

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1895

Nov. 12.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AGAINST

THE SHIP *E. B. MARVIN*.

*Maritime law—The Behring Sea Award Act, 1894, art. 6, sched. 1—Con-
travention—Seizure upon mistake of facts—Costr.*

Article 6 of schedule 1 of *The Behring Sea Act, 1894* (57 Vict. (U.K.) c. 2), prohibits the use of nets, firearms and explosives in the fur seal fishing in certain waters mentioned in the Act, during the season therein prescribed.

A vessel left the port of Victoria, B.C., on the 11th January, 1895, to prosecute a fur sealing voyage in the North Pacific, her equipment including a supply of firearms and explosives. *The Behring Sea Award Act, 1894*, came into force on the 23rd April, 1894. On the 18th June of that year the master of such vessel received notice of the Act, with instructions to proceed to Copper Island for the purpose of getting his firearms sealed up. On the 27th July the vessel reported to the American Custom-house officer there, who informed the master that he had no authority to seal up the arms and ammunition, but after making a manifest of the things on board, gave the master a clearance permitting his vessel to proceed to Behring's Sea for the purpose of hunting for seals. The manifest showed that the vessel had on board a certain number and certain kinds of loaded and empty cartridge shells.

On the 2nd September the vessel was boarded by officers of the U.S.S. *Rush*, and afterwards arrested by them and taken to Ounalaska, and there handed over to H.M.S. *Pheasant*, as being guilty of an infraction of article 6 of *The Behring Sea Award Act, 1894*. The grounds upon which the arrest was based were: (1) The fact that among the 336 sealskins on board, one had a hole in it which might have been caused by a bullet or buckshot; and (2) That there was a less number, as well as another kind, of shells found on board the vessel when arrested than appeared in the manifest. At the trial it was not established beyond a doubt that the hole in the skin in question was produced by a gun shot, or, if so, by one fired by those on board the defendant vessel. On the other hand, it could be reasonably inferred from the evidence that the number

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and the kinds of shells on board the vessel were incorrectly stated in the manifest.

Although the evidence disclosed doubts as to a breach of the provisions of the Act, which the court resolved in favour of the vessel, yet it was held that the circumstances created sufficient suspicion to warrant the arrest, and no costs were given against the Crown in dismissing the petition.

THIS was an action *in rem* for the condemnation of a vessel for an alleged infraction of *The Behring Sea Award Act*, 1894.

By the statement of claim filed on behalf of Her Majesty, it was alleged as follows :

1. The ship *E. B. Marvin* is a British vessel registered at the Port of Victoria, in the Province of British Columbia.

2. The said ship *E. B. Marvin*, W. D. Byers, master, set sail from the Port of Victoria on the 11th day of January, 1895, for the purpose of fur seal fishing in the North Pacific.

3. The said ship *E. B. Marvin*, W. D. Byers, master, 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 2nd day of September, 1895, in the Behring Sea, in latitude 56° 25' north and longitude 172° 59' west.

4. The said ship *E. B. Marvin*, at the time of her departure from the said Port of Victoria and at the time of the seizure aforesaid, was fully manned and equipped for the purpose of killing, capturing or pursuing seals, and at the times aforesaid had on board thereof firearms and ammunition, loaded cartridges, powder shot and ball, and had also on board at the time of her said seizure 386 fur seal skins captured during the said voyage including the skin of one fur seal which had been killed in the Behring Sea by the use of firearms by some person in such ship.

5. The said schooner *E. B. Marvin* was continuously engaged in the fur seal fishing within the waters of

the Behring Sea from the 9th day of August, 1895, to the 2nd day of September, 1895, the date of the seizure aforesaid, and during all this time had on board guns, rifles, shooting implements and loaded cartridges and empty cartridge cases for use in the said guns, and rifles and also powder, ball and shot, and the necessary apparatus for filling cartridges, and during the times between the said 9th day of August, 1895, and the said 2nd day of September, 1895, did employ and use the said guns and firearms and explosives in the fishing for and for the purpose of killing the said fur seals or some, or one of them within the waters of the Behring Sea aforesaid.

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6. The said schooner *E. B. Marvin* with her crew, equipment and seal skins were sent to Ounalaska by the said Captain Hooper, and there handed over to Frank A. Garforth, Lieutenant, commanding H. M. S. *Pheasant*, on the 9th day of September, 1895.

