

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

1893

Jan. 5.

HER MAJESTY THE QUEEN. PLAINTIFF ;

AGAINST

THE SHIP OSCAR AND HATTIE.

Illicit hunting of seals in Behring's Sea—54-55 Vic. (U.K.) c. 19, sec. 1, sub-sec. 5—Interpretation—Presence of fully-equipped sealer in forbidden waters—Lawful intention—Burden of proof.

By sub-section 5 of section 1 of the Imperial Act, 54-55 Vic. c. 19 (*The Seal Fishery [Behring's Sea] Act, 1891*) it is enacted that "if a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this Act."

Held, that the words "used or employed" are not to be confined to the particular use and employment of the ship on the occasion of her seizure but extend to the whole voyage which she is then prosecuting ; and if the ship is found in the condition described in the said sub-section she is liable to forfeiture unless the presumption therein raised can be rebutted by the owner or master.

ACTION *in rem* for the condemnation of a ship for a contravention of *The Seal Fishery (Behring's Sea) Act, 1891*.

The facts of the case are stated in the judgment.

December 29th, 1892.

The case was heard before Sir Matthew B. Begbie, C. J., Local Judge in Admiralty for the district of British Columbia.

Pooley, Q.C. for plaintiff ;

Eberts, Q.C. for the ship.

Sir MATTHEW B. BEGBIE, (C.J.) L.J. now (January 5th, 1893) delivered judgment.

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In this case the court is asked to condemn the *Oscar and Hattie* for a contravention of the *Seal Fishery (Behring's Sea) Act*, 1891, chapter 19, section 1, sub-sections 2 and 5. (1).

The schooner *Oscar and Hattie* left Victoria on a sealing voyage, on the 28th January last, and took a new departure from Yakima, in Oregon, on the 18th February. She was seized on Wednesday, the 31st August last (the schooner's, i. e. Victoria time,—disregarding the 180 degree long. limit) in Gotzleb harbour, on the north side of Atu Island, and so, within the prohibited waters; having on board a full equipment of arms and crew and two hundred and seventy-six seal skins, and admittedly in all respects within the express terms of sub-section 5. The sole defence is that the schooner was in that harbour, and in fact in Behring's Sea at all, solely for the purpose of procuring water, for want of which she was quite unable to prosecute her return voyage to Victoria. The defence admits that the schooner had on the 17th June, 1892, been duly warned not to enter Behring's Sea to fish there, and served with a copy of the Act. The Captain being examined on a commission declared that the schooner had entered the prohibited limits the day before the seizure, but only in search of water. That all the seal skins on board had been secured outside those limits, viz.: a little to the southward of

(1) Sub-section (2). While an Order-in-Council under this Act is in force—

(a) A person belonging to a British ship shall not kill, or take, or hunt, or attempt to kill or take, any seal within Behring's Sea during the period limited by the Order; and

(b) A British ship shall not, nor shall any of the equipment or crew thereof, be used or employed

in such killing, taking, hunting or attempt.

Sub-sec. (5) If a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this Act.

Copper Island, nearly two hundred miles from Atu, and about one hundred miles (roughly speaking) from the dividing line claimed by the United States, and which bounds the forbidden waters on the west as the chain of the Aleutian Islands bounds them on the south. That, finding seals scarce and the weather bad, and being besides short of water, he being then about forty or fifty miles off the south-east end of Copper Island, determined to abandon further hunting and return to Victoria; but in order to procure water, he bore away for Gotzleb harbour, in Atu Island, which he had known before of, and where he moored on Tuesday evening 30th August at 6.30 o'clock. The next morning he commenced watering his vessel and took fifteen hundred gallons on board that day, when at 5 p. m. he was seized by an officer from the United States ship *Mohican*.

In support of these allegations there were produced Captain Turtle's deposition, the log of the *Oscar and Hattie*, and the evidence of Joseph Brown, a hunter. The evidence of this last witness was almost perfectly immaterial. He probably knew nothing—he certainly said nothing—as to the localities visited by the schooner in the course of the summer. Probably none of the crew, except the master and the mate, could speak with any knowledge of the matter, but only what they had heard from these two; and the mate was not examined.

