

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1895

HER MAJESTY THE QUEEN.....PLAINTIF;

Nov. 18.

AND

*THE SHIP "BEATRICE"*.....DEFENDANT.

*Maritime law—The Behring Sea Award Act, 1894—The Merchant Shipping Act, 1854—Violation of prohibition—Enactments in pari materia—Construction.*

By section 1, subsection 2, of the *Behring Sea Award Act, 1894*, any ship employed in a contravention of any of the provisions of the Act shall be forfeited to Her Majesty as if an offence had been committed under section 103 of *The Merchant Shipping Act, 1854*. Subsection 3 enacts that the provisions of *The Merchant Shipping Act, 1854*, respecting official logs (including the penal clauses) shall apply to any vessel engaged in fur seal fishing. The penal clauses of section 284 of the last mentioned Act merely subject the master to a penalty, in the nature of a fine, for not keeping an official log book, and do not attach any penalty or forfeiture in respect of the ship.

*Held*, (following *Churchill v. Crease*, 5 Bing. 180) that inasmuch as the particular provisions of *The Merchant Shipping Act, 1854*, inflicting a fine only upon the master was in seeming conflict with the general provisions of subsection 2 of the *Behring Sea Award Act, 1894*, imposing forfeiture for contravention of the latter Act, such provision of the last mentioned enactment must be read as expressly excepting a contravention by omission to keep a log.

Section 281 of *The Merchant Shipping Act, 1854*, enacts that every entry in an official log shall be made, "as soon as possible," after the occurrence to which it relates.

2. *Held*, (following *Attwood v. Emery*, 1 C.B. N.S., 110) that the words "as soon as possible" should be construed to mean "within a reasonable time;" and what is a reasonable time must depend upon the facts governing the particular case in which the question arises.

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

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

1. The ship *Beatrice* is a British vessel registered at the port of Vancouver, in the Province of British Columbia.

2. The said ship *Beatrice*, L. Olsen, master, set sail from the port of Vancouver on the 4th day of July, 1895, for the North Pacific Ocean for the purpose of hunting and sealing there.

3. The said ship *Beatrice* was seized by C. L. Hooper, a captain in the revenue cutter service of the United States, commanding the United States revenue steamer *Rush*, on the 20th day of August, 1895, in the Pacific Ocean in latitude 54° 54' 03" north and longitude 168° 31' 21" west.

4. From the 2nd day of August, 1895, down to and at the time of the seizure aforesaid, the said ship *Beatrice* was engaged in fur seal fishing, and the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day were not entered by the master of the said ship *Beatrice*, in the official log-book of the said ship *Beatrice*, as required by the *Behring Sea Award Act*, 1894; the last entry in the said official log-book having been made on the 14th day of August, 1895.

5. At the time of the seizure aforesaid there were on board the said ship *Beatrice* one hundred and forty-seven seal skins captured during the said voyage, and only sixty-four seal skins were and have been entered in the said official log-book.

6. On the 21st day of August, 1895, the said ship *Beatrice* with her fur seal skins and her equipment, and everything on board of her, were handed over to Frank A. Garforth, lieutenant commanding Her Majesty's ship *Pheasant*, at Ounalaska, by the said Captain C. L. Hooper.

7. The said Lieutenant Commander F. A. Garforth endorsed the certificate of registry of the said ship *Beatrice*, and directed the said master, L. Olsen, to proceed direct to Victoria with his said ship *Beatrice*, and report to the Customs there.

8. On the arrival of the ship *Beatrice* at Victoria aforesaid there were on board the said ship *Beatrice* two hundred and two fur seal skins, which were captured during the said voyage, and the said skins were at the request of the owner and by consent sold for \$1,818; which said sum was on the 24th day of September, 1895, deposited in the savings bank department of 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, commander in H.M.S. *Royal Arthur*, claims the condemnation of the said ship *Beatrice*, and her equipment and everything on board of her, and the proceeds thereof, on the ground that the said ship at the time of the seizure was in the waters of the Pacific Ocean in latitude 54° 54' 03" north and longitude 168° 31' 21" west, engaged in fur seal fishing; and prior thereto, from the 2nd day of August, 1895, to the date of the said seizure, had been engaged in fur seal fishing in the waters of the Pacific Ocean, and the master did not enter accurately in her official log-book the date and place of each fur sealing operation, and also the number and sex of the seals captured upon each day, as required by the *Behring Sea Award Act*, 1894.

