JESSE LEWIS (UNITED STATES) *v.* GREAT BRITAIN

(David J. Adams *case. December 9, 1921. Pages 526-536.)*

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The United States Government claims from His Britannic Majesty's Government the sum of $8,037.96 with interest thereon from May 7, 1886, for loss resulting from the seizure of the schooner *David J. Adams* by the Canadian authorities in Digby Basin, Nova Scotia, on May 7, 1886, and the subsequent condemnation of the vessel by the Vice-Admiralty Court at Halifax on October 20, 1889.

I. *As to the facts:*

The *David J. Adams*, a fishing schooner (United States memorial, p. 316), of 66 register tonnage, owned by Jesse Lewis, an American citizen of Gloucester, Massachusetts, United States of America; Alden Kinney, likewise an American

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citizen, being the master, sailed from Gloucester on or about April 10, 1886, for cod and halibut fishing on the Western Banks, lying to the south-east of Nova Scotia, in the North Atlantic Ocean, with special instructions to the master not to enter into Canadian ports (United States memorial, pp. 182, 185, 248). After remaining on the Banks for about 12 days, the vessel proceeded to Eastport, Maine, United States of America, to obtain bait and other supplies, but being unable to procure at Eastport her needed supply of bait, she proceeded to Nova Scotia's shore, namely, to Annapolis Basin (United States memorial, pp. 249, 309). On the morning of May 6, 1886, contrary to the owner's instructions, she entered Annapolis Basin, and when entering the Gut, she heard from another boat that there was bait at Bear River (United States memorial, p. 309). Then she anchored above the mouth of Bear River (United States memorial, pp. 269, 273, 288, 309). While the schooner was lying at anchor, the master with some men of the crew went on shore, and addressing a Canadian fisherman, Samuel D. Ellis, he said that he wanted to know whether he had any bait, and on the affirmative answer of Ellis, he asked him whether he would sell it to him.

On the refusal of Ellis, because it was against the law and he could not sell to Americans, Kinney replied "that the schooner had been an American, but the English had bought her". Having been told by Ellis that the price was $1.00 a barrel, he offered $1.25, and so he bought four barrels of herring which had been caught the same morning (United States memorial, p. 275). The same Kinney addressed, likewise, a certain Robert Spurr: he asked him who owned the bait, and the said Robert Spurr, showing about four and a half barrels of bait in a boat anchored in a weir, said it belonged to his father, William Spurr, and to his partner, George Vroom. The master of the *David J. Adams* bought those four and a half barrels and engaged the next morning's catch at the rate of $1.00 per barrel. On May 7th, as she was preparing to leave Digby Basin, the schooner was boarded by the chief officer of the Canadian cruiser *Lansdowne*, who asked the master what he was in for and if he had any bait on board; the master answered that he was in to see his people (United States memorial, pp. 253, 289), and that he had no bait on board; then the said officer told Kinney that he had no business to be there; he asked him if he knew the law, and being answered affirmatively (United States memorial, pp. 254, 258), he ordered the said master to proceed beyond the limits and returned to his cruiser. Being ordered by the commander of the cruiser to board the schooner again and to examine her thoroughly, the same officer went alongside the schooner and told the master it was reported that he had bought bait. On the formal denial of Kinney the officer proceeded to make a search, and having found bait, apparently perfectly fresh, was told by the master it was ten days old. Leaving the schooner again, the officer went to report to his commanding officer, and, having so reported, was ordered to return to the schooner with Captain Charles T. Dakin, of the *Lansdowne*, who after putting the same questions and having received the same denials from the captain, returned to the *Lansdowne*, once more leaving the schooner free. But on their report the commanding officer of the Canadian Cruiser ordered the schooner to anchor close to the *Lansdowne*. The following day, i.e. on May 8th, the schooner was declared to be seized (United States memorial, pp. 253, 254, 259).

On the same day the vessel was removed to St. Johns, New Brunswick, and three days later she was taken back again to Digby.

