

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

1894

HER MAJESTY THE QUEEN.....PLAINTIFF;

Jan. 9.

AGAINST

THE SHIP *AINOKO*.

*Pelagic Sealing—The Seal Fishery (North Pacific) Act, 1893—Evidence—Admissibility of unofficial log—Presence within prohibited zone through mistake, effect of.*

Where the official log of a ship arrested under *The Seal Fishery (North Pacific) Act, 1893*, did not disclose the position and proceedings of the ship on certain material dates, an independent log kept by the mate was offered in evidence to prove such facts ;—

*Held*, not to be admissible.

*The Henry Coxon* (3 P.D. 156) referred to.

2. The mere presence of a ship within the prohibited zone, owing to a *bond fide* mistake in the master's calculations, is not a contravention of the Act.

THIS was an action for condemnation under the *Seal Fishery (North Pacific) Act, 1893*.

The condemnation of the British Schooner *Ainoko* was asked in this action for an alleged contravention of the provisions of the above mentioned Act and of an order in council passed thereunder on the 4th of July, 1893. By such Act and order in council the killing or hunting of seals, or attempting to kill or take seals, was prohibited within a zone of thirty marine miles round the Komandorsky Islands, as defined in the said order in council, on the Russian coast, during the period between the 4th July, 1893, and the 1st January, 1894.

The schooner *Ainoko*, owned by Captain Grant of Victoria, B.C., left that port in the spring of 1893, under Captain George Heater, as master, on a fishing and sealing voyage in the North Pacific. After taking on an Indian crew at Hesquiot and touching at various points, particularly the port of Sand Point,

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKE.  
 ———  
 Statement  
 of Facts.  
 ———

Shinigin group, where she received the official warning subsequently alluded to, the vessel proceeded northward and was seized on the 22nd July, 1893, within the prohibited zone, by His Imperial Russian Majesty's despatch boat *Yakout*, being then fifteen or sixteen miles off the southern point of Copper Island, one of the Komandorsky group, round which and Tulenew (Robben Island) the prohibited thirty-mile belt is drawn by sec. 1 of the said order in council.

She was at the time of the seizure fully armed and equipped for catching and killing seals in the North Pacific, and had then on board (as alleged in the Russian protocol) sixty-eight seal-skins.

The writ was issued on the 3rd November, 1893.

The statement of claim placed the seizure in latitude 54 deg. 23 min. 5 sec. north, and longitude 168 deg. 32 min. east, within 16 miles of Copper Island and within the prohibited zone round the Komandorsky Islands. The position of the place of seizure on the map was proved by Captain Hughes Hallett, R.N., of H.M.S. *Garnet*, the officer in command at Esquimalt.

The statement of claim further charged that Capt. George Heater was duly warned not to enter the prohibited waters of the North Pacific, and not to proceed within a zone of thirty marine miles round the Komandorsky Islands, of which Copper Island forms part.

After the seizure and search of the *Ainoko*, and the examination of the papers of the Russian official commission of the *Yakout*, it was decided to seize the *Ainoko's* papers; and her captain was directed to proceed in the *Ainoko* to Yokohama, to appear before the British Consul there; a provisional certificate (made under subsec. 1 of sec. 2 of the Act) being given to him to enable him to reach that port.

Besides the alleged sealing, or attempt to seal, the plaintiff's pleadings further charged that Capt. George

Heater did not proceed to the port of Yokohama and report to the British Consul there; but sailed to the port of Victoria, in the Province of British Columbia, where he arrived on the 26th August, 1893; whereupon Capt. Hughes Hallett, R. N., of H.M.S. *Garnet*, claimed the condemnation of the *Ainoko* and everything on board of her, or the proceeds thereof, on the ground that she was at the time of the seizure within a zone of thirty marine miles round the Komandorsky Islands—as defined by the above mentioned order in council, made in pursuance of the above mentioned *Seal Fishery (North Pacific) Act, 1893*—fully manned and equipped for killing, taking or hunting seals; and had on board shooting implements and seal-skins. And that the said ship was used and employed in killing, taking or hunting seals, and had on board shooting implements and seal-skins. Also that the said ship was used and employed in killing, taking or hunting, or attempting to kill or take seals within the prohibited waters aforesaid.