The following is the statement of defence:—

1. Charles Doering, of the city of Vancouver, in the province of British Columbia, is the sole owner of the schooner *Beatrice*.

2. Paragraph 2 of the statement of claim, as to the sailing of the schooner *Beatrice*, and the purpose thereof, is admitted.

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3. The schooner *Beatrice* was seized as alleged, but in latitude  $55^{\circ} 1' N.$  and longitude  $168^{\circ} 55' W.$

4. *The Merchant Shipping Act*, 1854, is relied on, and more particularly sections 280 to 287, inclusive.

5. That the master of the schooner *Beatrice* did enter accurately the date and place of each fur sealing operation; and also the number and sex of the seal captured upon each day in his log-book and account book of the seal catch.

6. The official log-book was duly entered up in pursuance of the *Behring Sea Award Act*, 1894, until the 14th day of August, 1895.

7. The master has entered up his log-book and account book of the seal catch up to the 18th day of August, 1895, and the schooner *Beatrice* was boarded and seized early on the morning on the 20th day of August, 1895, and in accordance with the master's custom in that behalf—the master's log-book would, on the 20th day of August, 1895, be entered up showing the fur sealing operation of the 19th day of August, 1895—and also the account book written up showing the number and sex of the seals captured upon the 19th day of August, 1895, but the master was prevented from so doing by such seizure.

8. The master of the schooner *Beatrice* in pursuance of *The Merchant Shipping Act*, 1854, would have, but for being prevented as aforesaid, made entry in the official log-book of all proper occurrences and as required by the *Behring Sea Award Act*, 1894, showing the date of the required occurrences, and the date and place of each fur sealing operation, and also the number and sex of the seals captured upon each day from the original data so kept in his log-book and account book of the seal catch, and the master was entitled to make such entry within twenty-four hours after the arrival of the schooner in port.

9. At the time of the seizure there were on board the schooner *Beatrice* 147 seal skins captured during the said voyage.

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10. Paragraphs six and seven of the statement of claim are admitted.

11. On the day of the seizure of the schooner *Beatrice* and after such seizure, 52 fur seals were taken in addition to the 147 fur seals aboard the schooner at the time of seizure, the boats being out engaged in their sealing operations at the time of seizure, and were brought aboard after the schooner's official log-book was taken from the master, and after the master's log-book was initialled by the revenue officer.

12. The seal skins, 202 in number, were by mutual consent sold for \$1,818, which sum was on the 24th day of September, 1895, deposited in the Savings Bank Department of the Bank of British Columbia to abide the event of this action and to be dealt with as this honourable court shall direct.

13. The defendant says that if the master erred in not entering up the official log-book as alleged, that it is only a matter for the imposition of penalties as provided for in section 284 of *The Merchant Shipping Act*, 1854, and not a matter for forfeiture of the schooner.

And by way of counter claim the defendant Charles Doering, the owner of the schooner *Beatrice*, says:— That he has suffered great damage by reason of the seizure.

And he claims as follows :

1. Judgment against Her Majesty or Arthur Yerbury Moggridge, commander of H. M. S. *Royal Arthur* for the damage occasioned to the defendant by the seizure and detention of the schooner *Beatrice*, in that there were no reasonable grounds for such seizure and detention, and for the costs of this action.

2. To have an account taken of such damage.

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3. Such further and other relief as the nature of the case may require.

Issue joined.

This cause came on for trial at Victoria, before the Honourable Theodore Davie, C.J., Local Judge for the Admiralty District of British Columbia, on the 13th November, 1895.

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

*E. V. Bodwell*, Esq. (with him *G. H. Barnard*) for the defendant.

DAVIE, C.J.; L.J. now (November 18, 1895) delivered judgment.

The charge against the *Beatrice* is that, whilst engaged in seal fishing, the master did not enter in her official log-book the date and place of each fur sealing operation, and also the number and sex of the seals captured each day, as required by the *Behring Sea Award Act*, 1894. No other offence is charged against the ship, and for the offence above mentioned the present action is brought for the forfeiture of the vessel, her equipment, and everything on board.

It appears that the *Beatrice* was seal fishing from the 2nd to the 20th of August, on which latter date she was seized by the U.S.S. *Rush*. It seems that the entries had been duly made in the official log-book up to and including the 14th August, but none since, although fur seals had been captured on each subsequent day.