On May 7th a process in an Admiralty suit against the schooner was served on the vessel for: (1) violation of the convention between Great Britain and the United States signed at London on October 20th, 1818; (2) for violation of the Act of the British Parliament, being chapter 38 of the Acts passed in

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the 59th year of the reign of his late Majesty, George III, and being entitled "An Act to enable His Majesty to make regulations with respect to the taking and curing of fish in certain parts of the coasts of Newfoundland and Labrador, and in his said Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America;" and (3) for violation of chapter 72 of the Acts of the Parliament of the Dominion of Canada made and passed in the year 1883, and entitled "The Customs Act, 1883", and the Acts of the said Parliament of the Dominion of Canada in amendment thereof (United States memorial, p. 202).

In the meantime, the Secretary of State of the United States having been informed by the shipowner of these occurrences, the American Consul General at Halifax, acting on the instructions of the Secretary of State, proceeded to Digby to inquire into the facts. He seems to have encountered some difficulties in ascertaining what were the grounds on which the Canadian authorities were basing the seizure (United States memorial, pp. 39, 42, 43, 47) and it appears from the documents (United States memorial, pp. 78, 79, 89) that the charges against the schooner were alternatively said by the Canadian authorities to be a violation of the Fisheries Stipulations in force between the British Government and the United States Government, and of the Canadian Fisheries Acts, and a violation of the Canadian Customs Acts. On the other hand, the Consul General must have had some difficulty in ascertaining the true facts, since in the master's affidavit of May 13th, is the solemn and misleading declaration that he did not buy bait when anchored above Bear River (United States memorial, p. 44).

A diplomatic correspondence ensued with the United States Government protesting against what it contended to be a misinterpretation of the Treaty of 1818 by the Canadian Government and His Britannic Majesty's Government contending that, as the case of the *David J. Adams* was still *sub judice*, diplomatic action was to be suspended for the time being. After having been somewhat delayed, by reason of certain negotiations which took place in 1886-1888 between the two Governments concerning fisheries, the action for forfeiture of the *David J. Adams* and her cargo was decided on October 28, 1889, by the Vice-Admiralty Court at Halifax. The ship and her cargo were condemned as forfeited to Her Britannic Majesty for breach and violation of the convention and the various Acts relating thereto, and ordered to be sold at public auction, and expressly on the following motives (United States memorial, p. 326):

"That the said vessel [*David J. Adams*] . . . did on or about the 6th day of May, A. D. 1886, enter into Annapolis Basin, . . . and that the said vessel *David J. Adams* and those on board the said vessel did so enter for purposes other than the purpose of shelter or of repairing damages, of purchasing wood or of obtaining water, and that the said vessel *David J. Adams* and those on board of the said vessel did within three marine miles of the shores of the said Annapolis Basin on the said 6th day of May A.D. 1886, prepare to fish within the meaning of the convention between His late Majesty, George III, King of the United Kingdom . . . and the United States of America, made and signed at London on the 20th day of October, A.D. 1818, and within the meaning of . . . [British Act 59, George III, c. 38, and Canadian Acts, 31 Vict., chap. 61 (1868), 33 Vict., chap. 15 (1870), 34 Vict., chap. 23 (1871)], . . . and contrary to the provisions of the said convention and of the said several Acts, and that the said vessel *David J. Adams* and her cargo were thereupon seized within three marine miles of the shores of the Annapolis Basin . . .".

It is not contested that no appeal was taken against that decision.

Now this case is presented before this Tribunal under the following conditions:

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By reason of certain conditions of fact and for various other considerations, while by the Treaty of London of October 20th, 1818, the United States renounced the liberty of fishing in Canadian waters, except on certain specified coasts, the access of American fishermen to the British territorial waters of Canada was conventionally regulated between the American and British Governments as follows:

"The United States hereby renounce forever, any liberty, heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever" (United States memorial, p. 375).

Great Britain and Canada, acting in the full exercise of their sovereignty and by such proper legislative authority as was established by their municipal public law, had enacted and were entitled to enact such legislative provisions as they considered necessary or expedient to secure observance of the said Treaty; and, so far as they are not inconsistent with the said Treaty, those provisions are binding as municipal public law of the country on any person within the limits of British jurisdiction. At the time of the seizure of the *David J. Adams* such legislation was embodied in the British Act of 1819 (59 George III, c. 38), and the Canadian Acts of 1868 (31 Vict. 61), 1871 (34 Vict., c. 23).