7. The Lieutenant-Commander, Frank A. Garforth, endorsed the certificate of registry of the said ship *E. B. Marvin* and ordered the master to proceed direct to Victoria aforesaid, with his said ship and report to the Customs there.

8. Prior to the entry of the said ship *E. B. Marvin* into Behring Sea, G. C. Carmine, 2nd Lieutenant United States revenue cutter service and acting Customs officer at the Port of Attu, endorsed the manifest of stores and ballast of the said schooner *E. B. Marvin* on the 29th day of July, 1895, which manifest showed there were, 1,152 loaded brass shells, 903 empty brass shells, and 138 empty paper shells, 20 shot guns and 3 rifles, 1 bomb gun, 8 sets re-loading tools, 9 cappers, 2 sets rifle re-loading tools, 85 sacks buckshot, 3,130 lbs.; 1 box buckshot containing 300 lbs. (approximately); 16 cans powder, 311 lbs.; 29,000 gun wads, 16,000 primers; gun and cannon.

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Arthur Yerbury Moggridge, Commander of H. M. S. *Royal Arthur* claims the condemnation of the said ship *E. B. Marvin* and her equipment and all on board of her, and the proceeds thereof, on the ground that the said ship at the time of the seizure thereof was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the 9th day of August, 1895, to the 2nd day of September, 1895, continually, and during the whole of the said time had on board the said ship *E. B. Marvin* firearms and explosives for the purpose of killing the said fur seals contrary to the provisions of *The Behring Sea Award Act, 1894*.

The statement of defence was, in substance, as follows :

1. The defendants admit paragraphs 1, 2, 3, 6, 7 and 8 of the plaintiff's statement of claim.

2. The defendants do not admit so much of paragraph 4 as alleges that at the time of seizure the said ship *E. B. Marvin* had on board the skin of one fur seal which had been killed in the Behring Sea by the use of firearms by some person in such ship.

3. The defendants do not admit so much of paragraph 5 as alleges that the said ship *E. B. Marvin* during the times between the said 9th day of August, 1895, and the said 2nd day of September, 1895, did employ and use the said guns and firearms and explosives in the fishing for, and for the purpose of killing, the said fur seals or some, or one of them, within the waters of the Behring Sea aforesaid.

4. The defendants say that at the time when the said ship *E. B. Marvin* left the Port of Victoria she had on board, in addition to the guns and other implements referred to in paragraph 4, 29 spears and at the time of the seizure there were in addition to the articles mentioned in paragraph 8, 43 spears, including 14

spears which had been purchased by the said Captain W. D. Byers during the month of June at the Port of Hakodate, Japan, and 22 poles on board.

5. In answer to the whole of the plaintiff's claim the defendants say that the said fur seal was killed in the manner as is by the provisions of *The Behring Sea Award Act*, 1894, allowed and not otherwise.

Issue joined.

The case was tried before the Honourable Theodore Davie, C.J., Local Judge for the Admiralty District of British Columbia, on the 11th and 12th days of November, 1895.

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

H. D. Helmcken for the ship.

At the conclusion of the trial, judgment was delivered.

DAVIE, C.J. L.J.:—

This was an action for the condemnation of the British vessel *E. B. Marvin*; her equipment and everything on board of her, and the proceeds thereof, instituted by Arthur Yerbery Moggridge, Commander in H.M.S. *Royal Arthur*, on behalf of Her Majesty, on the ground that at the time of the seizure presently mentioned the said vessel was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the 9th August, 1895, to the 2nd September, 1895, continuously, and did during the said time use firearms and explosives for the purpose of killing fur seals, contrary to *The Behring Sea Award Act*, 1894.

The facts of the case, as proved before me, show that the said vessel, William Douglas Byers, master, left the port of Victoria on the 11th January, 1895, for the North Pacific on a fur sealing voyage, fully manned and equipped with the necessary outfit for seal fishing,

