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Dec. 7.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF ;

AND

THE SHIP " *VIVA* ".....DEFENDANT.*Maritime law—Behring Sea Award Act, 1894—Infraction by foreigner.*

The punitive provisions of the *Behring Sea Award Act, 1894*, operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner.

THIS was an action *in rem* for the condemnation of a ship for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

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

1. The British ship *Viva*, Mark Pike, master, was seized by an officer of the United States Steamer *Rush* on the 24th day of August, 1896, in latitude 57 deg. 30 min. N., longitude 171 deg. 2 min. 30 sec. W. from Greenwich, at a point within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article One of the first schedule to the *Behring Sea Award Act, 1894*.

2. The ship *Viva* at the time of the seizure aforesaid was fully equipped for fur seal hunting and was employed in killing, capturing and purchasing the animals commonly called fur seals within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule to the *Behring Sea Award Act, 1894*, and the master, hunters and crew of the said ship did capture and kill a number of the animals commonly called fur seals within the said prohibited zone.

3. The said ship *Viva* is a British ship registered at the port of Victoria, in the province of British Columbia.

4. The said ship *Viva* with the said Mark Pike as master set sail from the port of Victoria, British Columbia, on a sealing voyage on the 11th day of January, 1896.

5. At the time of the seizure aforesaid the said ship *Viva* had 70 fur seal skins on board, of which 16 had been captured on the day prior to the said seizure.

6. The said ship *Viva* after the seizure as mentioned in paragraph 1 hereof was ordered to proceed to Unalaska whence she was directed by Ernest Fleet, the commander of Her Majesty's ship *Icarus*, to proceed to Victoria and report to the Collector of Customs. The said vessel arrived at the port of Victoria on the 15th day of September, 1896.

Algernon J. Hotham a Lieutenant in H.M.S. *Impérieuse* claims the condemnation of the said ship *Viva* and her equipment and every thing on board of her and the proceeds thereof, on the ground that the said ship was at the time of the seizure thereof within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule to the *Behring Sea Award Act, 1894*, fully manned and equipped for killing, capturing and pursuing the animals commonly known as fur seals, and that the said ship was employed in killing, capturing and pursuing within the prohibited zone aforesaid the animals commonly called fur seals, and did within such prohibited zone capture and kill a number of the animals commonly called fur seals.

1. The defendants admit paragraphs 3, 4, 5, and 6 of the statement of claim herein.

2. The defendants deny the 1st and 2nd paragraphs of the statement of claim herein.

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3. The defendants deny that they or their said ship *Viva* were or was at any time in the year 1896 within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article One of the first schedule to the *Behring Sea Award Act*, 1894.

4. If it should be proved that the said ship was at the time of her seizure mentioned in the first paragraph of the said statement of claim within the prohibited zone, then the defendants say that neither the said ship nor any of her equipment, nor the crew thereof nor any person on board of her, was engaged or employed in capturing, pursuing or killing and that no person on board of the said ship captured, pursued or killed, any animals commonly called fur seals or any other animals within the said prohibited zone.

And by way of counter-claim, the Victoria Sealing and Trading Company Limited, the owners of the said ship, say :—

While lawfully prosecuting their business in the high seas, their ship was unjustly seized and detained and that the grounds for such seizure and detention were not reasonable, and that the defendants suffered damages and they claim the benefit of the provisions of section 104 of 17 & 18 Vic. c. 104, and pray that the court may award payment to them of costs and damages, and make such other order in the premises as it thinks just.

Issue joined.

The case came on for trial at Victoria, B. C., on 2nd December, 1896, before the Honourable M. W. Tyrwhitt Drake, Deputy Local Judge for the Admiralty District of British Columbia.

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

*P. Æ. Irving* and *L. P. Duff*, for the ship.

DRAKE, D. L. J., now (December 7th, 1896) delivered judgment.

The *Viva*, a schooner registered at the Port of Victoria, was seized on 24th August, 1896, in latitude 57 deg. 30 min. N., longitude 171 deg. 23 min. 30 sec. W. from Greenwich, at a point within the prohibited zone 35 miles from N. W. end of St. Paul's Island.