Great Britain and Canada, acting by such proper judicial authority as was established by their municipal law, were fully entitled to interpret and apply such legislation and to pronounce and impose such penalty as was provided by the same, but such judicial action had the same limits as the aforesaid legislative action, that is to say so far as it was not inconsistent with the said Treaty.

In this case the question is not and cannot be to ascertain whether or not British law has been justly applied by said judicial authorities, nor to consider, revise, reverse, or affirm a decision given in that respect by British courts. On the contrary, any such decision must be taken as the authorized expression of the position assumed by Great Britain in the subject matter, and, so far as such decision implies an interpretation of said treaty, it must be taken as the authorized expression of the British interpretation.

The fundamental principle of the juridical equality of States is opposed to placing one State under the jurisdiction of another State. It is opposed to the subjection of one State to an interpretation of a Treaty asserted by another State. There is no reason why one more than the other should impose such an unilateral interpretation of a contract which is essentially bilateral. The fact that this interpretation is given by the legislative or judicial or any other authority of one of the parties does not make that interpretation binding upon the other party. Far from contesting that principle, the British Government did not fail to recognize it (United States memorial, p. 119).

For that reason the mere fact that a British court, whatever be the respect and high authority it carries, interpreted the treaty in such a way as to declare the *David J. Adams* had contravened it, cannot be accepted by this Tribunal as a conclusive interpretation binding upon the United States Government. Such a decision is conclusive from the national British point of view; it is not from the national United States point of view. On the other hand, the way in which the Canadian Acts, enacted to enforce the Treaty, had been applied by the Canadian courts, and penalties have been imposed, is a municipal question, and this Tribunal has no jurisdiction to deal with them. The only exception would be the case of a denial of justice. But a denial of justice may

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not be invoked, unless the claimant has exhausted the legal remedies to obtain justice. As has been shown, the claimant in this case renounced his right to appeal against the decision concerning his vessel. Then the duty of this international Tribunal is to determine, from the international point of view, how the provisions of the treaty are to be interpreted and applied to the facts, and consequently whether the loss resulting from the forfeiture of the vessel gives rise to an indemnity (oral argument, p. 157).

According to the British view, the stipulation of the Treaty of 1818 according to which the American fishermen shall be admitted to enter the Canadian bays and harbors for shelter, repairing damages, purchasing wood, obtaining water, "and for no other purpose whatever", means that the American fishermen have no access to the said bays and harbors for purchasing bait.

On the other hand, the United States Government contends that the right of access as such is not prohibited to the American fishermen by the Treaty, except so far as it is inconsistent with the prohibition of taking, drying or curing fish within the three-mile limit, accepted by the United States in that Treaty. The four cases (shelter, repairs, wood and water) of admittance, are cases where admittance is secured by the Treaty and cannot be refused or prohibited by local legislation.

In other words, according to the American view the United States Government had renounced by the Treaty their former liberty to fish in Canadian territorial waters. That renunciation has a counterpart the obligation of the Canadian Government to admit American fishermen for shelter, repairs, wood, and water and for no other purpose. That is to say, that Canada has no obligation to admit the said fishermen for any other purpose than these four—that Canada may very well prohibit the entrance for any other purposes; but, so long as entrance for the purpose of purchasing bait is not prohibited by Canadian legislation, it must be considered as the legal exercise of the right of access belonging to any American ship.

In this Tribunal's opinion, a stipulation which says that fisherman "shall be admitted" for certain enumerated purposes and "for no other purpose whatever" seems to be perfectly clear and to mean that for the specified purposes the fishermen shall be admitted and for any other purposes they had no right to be admitted, and it is difficult to contend that by such plain words the right to entrance for purchasing bait is not denied.

No sufficient evidence of contrary intention of the High Contracting Parties is produced to contradict such a clear wording.

