BRITISH COLUMBIA ADMIRALTY DISTRICT.

1908
April 28.

HIS MAJESTY THE KING.....PLAINTIFF;

AGAINST

THE SHIP "*CARLOTTA G. COX.*"

Behring Sea Award Act, 1894—Illegal sealing—Vessel arrested within prohibited zone with fresh skins on board — Log—Evidence —Irregularities connected with the seizure—Effect on proceedings—Practice.

The Behring Sea Award Act, 1894, forbids subjects of Great Britain from pursuing, killing or capturing seals during the close season, (beginning on the 1st May and extending to 31st July) on the high seas north of the 35th degree of N. latitude and E. of the 180th degree of longitude. On the 29th May, 1907, a British sealing schooner was boarded, searched and arrested by the United States Revenue Cutter *Rush* in the North Pacific Ocean off Yakutat Bay, in latitude 59° 10' N. and longitude 141° 19' W. There were found on board 77 fur-seal skins, 6 of them being green with fresh blood on them. The schooner's log was not written up at the time of search, but the master said he had a note-book with pencil entries containing the particulars of seals killed from which he was able to make entries in the log as required by Article 5 of the first schedule of said Act. The master afterwards did enter in the log that the last killing of seals had taken place on the 27th of April. While not engaged in sealing at the time of being boarded, the schooner was admittedly within the prohibited zone, and was fully manned and equipped for sealing; and fur-seals had been seen by the *Rush* in the vicinity for several days before. The master did not give evidence at the trial nor was any excuse given for his failure to do so. Expert evidence was given on behalf of the Crown that the seals from which the said six skins were taken had been killed within four days before the 29th of May, and possibly some of them not longer than 24 hours.

Held, that, upon the facts, the schooner was employed in the unlawful killing of seals as charged.

2. Where the offending vessel is properly before the court and in the custody of its marshal, any antecedent irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of the court, will not vitiate the proceedings.

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THIS was an action *in rem* against a sealing schooner for condemnation for an alleged contravention of the Behring Sea Award Act, 1894.

The case came on for trial at Victoria, B.C., on the 4th day of February, 1908, before the Honourable Mr. Justice Martin, Local Judge of the Admiralty District of British Columbia.

A. P. Luxton, K.C., for plaintiff;

F. Peters, K.C., for the ship.

Mr. *Peters* raised the point, amongst others, that the seizure of the schooner was unlawful in that the Commander of the U. S. Revenue Cutter *Rush* was not shown to have been "duly commissioned and instructed by the President" to seize a British vessel in accordance with Imperial Order in Council of 30th April, 1894, sec. 1, and that the name of the cutter was not communicated to His Majesty in accordance with said Order in Council.

Mr. *Peters* raised the further point that sec. 103 of the *Merchant Shipping Act*, 1854, had not been complied with.

The facts are fully set out in the judgment.

On 7th March, 1908, the Local Judge delivered judgment ordering the forfeiture of the ship, but in case of payment of a fine of $400 and costs within 30 days she was to be released, and the following reasons for judgment were handed down by the Local Judge:—

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On the 29th day of May, 1907, shortly after 7 a.m., the sealing schooner *Carlotta G. Cox*, John Christian, master, a British vessel registered at Victoria, was boarded, searched and detained by the U. S. Revenue Cutter *Rush* in the North Pacific Ocean off Yakutat Bay, in latitude 59° 10′ N. and longitude 141° 19′ W. being suspected of contravening *The Behring Sea Award*

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Act, 1894, which, *inter alia*, forbids subjects of Great Britain and the United States of America from pursuing, killing or capturing fur seals during the close season (beginning on the 1st of May and extending to the 31st of July) on the high seas north of the 35th degree of N. latitude and eastward of the 180th degree of longitude. Later, and on the 4th of June, the schooner was formally seized at Sitka, where she had been towed by the *Rush*, and she was thence towed to Fort Simpson, B.C., where she was handed over to Captain Hackett, master of the Canadian Government steamer *Quadra*, then employed by the Department of Marine and Fisheries in the light-house service, who arranged with Captain Christian that he should take the schooner to Victoria and deliver her to the collector of customs there, which was done.

