

# CASES

DETERMINED IN THE

## EXCHEQUER COURT OF CANADA.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

1895

AND

Nov. 15.

### THE SHIP "SHELBY."

*Maritime law—Behring Sea Award Act, 1894—Seal Fishery (North Pacific) Act, 1893—Infraction—Presence within prohibited waters—Bona fides.*

*Held, The Seal Fishery (North Pacific) Act, 1893, and the Behring Sea Award Act, 1894, being statutes in pari materia, are to be read as one Act. (McWilliams v. Adams, 1 Macq. H.L. Cas. 120 referred to).*

2. *Held, (following The Queen v. The Ship Minnie 4 Ex. C.R. 151) that under the provisions of the above Acts the presence of a ship within prohibited waters, fully manned and equipped for sealing, requires the clearest evidence of bona fides to relieve the master from a presumption of an intention on his part to violate the provisions of such Acts; and where the master offers no explanation at all, and such evidence as is produced on behalf of the ship is unsatisfactory, the court may order her condemnation and forfeiture, or may commute the forfeiture into a fine.*

**ACTION** *in rem* against a ship for an alleged infraction of the laws and regulations respecting the taking of seals in the waters of Behring Sea.

By the statement of claim the plaintiff alleged as follows:—

" 1. The ship *Shelby* is a British vessel registered at Victoria, in the Province of British Columbia;

" 2. The ship *Shelby*, Christian Claussen, master, was seized by an officer of the United States ship *Corwin*, on the 11th day of May, 1895, in latitude 52°

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52' 10" north, and longitude 134° 10' 58" west, being a point within the prohibited waters of the Pacific Ocean as defined by the *Behring Sea Award Act*, 1894;

" 3. The said ship *Shelby* set sail from the port of Victoria on the 13th day of February, 1895, for the North Pacific Ocean, in order to hunt seals;

" 4. The said ship *Shelby* at the time of the seizure, as set forth in the second paragraph hereof, was fully manned and equipped for the purpose of killing, capturing or pursuing seals, and had on board thereof shooting implements and one hundred and twenty-four fur seal skins, and the said ship was used and employed in killing, capturing or pursuing seals within the prohibited waters of the Pacific Ocean aforesaid between the 1st day of May, 1895, and the day of her seizure as aforesaid, both inclusive;

" 5. That after the said seizure, as aforesaid, the said ship with her crew, equipment and seal skins was sent to Sitka, Alaska, and there handed over to Lieutenant F. A. Garforth, commanding Her Majesty's ship *Pheasant*;

" 6. The said Lieutenant F. A. Garforth endorsed the certificate of registry and sealed her guns, and directed the master of the said schooner, Christian Claussen, to proceed direct to Victoria and report himself, with his said vessel, to the Customs authorities there;

" 7. The said one hundred and twenty-four fur seal skins found on the said ship, as mentioned in paragraph 4 hereof, were on the 1st day of June, 1895, in order to save the said skins at the request of the owner thereof, and by consent sold for the sum of \$899. which said sum is deposited in the Bank of British Columbia to abide the event of this action, and to be dealt with as this honourable court shall direct;

" Arthur Yerbury Moggridge, lieutenant in H.M.S. *Royal Arthur* claims the condemnation of the ship *Shelby*

and her equipment and everything on board of her, or the proceeds thereof, on the ground that the said ship was at the time of the seizure thereof in the waters of the Pacific Ocean in latitude 52° 52' 10" north, and longitude 134° 10' 58" west, being a point within the prohibited waters of the Pacific Ocean as defined by the *Behring Sea Award Act* 1894, fully manned and equipped for killing, capturing or pursuing seals and had on board shooting implements and seal skins, and that the said ship was used and employed in killing, capturing or pursuing seals within the prohibited waters of the Pacific Ocean aforesaid between the first day of May and the day of her seizure aforesaid both inclusive."

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By the statement of defence it was alleged as follows:—

"1. The defendant admits paragraphs 1, 2, 3, 5, 6 and 7 of the plaintiff's statement of claim.