It has been said in support of the United States contention that "if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port 'for any purpose whatever, except to obtain wood or water, to repair damages, or to seek shelter' ". And also that "the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended" (United States memorial, pp. 56, 57).

Such an intention of the negotiators to contradict the literal meaning of the Treaty does not appear in the evidence presented in this case. It appears from the report dated October 20, 1818, from Gallatin and Rush, the two American Plenipotentiaries (British answer, pp. 27, 28), that they had in view to procure for the American fishermen fishing on the fishing grounds outside the three-mile limit off Nova Scotia coasts, the privilege (that is to say, the exceptional right) of entering the ports for shelter.

But, assuming the construction contended for by the United States Government, it must be considered that as early as 1819, that is to say, immediately after the Treaty, the British Act of 1819 (59 Geo. III, c. 36, section III) expressly

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enacted that the entrance into the Canadian bays and harbors should not be lawful. This act says:

"Be it enacted that it shall be lawful for any fishermen of the said United States to enter into such bays or harbours of His Britannic Majesty's Dominions in America as are last mentioned for the purpose of shelter, and repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purposes whatever."

If the entrance for the other purposes is not lawful, it is difficult to say that such entrance is not prohibited.

It is true that, according to the various documents produced, either by reason of arrangements between the American and British Governments or for political or economic reasons the enforcement of the prohibition resulting from that statute was practically rare, and it results from the documents that the entering of American fishermen into the Canadian ports for the purpose of purchasing bait was at certain periods of time commonly practiced.

But it has been shown that, at least in 1877, before the Halifax Commission, it was admitted by the United States that the American fishermen were enjoying access to the Canadian ports for purchasing bait "only by sufferance", and could at any time be deprived of it "by the enforcement of existing laws or the re-enactment of former oppressive statutes". And the United States Government stated at that time that it was not aware "that the former inhospitable statutes have ever been repealed. Their enforcement may be renewed at any moment" (British answer, p. 11).

During the period extending from 1877 to 1886, the fisheries articles of the Treaty of Washington (May 6, 1871; United States memorial, p. 392), superseded the Treaty of 1818 as regards the prohibition of fishing and the tolerance for purchasing bait was continued.

On January 31st, 1885, the United States Government denounced the Washington convention, which was declared to be terminated on July 1st, 1885 (British answer, p. 60), but in order not to disturb the fishing campaign of 1885 a *modus vivendi* was agreed upon by the two Governments to end on January 1, 1886, and the notes exchanged on that occasion show that the purchasing of bait was to continue during that time and that the Canadian authorities should abstain from impeding the local traffic incidental to fishing during the remainder of the season of 1885 (United States memorial, pp. 397, 400). At the same time the Canadian Government proposed to the United States Government that a mixed commission should settle by agreement the various fishing difficulties existing between the two countries and the *modus vivendi* was proposed from the Canadian side, based on a favorable Presidential recommendation for that proposal (United States memorial, p. 401; British answer, p. 62).

The Senate of the United States did not agree to that proposition.

At the termination of the transitory régime which purported to avoid an "abrupt transition" in the existing state of things (United States memorial, p. 399), in the early days of March, 1886, and before the beginning of the fishing campaign of 1886, the Canadian Government gave a public warning, dated March 5th, 1886 (United States memorial, p. 367), reproducing the text of the 1818 Treaty. The same warning also called attention to the provisions of the Canadian Act, 1868, respecting fishing by foreign vessels, but not to the special provisions of the Act of 1819 concerning the entrance by the fishermen into the Canadian harbors. The British Government requested the United States Government to give also a public warning; but it answered that the proclamation of the President already given on January 31st, 1885, constituted a "full and formal public notification", and it was not necessary to repeat it (British answer, pp. 62, 63).

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Such was the state of things when the owner of the *David J. Adams* was deprived of his vessel.