To all which the defendants replied, admitting the seizure as averred by the statement of claim (paragraphs 1 and 2), and admitting having sailed fully manned and equipped, as alleged; but that the schooner left on the 25th January, 1893, for Hesquot to obtain an Indian crew of hunters. That they arrived at Sand Point on the 17th of June, and on the 22nd of the same month she shipped all her seal-skins by the schooner *Borealis*, and continued her voyage from Sand Point. They admitted that Heater was duly warned not to enter the zone, as alleged in paragraph 4, and that Copper Island is one of the Komandorsky group. Also that when seized the vessel was fully manned and equipped as charged, but that they had at that time only forty-six seal-skins on board. They admitted (as charged in paragraph 6) that after the seizure of the ship and papers, and on the report of the official commission, George

1894

THE  
QUEEN  
v.

THE SHIP  
AINOKO.

Statement  
of Facts.

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Statement  
 of Facts.  
 ———

Heater was ordered by the captain of the *Yakout* to take his ship to Yokohama to appear before the British Consul there. And that a provisional certificate was given him to reach that port. They also admit so much of paragraph 7, as states that the schooner arrived in Victoria on August the 26th, 1893.

But in answer to paragraph 7, charging that Heater disobeyed the order given him by the captain of the *Yakout* to proceed to Yokohama, they say that he did obey such order until the 30th July, upon which date the captain of the *Ainoko* was obliged, on account of the objection made by the said Indian crew, who where fifteen in number, to proceed to Yokohama, to change his course and sail for the port of Victoria. And in answer to the whole of the plaintiff's statement of claim, the defendants aver that for some days prior to the 22nd July, the date of seizure, they were unable on account of the heavy weather to hunt for seals, and did not hunt for seals. That they were also unable during that period to take any observations, and that it was not until about three o'clock in the afternoon of the 22nd July, (Eastern time) the day of seizure, that the captain of the schooner sighted land, and found that his position according to dead reckoning was wrong, and on discovery of this fact, which he had been unable to discover sooner, the captain at once wore ship and made all possible haste to get outside the prohibited zone; but on account of the light wind and the heavy sea prevailing at the time, the schooner was unable to make headway when she was seized. And they add that during that time and up to the date of the seizure, the *Ainoko* did not kill, take, hunt or attempt to kill, take or hunt any seals.

They also alleged that at no time was the said schooner used or employed in contravention of the said Act.

December 22nd, 1893.

The case was tried before Mr. Justice Crease, Deputy Local Judge for the Admiralty District of British Columbia.

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

*Helmcken*, for the ship.

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Statement  
 of Facts.  
 ———

CREASE, D. L. J. now (January 9th, 1894) delivered judgment.

[After stating the facts as on pp. 195 to 198, his Lordship continued:] Such were the admissions of the defendants, that much trouble was saved to the Crown in collecting and arranging evidence of a great part of the facts necessary to support the plaintiff's case ; and it is fair to remark, that these admissions were made before the defendants had an opportunity of seeing the protocol of the Russian commander, framed upon the report of the official commission he had appointed to seize and examine the *Ainoko* and her papers and report thereon to him, or of knowing what incriminating evidence that document would contain.

This protocol was only produced during the trial, and was made evidence in the case by sec. 3, subsec. 1, of the *Seal Fishery (North Pacific) Act*, 1893. But of course it was, like all other evidence, subject to explanation and possible rebuttal by other evidence of equal or superior weight. The correctness of the translation into English was proved by an interpreter, a Russian by birth, duly sworn to interpret the Russian into English ; but Mr. Helmcken, the counsel for the defendants, objected to its admission on the ground that the interpreter could not swear that the confirmatory signature of the captain of the *Yakout*, which appeared to have been written in the third person, was really his usual signature ; and that the proof of this part

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

was necessary to the validity of the document before it could be said to "purport to be signed by the officer having power, in pursuance of the Act, to stop and examine the ship as to the circumstances under which, or grounds on which, he stopped and examined the ship."