"2. The defendant admits only so much, and no more, of paragraph 4 as alleges that the said ship *Shelby* at the time of the seizure was fully manned and equipped for the purpose of killing, capturing or pursuing seals and had on board thereof shooting implements and one hundred and twenty-four fur seal skins, but the defendant says that the whole of the said fur seal skins were killed or captured previous to, and not later than, the 30th day of April, 1895.

"3. The defendant in answer to the whole of the plaintiff's statement of claim says that the said ship was not used or employed after the 30th day of April, 1895, in killing, capturing or pursuing seals within the prohibited waters of the Pacific Ocean.

"4. The defendant says that the said ship after having finished sealing on the said 30th day of April, 1895, set sail for the port of Victoria, and was lawfully pursuing her voyage and was legally within the said pro-

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hibited waters when the said ship was seized as alleged.

“5. The defendant says that the said ship was not on the 1st or 11th days of May, 1895, or on either of said days, or on any day between said days used or employed in killing, capturing or pursuing seals within the said prohibited waters.

“6. Save as herein appears the defendant denies each and every of the allegations in the statement of claim.

“7. The defendant humbly submits that in the circumstances herein appearing this action should be dismissed.”

Issue joined.

This cause came on for trial, at Victoria, before the Honourable Theodore Davie, C. J., Local Judge in Admiralty for the Admiralty District of British Columbia, on the 4th November, 1895.

*C. E. Pooley*, Q.C., for the Crown ;

*H. D. Helmcken*, Q.C., for the ship.

DAVIE, C. J. L. J., now (Nov. 15th, 1895,) delivered judgment:—

The British vessel *Shelby*, Christian Claussen master, was seized by an officer of the U. S. S. *Corwin* on the 11th May, 1895, in latitude 52° 52' 10" north and longitude 134° 10' 58" west, being a point within the prohibited waters of the Pacific Ocean as defined in the *Behring Sea Award Act*, 1894, for an alleged contravention of the Act, such contravention being the employment of the vessel in pursuing seals within the proscribed waters during the period prohibited by law.

By force of the scheduled provisions of the *Behring Sea Award Act*, 1894, which under section 1 are to have the same effect as if enacted by the Act, the pursuit of seals within the aforesaid limit is

prohibited, and by subsection 2 of section 1, if there is any contravention of the Act, any person committing, procuring, aiding or abetting such contravention is guilty of a misdemeanor, and the ship employed in such contravention and her equipment, and everything on board thereof, are liable to forfeiture to Her Majesty: provided that the court, without prejudice to any other power, may release the ship, equipment or thing on payment of a fine not exceeding £500.

At the time of her seizure the *Shelby* was fully manned and equipped for killing, capturing and pursuing seals, and had on board implements and seal skins.

By section 1, subsection 6, of the *Seal Fishery (North Pacific) Act*, 1893, which Act was in force at the time of the seizure, if, during prohibited times and in prohibited waters, a British ship is found having on board thereof fishing and shooting implements or seal skins, it shall lie on the owner or master of such vessel to prove that the ship was not used or employed in contravention of the Act. The Acts of 1893 and 1894 being *in pari materiâ* are to be read as one Act (*McWilliam v. Adams*) (1).

The *Shelby*, therefore, having been found within prohibited waters with seals and implements for taking them on board is to be deemed to have been employed in contravention of the Act unless the contrary be shown.

Has it then be shown that the ship was not used or employed in contravention of the Act? The most important witness to prove this, if such were the case, would clearly have been Captain Claussen, the master; but he was not called, nor has the failure to call him been satisfactorily accounted for. The only reason offered for his absence is that he was away on a fishing expedition. His evidence might have been taken

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(1) 1 Macq. H. L. Cas., 120.