The vessel was boarded by the U.S. S. *Rush* about 6 a.m., at which hour all the boats were aboard and hunters at their breakfast.

The master asked if he might put his boats out, which was refused; the object of making this request is not apparent unless it was to accentuate the ignorance of the master of being within the prohibited zone.

The official log of the *Viva* shows the capture of 16 seals on the previous day, and the master details the course he had taken between the hour he got his boats on board and the time of his seizure and says his position was latitude 57 deg. 44 min., longitude 173 01 sec. W., and, on the previous day, latitude 57 deg. 47 min., longitude 172 deg. 50 sec. He kept no ship's log but laid down on the chart his position in pencil day by day; taking those positions as correctly showing his daily change of position, he on the 24th was only 6 miles further west than he was on the 23rd.

The real position where he was seized varies from the alleged position on his chart by many miles.

The master states that he got an observation on the 16th and none since, except an imperfect one on the 22nd which shows his position so greatly different from what he calculated it was that he did not rely on it,—what it was is not entered anywhere. There are no entries to show whether his dead reckoning was reasonably calculated, neither course of vessel, direction or force of wind being entered.

His chronometer was slow. The master by some manœuvres difficult to follow satisfied his own mind

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that on the 25th day of July his chronometer was two minutes slow and was losing two seconds a day; and he allowed for this error when he obtained a sight for longitude on the 14th August. When the vessel arrived at Unalaska, on the 26th day of August, his chronometer was found 12 minutes and 11 seconds slow; and it was shown by Lieutenant Daniels that if he had obtained an observation for longitude with the chronometer as it was, he must have been more than 100 miles to the east of his position as laid down on his chart.

How this sudden change in his chronometer arose is not explained further than stating that it took a jump occasionally.

The evidence as to sealing in the zone is proved by the captain. He, on the 23rd, was only $6\frac{1}{2}$ miles from his position, on the 24th when he was seized, which was 35 miles only from the N. W. end of St. Paul's Island, he captured 16 seals on that day. They therefore were captured in the prohibited waters, as he was at least 19 miles inside the limit.

The defence set up is that by Article One of the first schedule, the Act only applies to British subjects and there was no proof that the master of the *Viva* was a British subject; and by section 1, sub-section 2, it is declared to be a misdemeanour, if any person commits, procures, aids or abets, any contravention of the Act; therefore it was necessary before a vessel could be condemned that it must be shown that a British subject was employing the ship.

If the master was proceeded against for a misdemeanour it would be necessary to prove that he was subject to the penal clauses of the Act, but the contravention being once established the vessel employed being a British ship becomes liable to forfeiture. If every man employed on the vessel was a foreigner

it would not relieve the liability of the ship once a breach was proved.

The defendant further claims exemption on the ground of want of proof of any intention on the master's part to contravene the Act. A man's intention is judged by his acts, and when once a vessel is found within the prohibited zone taking or having taken seals, then the master has to satisfy the court that he took all reasonable precautions to avoid any breach of the regulations.

Did the *Viva* do so? According to the master he had no observations from the 16th August, he kept no ship's log showing the weather, wind and courses. His supposed position is marked only from day to day in pencil on his chart, and he sailed on the 16th, 22nd and 23rd of August without knowing where he really was. This can hardly be considered as taking all reasonable precautions. He apparently never attempted to establish his position by lunar observations or other modes known to navigators. It cannot, therefore, be said that he took reasonable precautions.

It has been argued that the masters of the vessels engaged in sealing cannot be expected to be scientific navigators and to be able to ascertain their position with accuracy. This is no doubt true, but when owners entrust valuable property to men without the necessary qualifications, the responsibility is theirs, and if they chose to run this risk they cannot relieve themselves by pleading want of knowledge in their servants.

I, therefore, adjudge the *Viva* and her equipment to be forfeited, and allow her the same relief as in the case of the *Ainoko* (*post p.* 371) on payment of £400 and costs within 30 days.

Judgment accordingly.

Solicitors for the Crown : *Davie, Pooley & Luxton.*

Solicitors for the ship : *Bodwell & Irving.*

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