This objection was overruled by the court on two grounds, viz., that such evidence was admissible under the Act, as if made by an officer of our own navy, and the principle *omnia præsumuntur rite esse acta* might, without straining the law, be applied; and, secondly, that the admissions of the defence, in the main, substantially covered the facts relating to the seizure, and the circumstances attending it, which the protocol purported to set forth. The protocol was then read. The only additions which it made to the facts already detailed were that it claimed to have found sixty-eight skins on board, whereas the evidence proved that only forty-six were there at the time, and the number of skins was not actually counted by the searching officer—a point of secondary importance; and that when seen the *Ainoko* was "without lights." And also that the crew consisted of, all told and all present, nineteen men; viz., fifteen Indians and only four whites—a circumstance which proved of some importance, in view of the subsequent change of the direction of the voyage from Yokohama to Victoria. And I observe that in the protocol the commission decided to seize the papers of the *Ainoko* "on the reason of her being found within the limits of" (Russian) "territorial waters," and no sealing or attempt to seal is therein alleged, and no examination on oath under sec. 3, subsec. 2, or cross-examination, appears to have taken place, or been reported under the protocol. The protocol, if the translation is correct, does not say that she was seized because she was found manned and equipped for sealing within a prohibited

zone und the English Act, but (although confessedly sixteen miles from land) for being within the territorial waters presumably of the Russian coast.

The court in this action in all its proceedings, and in the present decision, governs itself entirely and exclusively by the provisions of the Imperial Act of 1893, and the aforesaid order in council; and this without reference to the territorial and other rights mutually reserved to and by Russia and England in the correspondence of May last, between the late Sir Robert Maurier and Mr. Chickine on behalf of their respective Governments.

Taking, then, as proved the facts admitted by the defendants' pleadings, the presence and seizure of the *Ainoko* fully manned and equipped for sealing within the prohibited Kormandorsky group, by the Russian transport *Yakout* on the 22nd July, 1893, it remains to ascertain from the evidence under what circumstances she found herself, contrary to law, after notice, within the prohibited waters. Whether, while there, she attempted to kill or take seals, and, if so, under what circumstances. Why, also, when seized she was carrying no lights. What number of skins Heater really had on board, and whether he had truly reported the same. And lastly, the reason the defendant Heater had for disobeying Captain Chanouski's order to take the *Ainoko* to Yokohama by changing the direction of her voyage to Victoria, B.C., and the sufficiency or otherwise of such reason.

The evidence of Captain George Heater, which was given in a ready, straightforward manner, without concealment or equivocation, was: That on the 23rd January, 1893, the *Ainoko* started on a sealing and fishing voyage in the North Pacific. Took an Indian crew at Hesquiot, proceeded on her voyage to the port of Sand Point, where she remained from the 17th to 23rd

1894

THE  
QUEEN

v.

THE SHIP  
AINOKO.Reasons  
for  
Judgment.

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

of June, to refit. There Captain Heater received, both from Captain Grant, his owner, and from Captain Hughes Hallett, R.N., of H. M. S. *Garnet*, written notice forbidding him (amongst other things) to go within the thirty-mile limit round Kormandorsky Islands and Tulenew (Robben Island). That he sent all the skins he had taken (1,635) to Victoria by the *Borealis*, procured a proper clearance for hunting and fishing, and a bill of health from the United States authorities at Sand Point, and, with his coasting license of 23rd January, outward, foreign manifest of 15th March, 1891, certificate of registry, with the Articles called an agreement on account of the crew, and an official log (the papers afterwards seized by the *Yakout*) proceeded northward on his voyage, and on the 17th July found himself by observation in latitude 54 deg. 9 min. N. longitude 165 deg. 14 min. E, and from that time until the 22nd July, the day of seizure, thought himself outside the limits.

Under the circumstances I have detailed the *Ainoko* having (in the words of sec. 6 of the Act) been found during the period and within the seas specified in sec. 1 of the order in council before cited, having on board thereof shooting and fishing implements and seal-skins, it lies on the owner or master of the ship to prove that the *ship was not used or employed in contravention of the Act*, and unless that is done satisfactorily by showing that he was there ignorantly and by stress of weather, or some act of God beyond his control, the presumption under this section would become absolute against the ship and ensure its forfeiture.