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*de bene esse*, but no effort to procure his evidence seems to have been made. The mate, August Reppon, was called as a witness, and stated that the *Shelby* stopped sealing on the 30th April, when the ship's log shows the vessel to have been in latitude  $58^{\circ} 30'$  north and longitude  $139^{\circ} 30'$  west, and that she then set sail for Victoria. On the 11th of May, after 10 or 11 days' sailing, she was found by the *Corwin* in latitude  $52^{\circ} 52' 10''$  north, and longitude  $134^{\circ} 10' 58''$  west, a distance approximately of four hundred miles from the point of starting, or less than an average of 40 miles a day. The proper course for the ship to have steered for Victoria was E.S.E. magnetic, but it appears that frequently when the course of the wind as indicated by the log would have permitted that course to be made good the vessel was not headed in that direction. For instance, on the 2nd of May she was headed on a southerly course; on May 3rd on a south by west course, and on the 5th of May on an east by north course, whereas the wind on each of these days was favourable to an east-south-east course. Captain Moggridge states, from an examination of the log, that the schooner ought to have made a considerably greater distance on her course during these days; and in view of the fact, as stated in evidence, that the *Shelby* had a favourable current of nearly a knot an hour, it is clear that she ought to have made a much greater distance. The *Corwin* in coming from the south to the point where she picked up the *Shelby*, experienced strong head winds, which were favourable winds for the *Shelby*, and the prevailing winds at that time of the year, as shown by the "Coast Pilot," are westerly, also favourable to the E. S. E. course to be made by the *Shelby*.

The *Corwin* seized the *Shelby* for contravention of the Act, placed a crew on board her and ordered her to Sitka, a distance of 260 miles, which she reached under

sail in a little over two days. At Sitka the *Shelby* was ordered to Victoria, a distance of about 800 miles, as shown by the chart, which place she made, likewise under sail, in fourteen days.

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The mate, when asked to explain why he went out of his course, particularly on the 2nd, 3rd and 5th of May, ascribes the fact to defects in the compass, which he says varies three or four points, but this statement is shown by his own evidence to be an equivocation, and the variation to have had no effect whatever on the course actually made or intended to be made, for whilst it is true that the compass varies; and varies considerably, such variation is regular, known precisely, and duly allowed for. Having committed himself on his examination at the hearing to the variation of the compass reason, which he was compelled to admit on cross-examination was no reason at all, he was by permission of the court recalled a day or two after the evidence had been closed, and he then ascribed the deviations from the course to the state of the wind.

I find myself entirely unable to place any dependence on the evidence of the mate, Reppon, and this leaves the deviations from the regular course between the 1st to the 11th of May, and the fact that 400 miles only was made in ten days, altogether unaccounted for. It is true that Denny Florida, a hunter, August Schone, the cook, and Victor Emanuel Laerquest, one of the seamen, all testify, and I have no doubt with truth, that no seals were taken during these days, nor were the boats lowered; but it appears also that none were seen during these days. Their evidence leaves the question of deviations from the course untouched; and, in the absence of evidence explaining it, the only reasonable conclusion is that the deviations were occasioned by the attempt to pursue seals. At all events

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it has not been proved to my satisfaction that the vessel was not employed in the pursuit of seals during these dates. In *The Queen v. The ship Minnie* (1), it was held by Crease, J. that the presence of the ship within prohibited waters required the clearest evidence of *bona fides* to exonerate the master of any intention to infringe the provisions of the Act, and that, as his explanation of the circumstances in that case was unsatisfactory, the ship must be condemned. This ruling is, I think, in thorough accord with subsection 6 of section 1, and I am bound to follow it. It applies exactly to this case. Here the captain has offered no explanation at all, and the explanation of the circumstances, suspicious in themselves, given by the mate, is unsatisfactory. The vessel, therefore, must be condemned.

I am inclined to think that this is a case (as no actual taking of seals is shown, but negatived upon the evidence) where a fine might meet the justice of the case, instead of forfeiture. I have power, under subsection 2 of section 1 of the Act of 1894 to substitute a fine for forfeiture. I will hear counsel upon this point. The costs of suit must follow the condemnation.\*

*Judgment accordingly.*

Solicitor for the plaintiff: *C. E. Pooley.*

Solicitors for the ship: *Drake Helmcken & Jackson.*

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(1) 4 Ex. C.R. 151.

\*By a subsequent order a fine of £100 sterling was substituted for the forfeiture.