Baxter, C.J., in *Rex v. Bellman (ubi supra)*, in which he cites a passage from the judgment of Parke, B., in the case of *Daniel v. Wilkin*; at page 552 Mr. Justice Baxter says:

Daniel v. Wilkin, 7 Ex. 429, at p. 437, 155 E.R. 1016, is on closer ground, for Parke, B., said that "The ground on which a survey made by officers of the Crown under a commission is received, is, that it is presumed that they acted in accordance with their public duty, and have stated nothing in their inquisition or survey which is contrary to the fact."

In the absence of evidence establishing that the height of 86 feet mentioned in the chart exhibit B as well as in the Light List Book of the Department of Transport is inexact, I believe that I am bound to accept it.

The evidence shows conclusively that the *Geneva Ethel* had on board, when she was seized, 600 gallons of alcohol, 8 kegs of rum of four gallons each, 123 gallons of assorted liquors in bottles consisting of rum, gin, brandy and whiskey, and 16 cartons of cigarettes, and that these goods were not included or described in the manifest; the value of these goods for duty purposes was \$774, to wit \$758 for the liquors and \$16 for the cigarettes.

The manifest, dated at Saint-Pierre, August 12, 1937, and bearing the signature of the claimant, contains under the heading "Nombre et espèces des colis et nature des marchandises" the following entry, "Sur lest et provisions de pêche et quarante quintaux morue." The proof discloses that this manifest was the one obtained by Fudge from the customs the last time he cleared from Saint-Pierre prior to the 27th of August when his schooner was seized. The previous manifest from Saint-Pierre, filed as exhibit F, bears date the 9th of July, 1937; the description of the cargo reads: "Sur lest et provisions de pêche"; Fudge declared that on that particular occasion he also had liquors on board but had not disclosed them in the manifest.

Fudge admitted that ten or twelve years ago he was caught with liquor on board his vessel, which he was taking to Newfoundland for election purposes, that he was brought before the Court, pleaded guilty and paid a fine. Asked if that were the only time he had ever had liquor within the three-mile limit of Prince Edward Island he

replied that this was the only time. To the question as to whether he had ever given liquor off his ship to any person belonging to Prince Edward Island, Fudge replied: "Not to my knowledge." Asked if he would remember, he answered in the negative.

The evidence establishes beyond doubt that the claimant was engaged in the trade of contraband liquor.

It is idle to say that Coffin and MacNeill were officers within the meaning of paragraph (1) of subsection 1 of section 2 of the Act. As such they had, under sections 143, 151 and 208, the power to go on board the *Geneva Ethel* for the purpose of examining her cargo and manifest and to seize her and her cargo and stores and bring her to port.

It was urged on behalf of claimant that the *Geneva Ethel* was seized at a distance of $4\frac{1}{2}$ miles from the coast and not of $3\frac{1}{2}$ miles as stated by the Crown's witnesses. The captain of the schooner fixed the distance by taking a sounding with a "jigger," which was filed as exhibit 2. According to Fudge the sounding gave a depth of 26 fathoms; he said that with the aid of a chart (exhibit 1) he was able to determine the exact place at which the *Geneva Ethel* was seized. I doubt very much whether a "jigger" with a weight of only a pound and an ounce could be useful for the purpose of taking a sounding in 26 fathoms of water from a vessel drifting on a strong tide; I am inclined to believe that a sounding taken in these conditions would not be very accurate. According to Coffin, whose evidence is uncontradicted, a sounding lead weighs from 7 to 12 pounds. However that may be, the question as to whether the *Geneva Ethel* stopped and was seized at $3\frac{1}{2}$ or $4\frac{1}{2}$ miles from the coast seems to me immaterial, as the proof does not disclose the distance covered by the schooner from the time she changed her course to north northeast to the time she stopped after the cutter had fired shots at her and Fudge realized that it would be dangerous to proceed further.

Counsel for claimant submitted that, if the *Geneva Ethel*, in the course of her legitimate employment, namely fishing, moved inside the three-mile zone by error and, without in the meanwhile committing an overt act against

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the revenue laws of Canada, immediately proceeded outside, this would constitute an "innocent passage" for which her master would not incur any responsibility. I am unable to agree with this proposition, particularly in view of the fact that the schooner was hovering with liquor on board not described in the manifest: see *The Queen v. The Ship Beatrice* (1).

Contrary to the contention set forth by counsel for the claimant, I am of the opinion that the *Laurier* had the right to pursue the *Geneva Ethel* beyond the three-mile limit and search and seize her on the high seas: *The Ship North* and *The King* (2).

The certificate of registry of the *Geneva Ethel*, dated at St. Johns, Newfoundland, the 11th of March, 1935, gives the name of Jeremiah Petite, of English Harbour, Fortune Bay, Newfoundland, as owner of the vessel. A note signed by the collector of customs at Belleoram, Newfoundland, dated April 11, 1935, written on the back of the first page of the certificate exhibit C, certifies that John M. Fudge, the claimant herein, became on the said date master of the *Geneva Ethel*. Various receipts, bearing dates ranging from April to July, 1937, annexed to the certificate of registry (exhibit C), are all made to John M. Fudge as master of the *Geneva Ethel*.

A document entitled "Agreement and account of crew," dated May 14, 1937, concerning the *Geneva Ethel*, bears the signature of J. M. Fudge, as master.

After attentively reading and annotating the oral evidence and examining the exhibits and perusing with care the able and exhaustive argument of counsel, I am satisfied that on the 27th of August, 1937, in the afternoon, sometime between three and four o'clock, the *Geneva Ethel* hovered in Canadian waters, namely in waters adjacent to Sylvester Point, on the north shore of Prince Edward Island, while having on board alcohol, liquors and cigarettes not included or described in the manifest of the vessel and, upon signals to stop given by the revenue cutter *Laurier*—the evidence shows that all the signals required by section 151 were given—failed to come to a

(1) (1896) 5 Ex.C.R. 378.

(2) (1906) 37 S.C.R. 385.

stop immediately but proceeded toward the high seas, where, after pursuit and shots from the cutter's gun, she hove to and was seized.

In the circumstances the only conclusion to which I can arrive is that the claimant's claim must be dismissed, the decision of the Minister maintained and the vessel *Geneva Ethel* and her equipment, cargo and stores declared forfeited in favour of the respondent.

The respondent will be entitled to his costs against the claimant.

Judgment accordingly.

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