But it is a presumption capable of rebuttal or satisfactory explanation, when the *onus probandi* would be changed, and to this the whole efforts of the defence were directed.



No evidence on behalf of the plaintiff was adduced beyond the protocol and what was elicited from the defendants' witnesses on cross-examination, except Capt. Hughes Hallett's proof of the position, on the chart produced in court, of the *Ainoko*, when seized, and the papers transmitted with the protocol.

The first point which had to be settled was: To account for the position and proceedings of the schooner between the 17th July and 22nd July (Eastern time), when she was seized. In this connection it becomes of importance, as showing one main reason of the captain of the *Yakout* and his commission's decision to seize, that he conceived that he could only look at the official log for a record of the *Ainoko's* course and position from day to day. These the official log did not pretend to give, though it marked important facts during the voyage, such as leaving and reaching port, or first seeing land, finding herself on such a particular day at such a place, but not the daily routine or position. That was only in the mate's log. This latter was written in daily at some usual or practicable hour, the captain and mate, after consultation, pricking the position of the schooner off upon the chart; and the mate, who was the better scribe of the two, recording it with other events of the day, such as change of wind, force and direction of sea, and the like, in the mate's (commonly recognized as the ship's) log. Indeed, Capt. Heater considered he had no right (as well as no room) to put such details on the official log, and it is not made compulsory by British law to do so.

On the authority of *The Henry Coxon* (1), though not directly applicable in this case, and upon the objection of the Mr. Pooley, Q. C., the counsel for the plaintiff, I declined to receive in evidence the

(1) 3 Prob., 156.

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

so-called ship's log, which was carefully kept, though after proving the mate's memory, by several specific entries taken at random in different parts of the book, which he swore were made on the respective days to which they referred, reserving the right to him to refresh his memory by it, should he so require. But it was not so required; for both his and the captain's memory, were substantially good for all the events of the days more particularly in question in this case. And the plaintiff's counsel freely used it in a very full cross-examination of both master and mate, as he had a perfect right to do, against the ship. It is in evidence, uncontradicted, for we have no record of any examination of the master by the officers of the *Yakout* or any other evidence than I have mentioned produced by the plaintiff, that when Captain Heater came on board the transport, as ordered, with his papers, he produced the ship's log, made up in the manner I have described; but the Russian officer (he presumed the 1st Lieutenant) would not recognize it. He wanted the official log. Capt. Heater told him the positions were not regularly laid down on the official log, that it was the practice in the branch of mercantile marine to which he belonged to enter these only in the mate's log, used as the ship's log.

"He told me," Captain Heater says, "to send for the official log. I got it for him. He was sorry, he said (speaking good English) that I had not my positions on the official log. *He was sorry, because if I had he could let me clear.* I told him I could not help it; the positions were all on the log," (meaning the ship's log.)

The master's evidence, confirmed by that of the mate, proved that on the 17th July last, when he spoke the *Dora Seward* and a boat of the *Carlotta Cox*, he took observations by sextant, and found that they were in latitude 54 deg. 9 min. N., and longitude 165 deg. 14 min. E.—that is about 60 miles west of

Behring Island, and some 30 miles out of the prohibited zone, and some 95 miles from Copper Island.

The weather from the 17th July to the 21st (Eastern time) had been very heavy, with much rain and fog, with strong wind and heavy sea; the wind commencing from N.N.W., varying to W.S.W. and S.S.W., turning to a strong gale and high sea, and continuing with thick weather, day after day, from the 17th, with only brief occasional intervals of moderate wind; and this kind of weather lasted until the 21st (Western time), when, after a stormy morning, the wind fell, the sea being still high but going down; thick weather prevailing with intervals.

The truth of this account of the state of the weather during those five or six days, was incidentally confirmed by the Russian officer, who (as Wm. Heater, the mate, in his sworn evidence as to what occurred on board the schooner during the search states) then came on deck from below where he had been searching, and said:

“I suppose you know what we are at? (He spoke English with an English accent.) I said I did, we'd sighted land that afternoon. *I said you know how bad and stormy the weather has been; he admitted it, and said that was true.* We got driven in here (I added), it was not our fault we got here. I asked him what he intended to do? He said I guess we'll let you off.”