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1895 including a supply of firearms and explosives. *The*
 THE BEHRING SEA AWARD ACT, 1894, which, by article 6 of
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 E. B. force on the 23rd April, 1894, after the *Marvin* had left
 MARVIN. — Victoria and whilst she was prosecuting her voyage.
 Reasons On the 18th of June, 1895, Captain Byers received
 for notice of the Act, with instructions to proceed to Cop-
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 sealed up, and on the 27th July reported with his
 vessel to Captain Carmine, the American Custom-house
 officer at Copper Island, who informed him that he
 had no authority to seal up his arms and ammunition,
 but after making a manifest of the things on board
 gave Captain Byers a clearance permitting his vessel to
 proceed to the Behring Sea for the purpose of hunting
 for seals. The manifest with which Captain Byers
 went to sea from Copper Island included 1,152 loaded
 brass shells, 903 empty brass shells, and 138 empty
 paper shells. Having proceeded on her voyage, the
 vessel was overhauled and searched, but allowed to go
 free on the 21st August by the U.S.S. *Grant*, and by
 the U.S.S. *Perry* on the 26th August, and on the 2nd
 September, after the hunters had left the vessel for the
 day's sealing, the U.S.S. *Rush* hove in sight and
 boarded her. The cargo then on board of 336 seal skins
 was diligently examined by the officers of the *Rush*,
 and, with the exception of one skin, showed no appear-
 ance of anything but spearing. In one skin, however,
 a hole was discovered which might have been caused
 by a bullet or buckshot, and the officers of the *Rush*
 believed that it was so caused, and a count of the
 ammunition on board showed a considerable difference
 from the manifest; the actual count made by the officers
 of the *Rush* showing 1,081 brass shell cartridges loaded,
 734 brass shells empty, 44 paper shells loaded and 170
 paper shells empty. Under these circumstances the
Marvin was placed under seizure.

The hunters came home in the afternoon of the same day with a further catch of some forty seals, all taken apparently in a perfectly legitimate manner, as the hunters had neither firearms nor ammunition in their boat.

The *Marvin* was taken to Ounalaska and there handed over to Lieut. Garforth, of H.M.S. *Pheasant*, who again counted the ammunition. His count differed somewhat from that of the *Rush*, and besides those cartridges and shells formerly counted by the officers of the U.S. vessel, two cardboard boxes of empty brass shells were produced by Capt. Byers from the *Marvin's* lockers, making together, with those already counted, a total of loaded and unloaded brass and paper cartridges and shells amounting to 2,194, or within one of the number appearing on the manifest, but differing in kinds—Lieut. Garforth's count showing 1,104 brass shells loaded, as against 1,152 on the manifest; 742 brass shells empty as against 903 on the manifest; 305 paper shells empty, as against 138 on the manifest, and 43 paper shells loaded, while there were no paper shells loaded on the manifest.

Capt. Byers tells us that when the officers of the *Rush* made their count, he knew that there were more shells somewhere, and asked the officers to wait until the hunters came back, as they would probably know where the missing shells were, and that when the hunters came back, they did inform him of the shells which were afterwards produced from the lockers. He further tells us that the count made at Copper Island and appearing on the manifest was made by the hunters, whose word was taken for the number entered on the manifest. He accounts for the discrepancy between paper and brass shells by the one being then mistaken for the others.

I am of opinion that Capt. Byers' explanation is a reasonable one. Upon inspection of the cartridges I

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observe that the butt of the brass and paper cartridge is identical, both being of brass, and I can very well believe that in counting them in the boxes this mistake might easily have occurred. I attach no importance to the hole in the skin. Mr. Lubbe, a fur dealer, who was called as a witness, whilst expressing his belief that a hole pointed out by him was a buckshot hole, pointed out a different hole and one which had not been perceived by the officers of the *Rush*. I am by no means persuaded that either hole was caused by a shot, although of course either might have been; but then again, even if caused by a shot, it by no means follows that the shot was from the *Marvin*. On the contrary, it is quite possible that if the hole was a shot wound such shot might have been fired by a stranger some time before, for Mr. Lubbe tells us that the wound would not heal over for two or three weeks, and he also tells us that it is no uncommon thing to find nests of old shot in the skins of seal killed by spearing or in other ways. Captain Byers, who gave his evidence in a straightforward and unequivocal way, assures us that no shooting whatever took place, and the fact that the hunters came back after the seizure without arms or ammunition, and the further fact that no indication whatever of shot were found in any of the other skins, and the tally, within one, of the total count on the manifest, strongly corroborate him.

I think that the discrepancy at first in the number and in the kind between the ammunition found and that described in the manifest created sufficient suspicion to warrant the arrest; but this suspicion, I think, has been satisfactorily cleared up by Captain Byers.

The suit will, therefore, be dismissed without costs.

Judgment accordingly.