At the time of the first searching on May 29th there were 77 fur seal skins in the schooner's salt-room, of which the six top ones were very green, with blood on them so fresh that it soiled the fingers; the seventh and following skins were quite distinct in appearance, not fresh nor moist, but cured. On the 4th of June when these six skins were again examined they had changed in appearance so that they could not be distinguished from the others; when the said six were first seen they had a thin layer of salt on them. The schooner's log was not written up but the master said he had a note-book with pencil entries which he produced and said contained the particulars of seals killed, from which he claimed to be able to make the entries in the log required by article five of the first schedule of said Act, and later he did, before reaching Sitka on the 4th of June, make certain entries showing his total catch to be 133, out of which 56 skins had been landed at Hesquiat, V.I., on April 22nd, for shipment to Victoria.

The schooner was fully manned and equipped for sealing, and was admittedly within the prohibited area when

seized; but the contention of her captain is that all the seals had been taken before the close season and outside of the prohibited area. At the time she was first discovered, about 6 a.m., by the *Rush*, she was lying-to, not sealing; the weather was clear, and Mount St. Elias could be distinctly seen, 68 miles away. That locality is well known to sealers as the Fairweather Sealing Grounds; and fur seals had been seen by the *Rush*, in the vicinity for several days before, and at the time of search a Japanese sealer was engaged in sealing within five or six miles of the *Carlotta G. Cox*, with several boats out, and other Japanese vessels had previously been sighted sealing in the vicinity and using firearms, the use of which is forbidden British and United States subjects by article 6 of the said first schedule. As one of the officers of the *Rush* described it: "Japanese vessels were shooting all round there," and though the *Rush* boarded one of them on the same morning, shortly after she had searched and detained the *Carlotta G. Cox*, nothing could be done to stop it because Japan is not a party to the treaty between Great Britain and the United States of America, upon which the said *Behring Sea Award Act*, 1894, is founded.

With respect to the said six green skins I am satisfied, largely upon the convincing evidence of the pilot of the *Rush*, James W. Keen, who has had a long experience in salting, overseeing and examining seal skins in the waters in question, and in connection with seizures, that the seals from which they were taken had been killed within four days before the 29th of May at the outside, and possibly some not longer than 24 hours. But even taking the killi to have been within four days what explanation is offered by the master? Nothing that is satisfactory to this court, and in the circumstances the entry in his log which states that the last killing of seals took place over a month before, viz., on the 27th of

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April when 25 were captured, is entitled to no credit. The master was not brought forward as a witness to explain this suspicious circumstance, and I have no hesitation on all the facts in rejecting the suggestion that he happened to be in the locality in question hunting for sea otters, or on his way to Kadiak Island, or the Shumagin Islands for that purpose. It was laid down by this court in *The Minnie* (1), and in *The Shelby* (2), and followed by a long line of cases ending with *The Otto* (3), that the statutory onus upon the master to explain his conduct in circumstances similar to these is a strong one, but, like the master in the *Shelby Case*, he did not come forward (though this was done, *e. g.*, in *The Ainoko* (4), to discharge that onus, nor was any reason given for his failure to do so, therefore, I am satisfied on all the facts that his schooner was employed in the unlawful killing of seals as charged.

There is a further charge in par. 9 of the statement of claim, that proper entries were not made in the official log giving the particulars of killing as aforesaid and the condemnation of the vessel is also asked on that ground, but it has been already decided by this court in *The Beatrice* (5) that such neglect is not one that attaches any penalty or forfeiture to the ship, though the master is personally liable to suffer the statutory consequences; therefore it is unnecessary to consider that point in relation to the schooner. With respect to the decision in the *Beatrice Case*, it may be that, as Mr. Luxton contends, full consideration was not given to sec. 4 of the said Act, nevertheless, Mr. Peters is justified in claiming it as an express decision on the point in his favour, by which I am bound.