A conversation to the same effect occurred between Capt. Heater and the 1st Lieutenant on board the *Yakout*, which I shall have to allude to when dealing with the current, which so greatly threw them out of their course. The account which the master of the *Ainoko* gives of this (to him) eventful day, also from his recollection, is in the same direction. It is that on 21st July (Western time) they had a strong wind from the S.W. with a high sea, the ship's head bearing westerly. “At 8 a.m.,” he says, “I wore ship's head to the S. E. as the wind came more to the

1894

THE  
QUEEN

v.  
THE SHIP  
AINOKO.

Reasons  
for  
Judgment.

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

S.S.W. About noon there was a strong wind and a high sea, the wind veering to the S.E. About 3 p.m. the fog lifted a little, and I caught sight of the land, when the fog came down and covered all again. I judged from the glance that I had that the shore was fifteen to twenty miles off." He does not tell us in this part of his evidence what particular shore it was, but he was sure it was within the limits, for he says, "I immediately wore ship, set all sail and set her course at S.W.," a direction which the Admiralty chart and the ship's chart, which is also in evidence, show, would take her right off the island out of the forbidden waters. And it is very noteworthy that she was sailing with full sail towards the S.W., S. and S.W., presumably on her way out, when she was overhauled by the Russian transport late that same evening.

There is not even a suspicion that Heater knew of or saw the *Yakout* before she came on him. The presumption is fairly the other way. The change in the sails (of which we have much evidence) necessitated by the change in the course of the schooner, and her position as respected the direction of the wind, which remained about the same, help to show that she changed her course to S. W. from N. W., and was on that course when seized (as the protocol says) "under sail." For when she sighted the land (we gather from the evidence) she carried in lieu of the big mainsail, then closely furled, a storm trysail with a double-reefed foresail and a reefed forestaysail, her jib and her flying-jib being down and furled. When she wore round in order to be under full sail, she must have stowed away her storm trysail, hoisted her mainsail, shaken out the reefs in and hoisted her foresail, set her maintopsail, shaken out the reefs and hoisted fore staysail and hoisted her jib and flying-jib. And this is what she did.

But the difference in the sails set so entirely agrees with a change of course from N.W. to S. and S.W., as to form a coincidence, the more effective for being undesigned, with the change of course, to which he swears and corroborates his evidence in that particular.

“When I sighted land,” he adds in cross-examination, “it was pretty nearly ahead or a little on the starboard bow. The same time I saw it I looked at the compass; that was pointing to the N.W. The sail we were under was trysail, reefed foretopsail and trysail. We wore ship because there was not enough wind to stay the ship, and we had small sail on. That the course adopted was the right and only right one to get out of the zone, and that was their real object, is proved by the evidence of the mate, who, in an ably conducted cross-examination, stated “the wind was light, there was a heavy sea on the land, we could not make much headway, the sea was too heavy. No; we could not have steered any other course to have got off shore.”

The other white sailors corroborated this in every material particular.

An examination of the positions of the schooner from the 17th to the 22nd, as laid down on the chart of the *Ainoko*, goes to prove that they considered themselves all those days outside the forbidden zone, for that shows that on the 17th July, she was, by observation with sextant, at latitude 54 degrees 9m. N., longitude 165 degrees 14m. E., about sixty nautical miles from Behring Island and ninety from Copper Island, far outside the zone. On the 18th, by dead reckoning, in latitude 53 degrees 44m. N., longitude 166 degrees 15m. E., or one hundred miles from Copper Island. On the 19th, by same reckoning, latitude 53 degrees 41m. N., longitude 166 degrees 25m. E., or seventy-nine miles from Copper Island. On the 20th, by dead reckoning, latitude 53 degrees 21m. N., longitude 166 degrees 40m. E., or seventy-six miles from that island. On the 21st, (Western time), we know that when found by the steamer she was sixteen miles South West of Copper Island. During the five days following the 17th, the master of the schooner was unable to take a single observation. On

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.