There seemed to be during the argument some misconception on both sides as to the nature of the charge and the facts which would exonerate the schooner. The prosecution seemed to treat the presence, within the forbidden limits, of a British ship fully equipped for sealing as a substantive offence. That is not so. A perfectly innocent man may be found standing over a

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newly slain corpse with a bloody knife in his hand. That would arouse vehement suspicion, but is not a crime in itself. Again, the defence seemed to suppose that if they showed that the schooner was not actually hunting when seized, but, on the contrary, had a very good and innocent reason for being there at that time, she was bound to be returned to the owners. That assumes, in favour of the ship, the narrower meaning of the words of the Act. For the question then immediately arises, do the words 'used or employed in contravention of the Act' refer to the use or employment on that particular occasion; or do they not rather mean employment generally on the voyage. I think they must have the latter and wider meaning. For otherwise, the master of any ship seized in Behring's Sea, especially if near the land (unless seized in active pursuit of seals), could easily contrive an excuse—none perhaps more easily contrived or established than a scarcity of water—to show that he had, at the time of capture, a lawful intention, or even that he was there through necessity. And in the case of a seizure of a ship actually engaged in hunting, it seems quite improbable that the legislature should enact that merely an inference, liable to rebuttal, is to be drawn from her being seized red-handed. I think the section means that a ship seized with arms, etc., was to be deemed to have offended against the Act, and forfeitable, unless the contrary were shown. The particular purpose on which the ship was actually engaged when seized may have been, and probably would be, occasioned by, or be necessary for, the prosecution of the general purposes of the voyage; of which indeed, it thus becomes a part; and though colourless and indifferent in itself, becomes illegal, just as much as lowering a boat, if performed as a part of the illegal use or employment of the ship. In a word, if

the schooner was short of water on August 31st., it would be necessary for her to take a fresh supply, whatever she had been doing or was about to do, whether engaged in sealing or on her return to Victoria; and the taking of such supply throws no light whatever upon her plans or purposes or employment. The question, therefore recurs: What is the evidence offered in rebuttal? At the end of the argument I reserved my decision, intimating at the same time that the conduct of the schooner had at the very least been so suspicious as fully to warrant the seizure on the part of the naval officers of both services. I wished also to examine the log and the courses it records for the whole voyage, about which really nothing had been said in argument. And the log produced certainly throws a strong light on the truth of the case. In Captain Turtle's evidence the only statement in exoneration is in ambiguous terms—'I never lowered a boat in Behring's Sea,' is his expression, which he again repeats, and a third time adopts when repeated to him by his counsel, excepting, of course, the boats in Gotzleb harbour on the 31st August. He uses no other expression of denial. I do not wish to attribute to him any desire to deceive the court or his owners, but many of his statements—nearly all of them—are so flatly contradicted by the statements in the log, by Commander Johnson, and even by his own evidence, that all his words are to be carefully weighed; and it is impossible to carry them further than the dry meaning they express. It is evident that he does not, in express terms, contradict the charge that he was in Behring's Sea attempting to hunt seals, and that the schooner was employed for that purpose. All he says is that he himself never lowered a boat there. To understand the accuracy of Captain Turtle's memory, and the credit his statements deserve, we must compare them

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with the log, with his own statements, and with the other evidence in the case. Now, his own statement, made on oath, is that he made up his mind to get water on Friday, the 26th August, when forty or fifty miles south of Copper Island, immediately before bearing away for Atu Island ; that he could not make the south side of Atu Island on account of the wind, and that his want of water was the only reason why he was found within Behring's Sea at all. Every one of these statements is contradicted by the entries in the log. On the 26th the log makes no mention of scarcity of water, but states that at noon that day they sighted Copper Island twenty miles off, ran for six hours north-west, which must have taken them pretty well up the coast of Copper Island ; and then, *i.e.*, 6 p.m., on August 26, commenced a south-easterly course, on the average, for about sixty hours. Then the log for the first time mentions a shortness not of water only but of fuel also, and that Captain Turtle resolved to find a supply of both (*i.e.*, water and drift wood) "here." This was at noon on the 29th, up to which time their course seems to have been well enough directed for Victoria. The distance run each day, as well as the rate per hour, is entirely omitted from the log ; but it seems reasonable that on the 29th August they should be well to the southward and eastward, not of Atu Island merely, but of Aguttou, an island fifteen or twenty miles south of Atu ; an appreciable distance on the return to Victoria. Then, according to the log, the master, making for water and fuel, turns his course completely round, *viz.*, westward, in consequence of which manœuvre about 10 p.m. Aguttou Island is stated in the log to be abeam ; and they double the west end of Atu Island the following morning, the 30th. So completely does the log contradict the master's statement that he could not make the south side of Atu Island for the wind,

whereas he had just come from the south side. Of course, it may be that there is no convenient watering place either on Aguttou or the south side of Atu; but that is not what the master says was his reason for making Gotzleb harbour. The master's evidence is also contradicted as to the state of the weather in Gotzleb harbour. The log alleges the wind to be strong northerly; cloudy and rainy; the master describes the way as an open roadstead facing due north, but that he was protected against the heavy swell—"rough, stormy, with a heavy sea,"—by a westerly bluff, which could hardly protect him from the north. The log says nothing of this. Commander Johnson's evidence contradicts it; and the state of the weather on this leeshore did not prevent the schooner taking on board fifteen hundred gallons of water in two or three hours when he once commenced operations. Captain Turtle's evidence (in itself not very probable) says that Commander Johnson, immediately after the capture, admitted that the schooner had only come into Behring's Sea for water. How could the Commander make such a statement? Of what value is it, if made? How could he know where the schooner had been, or what she had been about? And the whole alleged admission is completely contradicted by the Commander himself. Nor does Captain Turtle fail to contradict himself, apparently. He says: 'Gotzleb is the harbour I know;' and again: 'I did not want to go into Tschitschogoff harbour but Gotzleb.' But later on he has forgotten this preference, and says he went into Gotzleb as the only one he could make with safety. By his evidence also on the same page, Captain Turtle appears never to have been in Behring's Sea in his life, except on this unfortunate occasion. How did he know these two harbours so well as to distinguish between their characters? He says he had no