Article 5 of the scheduled provisions of the *Behring Sea Award Act*, 1894, enacts that the masters of vessels engaged in fur sealing shall enter accurately in their official log-book the date and place of each fur sealing operation, and also the number and sex of the seals captured upon each day. Subsection 3 of section 1

enacts that the provisions of *The Merchant Shipping Act*, 1854, with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing, and section 281 of *The Merchant Shipping Act*, 1854, provides that every entry in an official log shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence and of the entry respecting it, and that in no case shall any entry therein in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge be made more than 24 hours after her arrival.

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Under section 1, subsection 2, of the *Behring Sea Award Act*, 1894, "if there is any contravention of the Act (and the scheduled provisions are made part of the Act) the ship employed in such contravention, and her equipment and everything on board thereof shall be liable to be forfeited to Her Majesty as if an offence had been committed under section 103 of *The Merchant Shipping Act*, 1894.

Assuming then a contravention of the Act owing to the neglect of the master to keep up his log, can the ship be said to be "employed" in such contravention, as it is only when "employed" in the contravention that she is subject to forfeiture?

If the contravention had been the taking of seals at a prohibited time or place or in a proscribed way, the vessel might fittingly be said to be "employed" in the contravention; but the keeping of the log is another matter, that is the master's duty. I cannot see how the vessel can be said to be "employed" in keeping the official log, or in omitting to keep it.

But, beyond this, following the general provisions of subsection 2, which, among other things impose the

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forfeiture of a vessel employed in contravention of the Act, is subsection 3, which says that the provisions of *The Merchant Shipping Act, 1854*, with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing. The penal provisions of *The Merchant Shipping Act*, section 284, subject only the master to a particular penalty for not keeping the official log-book, such penalty being a fine of £5 or £30, according to the offence. No penalty or forfeiture whatever attaches to the ship. The particular provision of *The Merchant Shipping Act, 1854*, inflicting a fine only upon the master, seems to be incompatible with the general provisions of subsection 2 of the Act of 1894, imposing a forfeiture, and such being the case, and following the well recognized rule of construction laid down in *Churchill v. Crease* (1), *Pilkington v. Cooke* (2), and *Taylor v. Oldham* (3), subsection 2, imposing forfeiture of the vessel, must be read as expressly excepting a contravention by omission to keep a log. Hence, the vessel is not liable to be proceeded against, although the master might be punished by a fine.

But I am by no means persuaded that the captain was punishable for or guilty of any culpable omission in respect of the official log. As before pointed out, by section 281 of *The Merchant Shipping Act, 1854*, every entry in an official log is to be made as soon as possible after the occurrence to which it relates.

“As soon as possible” means “within a reasonable time,” *Attwood v. Emery* (4), *Cammell v. Beaver Ins. Co.* (5), *Hobson v. Western Assurance Co.* (6); and what is a reasonable time must depend upon the facts governing the case in which the question arises.

(1) 5 Bing. 180.

(2) 16 M. & W. 615.

(3) 4 Ch. D. 395.

(4) 1 C. B., N. S., 110.

(5) 39 U. C. Q. B. 8.

(6) 19 U. C. Q. B. 326.

Here it was proved in evidence that the captain kept a book of account with his hunters, who were paid according to the seals taken, and this book was kept in the cabin, constantly open and in use; and contained a daily entry of the particulars of the catch. Besides this the captain kept his ship's log, in which were entered daily particulars of the voyage other than the capture of seals, whilst the official log-book was kept locked up. The crew, besides the hunters, consisted only of the captain, mate and cook. The hunters would leave the ship in their boats at 5 a.m., and generally remain out until evening, and the crew of three left on board would have their time well occupied, particularly in rough or foggy weather, in navigating the vessel and keeping the boats in sight or hearing.

At night when the boats came in, the captain would take, on deck, particulars of the capture, and then go below and enter them in the account-book. When time and convenience afforded relaxation from other duties, the captain would make entries in his official log, which had, in this case, been duly posted up to and including the 14th of August.

The ship's log shows that between the 15th and 20th August there was considerable fog and bad weather. I am unable to say, under these circumstances, that the captain permitted an unreasonable time to elapse in making entries in the official log.

On these grounds I am of opinion that the action for condemnation wholly fails, and as, in my judgment, the charge upon which the vessel was arrested was of something for which arrest could not legally be made, no question of reasonable ground for the arrest arises, and, the ship having been arrested when in the pursuit of a legal and profitable employment, is entitled to recover damages therefor.

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I therefore dismiss the action for condemnation with costs; and I direct a reference as to the damages to which the ship is entitled for her illegal arrest and detention.

*Judgment accordingly.*

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

Solicitor for ship: *E. E. Wooton.*

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