

1898

Nov. 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AGAINST

THE SHIP "OTTO." .....DEFENDANT.

*Admiralty law—Behring Sea Award Act, 1894—Illegal sealing—Unintentional offence—Nominal fine.*

Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but for some unforeseen cause against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, the court may properly exercise its discretion and impose a nominal fine only.

THIS was an action *in rem* against a ship for condemnation 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 *Otto*, Josiah F. Gosse, Master, was seized by Captain Frank Finnis of Her Majesty's ship *Amphion*, on the 10th day of September, 1898, in latitude 57° 8' N., longitude 171° 49' W., from Greenwich, at a point within the prohibited zone of 60 miles around the Pribiloff Islands, as defined in article one of the first schedule to *The Behring Sea Award Act, 1894*.

2. The said ship *Otto* at the time of the seizure aforesaid was fully equipped for fur seal hunting and was employed in killing, capturing and pursuing the animals commonly called fur seals within the prohibited zone of 60 miles around the Pribiloff Islands, as defined in 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 *Otto* is a British ship registered at the port of Victoria, in the Province of British Columbia.

4. The said ship *Otto*, with the said Josiah F. Gosse as master, set sail from the port of Victoria, British Columbia, on a sealing voyage on the twentieth day of June, 1898.

5. At the time of the seizure aforesaid the said ship *Otto* had 770 fur seal skins on board, and when she arrived at the port of Victoria after her said seizure she had 790 fur seal skins on board.

6. The said Captain Frank Finnis after the seizure of the said ship *Otto*, as aforesaid, endorsed the ship's certificate and directed the said ship to proceed to Victoria, British Columbia. The said ship arrived at the port of Victoria on the 1st day of October, 1898.

Captain Frank Finnis, of Her Majesty's ship *Amphion*, claims the condemnation of the said ship *Otto*, and her equipment and everything 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 Pribiloff 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.

The statement of defence was as follows;—

1. The defendants admit the allegation contained in paragraph one of the statement of claim.

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2. The defendants admit the allegations contained in paragraph two of the statement of claim; but say that the master, hunters and crew of the said ship *Otto*, at the time mentioned in paragraph two of the statement of claim, were engaged in the sealing operation referred to in said paragraph in the *bonâ fide* belief that the ship *Otto* was not within the prohibited zone of sixty miles around the Pribiloff Islands.

3. The defendants admit the allegations contained in paragraphs 3, 4, 5 and 6 of the statement of claim.

4. In answer to the plaintiff's claim, the defendants say that on the 8th day of September, 1898, the master of the said ship took observations for the purpose of ascertaining his position, which showed the said vessel to be in  $56^{\circ} 59'$  north latitude, and  $172^{\circ} 30'$  west longitude, being outside of the prohibited zone.

5. On the following day, namely, the 9th day of September, 1898, the master of the ship *Otto* was unable to take observations to ascertain his exact position on account of the cloudy state of the weather; but calculated, "by account" or dead reckoning, that his position was  $57^{\circ} 20'$  north latitude, and  $172^{\circ} 24'$  west longitude, being outside of the prohibited zone.

6. On the night of the 9th of September, 1898, the said ship *Otto*, being then approximately in the position mentioned in paragraph five hereof, set all sail and stood off in a south by westerly direction, which was calculated to increase the said ship's distance from the said prohibited zone; but, by reason of a heavy swell from the west, and of a current setting in to the eastward, unknown to the master of said ship, the said ship was placed in the position mentioned in the statement of claim.

7. The current mentioned in paragraph six hereof was, according to the chart in the possession of the master of said vessel, setting in a westerly direction;

but, on the arrival of H. M. S. *Amphion*, it was ascertained that the current was actually setting to the eastward, which would tend to drive said ship *Otto* within said prohibited zone.

8. The defendants further say that prior to the said *Otto* setting sail from the port of Victoria, express instructions were given by the owners to the captain of said ship *Otto* to keep outside of the said prohibited zone, and under no circumstances whatever to disobey said instructions

Issue joined.

The case came on for trial at Victoria, B.C., on the 28th day November, 1898, before the Honourable A. J. McColl, Chief Justice, Local Judge for the Admiralty District of British Columbia.

*C. E. Pooley*, Q.C. for the plaintiff.

*E. V. Bodwell* for the ship.

Mr. Pooley cited *The Queen v. Minnie* (1); *The Queen v. Ainoko* (2); *The Queen v. Beatrice* (3); *The Queen v. Viva* (4); *The Queen v. Shelby* (5).

*McColl, C. J.*; *L. J.* now (November 28th, 1898) delivered judgment.

The mere fact, which is admitted, that the ship was engaged in sealing in prohibited waters constitutes an offence under the Act. (The ship *Minnie*) (1).

Mr. Pooley stated that he could only ask for a fine, Captain Finnis, the seizing officer, having attributed carelessness only to the master.

Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but for some unfore-

(1) 23 Can. S. C. R. 484.

(2) 5 Ex. C. R. 366.

(3) 5 Ex. C. R. 369.

(4) 5 Ex. C. R. 360.

(5) 5 Ex. C. R. 1.

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seen cause, against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, I think that the discretion permitted the court would be well exercised by the imposition of a nominal fine only.

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But in this case the master for eight days immediately preceding the day of seizure was knowingly sealing in the close vicinity of the prohibited zone; and while I am desirous of making every allowance for him because of his having been misled as to the current by the chart upon which he relied, and in the difficulties owing to bad weather, and to his men not being well under control, I cannot acquit him of great carelessness in not taking a sight on that day before allowing his men to leave the ship.

Having regard to the limit of £500, I think the justice of the case will be met by the infliction of a fine of £200, upon payment of which within one month, the ship, equipment and cargo will be released.

*Judgment accordingly.*

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