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chart except the general chart of Behring's Sea, on a scale, I suppose, of some forty miles to the inch; and his deposition leads one to suppose that he had no other sources of information; and he had never been on a sealing voyage before. How then did he know? This seems to have struck even himself a little, for when asked why he went into that particular harbour, he says on the same page, after giving a very bad account of the weather: 'It was the only harbour I could make out that I thought it safe to go into.' And this witness is very cautious about his statements, for he for a long time declines to commit himself to the statement that the Aleutian Islands are the southern boundary of Behring's Sea, though he was warned by the United States steamship *Adams*, and furnished with copies of the proclamation, Act of Parliament and order-in-council,—documents which very plainly describe the proscribed boundaries. Clearly none of these statements by Capt. Turtle can be relied on for rebutting the statutory inference which I am commanded to draw from the equipment of the schooner.

Then I was referred to the log, and certainly the entries there show, if they can be relied on, that the *Oscar and Hattie* did not, during the month of August, enter on the forbidden limits, except with an innocent purpose. But upon the log, as produced, there are many remarks to be made. In the first place I apprehend that in these proceedings the statements in the log, like the entries in a merchant's ledger or day-book, may be evidence against the owners but not for them. In the next place on examining the hand-writing, the whole appears to have been written by Peters, the mate, as it professes to be (certainly, I think, by a German); and the last entry states their arrival at Ounalaska on the 5th September. The original log-book ought surely to have been taken into the posses-



sion of the captors when the schooner herself was seized, and carefully retained by them. Then the entries would have been beyond suspicion, and would, perhaps, have contained much information which is now wanting.

I do not quite understand how the log-book has been treated since August 31st. At page 5, the master says it was seized by Ensign Harrison on August 31st.; but it must have been returned immediately, for Peters, the mate continues to make entries up to the arrival, on September 5, at Ounalaska. The master's statement is either untrue or disingenuous in not stating this clearly: if he and Peters had contemplated the construction of a fictitious log, they had most ample opportunity. And the production of a log-book of this character, under the circumstances, merely adds to the suspicious nature of the whole case for the defence. But the curious thing about this log-book is that, although it is called on the title page "Log of the schooner *Oscar and Hattie* on a voyage from Victoria to the North Pacific," a title which is repeated at the head of each page up to the 26th or 27th August, and although we are told that the schooner first left Victoria on the 28th January, and received her present master and sailed from Yakima on the 18th February, the log produced commences on the 30th July at some point off Copper Island. There are six months unaccounted for, and this is the only log-book referred to or mentioned in argument. Under the circumstances it seems very doubtful whether Captain Turtle's statement in his deposition or the mate's in the log as to the transactions in August is the less entitled to credit. But even if one of them be exactly true, I do not see how it proves more than this, that during one month out of the seven, from the 20th January to the 30th August, the schooner did not contravene the Act.

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Neither the log nor Captain Turtle speak of the other six months. There is therefore no rebutting evidence at all except Captain Turtle's wide declaration that except on the 30th August, he never 'lowered a boat' in Behring's Sea. This does not even amount to a point-blank denial that the ship was employed in hunting in contravention of the Act. And for the reasons above given, the case being otherwise full of suspicion—no log-book for June or July, no tender of Peters for examination, no explanation of the direct contradiction between the log and the master's statements in examination—I do not think this sufficient to rebut the statutory presumption, though if these proceedings had been against individuals, a jury might have hesitated *in favorem libertatis* to find them guilty of a misdemeanour. I, therefore, declare for the condemnation of the schooner, tackle and cargo under the Act. Any application respecting the fund in court or other fruits of the capture may be made to me in Chambers. I suppose the successful captors do not apply for the costs. If they do I must award them against the owners.

If I am wrong in my construction of the inference to be drawn under sub-section 5 of section 1 of the Act (1), there is now a cheap and ready appeal court at Ottawa; it is no longer necessary to have recourse to the costly and tardy appeal to the Privy Council.

*Judgment accordingly.*

Solicitor for plaintiff: *Chas. E. Pooley.*

Solicitor for the ship: *D. M. Eberts.*

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(1) The Seal Fishery (Behring's Sea) Act, 1891.