(1) 4 Ex. C. R. 151; 23 S. C. R. 478.
(2) 5 Ex. C. R. 1.
(3) 6 Ex. C. R. 188.
(4) 5 Ex. C. R. 366.
(5) 5 Ex. C. R. 378.

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But the objection is raised that the seizure here was unlawful in that the commander of the *Rush* is not shown to have been "duly commissioned and instructed by the President" to seize a British vessel, as is required to be done by sec. 1 of the Imperial Order in Council of 30th of April, 1894, and also that the name of the United States vessel making the seizure was not beforehand "communicated by the President of the United States to "Her Majesty as being a vessel so appointed" for that purpose, as is also required by said order in council. And it is further objected that the commander of the *Rush* neither brought the schooner "for adjudication "efore any such British Court of Admiralty," nor "delivered her to any such British officer as is mentioned "in the said section (103 of *The Merchant Shipping Act*, "1854) for the purpose of being dealt with pursuant to "the recited Act" (*i. e. hrin g Sea Award Act*, 1894). Said sec. 103 is as follows:—

"Sec. 103. And in order that the above provisions as to forfeitures may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly, or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any court having admiralty jurisdiction in Her Majesty's Dominions, and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right."

In my opinion, (after careful consideration of these important questions now for the first time raised in these sealing cases), even assuming that the commander of the

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Rush was not "duly commissioned and instructed" to seize the schooner, and even though the commander of the *Quadra*, to whom she was first delivered, is not an officer who can take proceedings against her under said sec. 103, yet seeing the fact is that she has been brought for adjudication, and is now before this court (and in the custody of its marshal) by and at the instance of an officer, Commander Allgood, R N., who admittedly is within said sec. 103, and who claims her condemnation for contravention of *The Behring Sea Award Act*, it is not open to her owners to answer that charge (whatever other remedies they may have) by setting up irregularities in the manner in which she was originally seized, or in the means whereby she was ultimately brought within the jurisdiction of this court, and, later, before it by Commander Allgood, who instructed the writ to be issued on the 29th of November, as appears by the indorsement thereof. According to the principle decided in *The Annandale* (1), the forfeiture here accrued at the time the illegal act was done, and I am unable to agree that any of said antecedent irregularities can affect the admittedly regular proceedings of this court.

The result is, therefore, that I find there has been a contravention of *The Behring Sea Award Act*, 1894, in the manner aforesaid, by the schooner *Carlotta G. Cox*, and I therefore declare her and her equipment and everything on board of her to be forfeited to His Majesty, but, following the precedent established in *The Ainoko* (2), and *The Beatrice* (3), in case of payment of a fine of four hundred pounds and costs within thirty days, she, her equipment, and everything on board of her may be released.

Though I have come to this conclusion, yet I think it proper to observe that I have not overlooked the strong

(1) [1877] 2 P. D. 179.
(2) 4 Ex. C. R. 195.
(3) 5 Ex. C. R. 9.

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appeal of the defendant's counsel that this court should now cast a lenient eye upon these infractions of *The Behring Sea Award Act*, 1894, since, it is contended, the facts proved in the course of the hearing show that it has failed in its object and not only places the citizens of Canada at a disadvantage in their sealing enterprises in adjacent waters, but creates special opportunities to foreign sealing vessels from, *e. g.*, the other side of the Pacific. But however strong a case such facts may ground in diplomatic circles for a change in the Treaty and Act, they can have no weight in a court of justice. The sole duty of a judge is to administer the law as it is given to him by that Legislature which has the power to enact it, and therefore I have imposed a penalty just as though there had been no change in the condition of affairs since 1894 when the statute was passed.

Judgment accordingly.

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

Solicitors for the Ship: *Peters & Wilson.*