The United States Government contends that even assuming the existence of the prohibition of entering into Canadian harbors for purchasing bait, the seizure was, on the facts in this case, a violation of international law, because "as a matter of international law, where for a long continued period a Government has, either contrary to its laws or without having any laws in force covering the case, permitted to aliens a certain course of action, it cannot, under the principles of international law, suddenly change that course and make it affect those aliens already engaged in forbidden transactions as the result of that course and deprive aliens of their property so acquired, without rendering themselves liable to an international reclamation" (oral argument, p. 751; see also p. 47).

But it seems difficult to apply such a principle based upon the bona fides of foreigners to this case where *(a)* the master of the schooner was not an alien already engaged in the country in a transaction suddenly forbidden; *(b)* the said master entered the Canadian harbor in violation of his own shipowner's instructions (United States memorial, pp. 182, 185, 248); *(c)* the said master admitted that he knew the Canadian law (United States memorial, pp. 254, 258); *(d)* the said master, in order to induce his vendor to sell him the bait, falsely declared that his vessel had been bought by Englishmen and was no more an American one; *(e)* the said master falsely declared that he entered the harbor to see his relatives (United States memorial, pp. 253, 289); that he had no bait on board (United States memorial, pp. 254, 263); that he strongly denied that he had bought bait (United States memorial, pp. 254, 259); that the bait, which was afterwards revealed by the search, was ten days old (United States memorial, pp. 254, 263, 289, 290, 302), and even after the seizure, he tried to deceive the United States Consul General by asserting under oath that he did not purchase or attempt to purchase bait while at anchor above Bear River (United States memorial, pp. 46, 269, 273, 288, 309); *(f)* the said master took away the ship's papers (United States memorial, p. 45), which afterwards he refused to give to the Canadian authorities (United States memorial, p. 316); and where, as it is clearly shown, this master made desperate efforts to avoid the consequences of an act which he knew was illegal.

If, on the other hand, such an attitude of the master of the *David J. Adams* is compared with the public proclamations by the Canadian Government as well as by the United States Government (United States memorial, p. 367; British answer, pp. 62, 63), it does not appear that this was a case of a sudden and unexpected change of a Government's conduct towards a foreigner suddenly surprised by that change.

Furthermore, and without interfering with what the Canadian authorities, acting under their municipal rights of jurisdiction, held to be the proper application of their legislation and the penalties thereunder, and without admitting any foundation in this case for a contended denial of justice, for the reasons above stated, this Tribunal cannot refrain from observing that if the unlawfulness of the entrance in the Canadian ports was effectively provided for in the Act of 1819, in accordance with the Treaty of 1818, on the other hand the penalty of forfeiture for buying bait was enacted for the first time by the Act of 1886 (49 Vict., c. 114; United States memorial, p. 386), posterior to the seizure of the *David J. Adams*.

Further, if the consequences resulting to the owner of the *David J. Adams* from the confiscation so pronounced are considered, they appear as being particularly unfortunate and unmerited.

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It results from the documents (United States memorial, p. 181) that Jesse Lewis was a poor, aged man, who was possessed of no means of any moment or value other than the said schooner, that his wife was an invalid, and that after his vessel was seized he was compelled to go to sea to earn a living for himself and his wife (United States memorial, p. 183). And, further, he appears as having been perfectly innocent of his master's conduct, whom he had expressly prohibited from entering Canadian ports, as it has been shown.

It is true, the proceedings which resulted in the confiscation of the *David J. Adams* constituted an *actio in rem* against the vessel and not against the owner; but finally all the consequences of the affair were inflicted on the owner and his abandonment of his right of appeal which might have succeeded as to the penalty, seems to have been partly due to his absence of pecuniary means.

Under these circumstances, this Tribunal thinks it is its duty to draw the special attention of His Britannic Majesty's Government to the loss so incurred by Jesse Lewis and it ventures to express the desire that that Government will consider favorably the allowance as an act of grace to the said Jesse Lewis or to his representatives, on account of his unfortunate misfortune, of adequate compensation for the loss of his vessel and the damages resulting therefrom. That compensation, this Tribunal earnestly urges upon the attention of the British and Canadian Government.

For these reasons

The tribunal decides that, with the above recommendation, the claim presented by the United States Government in this case be disallowed.

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