**Reasons  
 for  
 Judgment.**

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

the 17th they were certain of their position, but afterwards only by dead reckoning, making no proper allowances in making their reckoning for the strong current setting on shore, for the simple reason that Captain Heater did not know it, having obtained his first knowledge of it from the courtesy of the Russian officer on the *Yakout* after the seizure. This current sets strongly in a north-eastern direction when the wind is south and westerly on shore. Captain Bissett, of the *Annie Paint* sealing vessel, who had known this current well during three years sealing in the neighbourhood of these islands, stated in his evidence that from its blowing so much before from the south and south-west, the current was unusually strong this year with a strong set to the north-east, and, as one came closer in shore of some two miles an hour, he himself though deeper in the water, and his ship a better sailer than the *Ainoko* was driven by it, notwithstanding his previous experience of it—from forty-five miles off land, the regular cruising ground of sealers, to twenty-two or twenty-three miles from it, that is seven or eight miles within the zone, and although a schooner can generally sail  $4\frac{3}{4}$  or 5 points off the wind, if the sails set well, the current would trend on to Copper Island by the south end of the island. When the wind was about south by west the drifting would be considerable. Some vessels drift more than others, less or more according to their depth in the water and other conditions, and the way they are sailed. The *Annie Paint* was deeper in the water than the *Ainoko* and therefore, holding her way better, was presumably somewhat less affected by it; yet under the influence of it she drifted, though a less distance than the *Ainoko*, some six or seven miles within the zone before a favourable breeze carried her out. That this current, acted upon by the stormy south and west winds and the high seas of those five

stormy days which preceded the seizure, had a most potent effect in driving the schooner towards the point where she was ultimately picked up by the steamer, notwithstanding her efforts against wind and sea, as appears from Heater's evidence in several places—and especially in his first interview with the Russian officer on board, of which he says:—

“ He asked me to come on board and bring the ship's papers, which I did immediately. When I got on board one officer asked me if I knew I was within the limits? I think the first Lieutenant, as he did all the talking. I told him I did and spied land that afternoon, that's why I was trying to get outside. I said, you know what weather we have had lately; we didn't come here with our good will. We were driven here. He said: Yes, I know you had bad weather and drifted. I said: There must be a strong current in here, else we couldn't possibly be here? He said: *I admit a strong current here sets in north-east with southerly and south and west winds. I told him that was unknown to me; I had never seen it. Then he asked me for my log, etc.*

This makes the position in the mate's or ship's log of very little value as a guide to his position on the five days in question when they were nearing the island, although the schooner would be comparatively much less influenced by it on the 17th and 18th days, when they were furthest away than on any of the subsequent days.

Capt. Bissett's evidence, although it is subject to this remark—that he had himself had a talk with Capt. Heater the evening before, and is himself a sealer, and although not caught was from having been within the zone to a certain extent *in pari delicto*—is not to be thrown aside on that account alone. He was in no worse position than the other sealer witnesses who had been in court all the time, and whose testimony was received without objection, and if incorrect it was liable to be disproved by other evidence—and particularly because it was confirmed in the most material respect by the frank statements of the Russian officers which I have already given on the chief points. Capt.

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

Bissett tells us that the general practice of sealers of that locality (and Heater tells us he adopted it at the period in question) was to cruise backwards and forwards well outside the thirty mile limit, three miles towards the islands and four miles away from them, keeping off at least forty-five (always nautical) miles from the land—and trying to keep on and west of this forty-five miles off, as their general position while hunting for seals, backing and filling to hold their own, in order to effect this object and keep well out of danger. And in this way sealing vessels go at times even sixty, seventy, one hundred and fifty, and even one hundred and eighty miles off the land. He substantially corroborates the account the *Ainoko* gave of her various positions from the 17th to the 22nd July by comparison with his own (generally) on those days, and also taken by observation on the 17th, and by dead reckoning only—for the same reason, inability to take observation—after the 17th, a period during which the *Ainoko* was frequently in sight, though five or six miles nearer to the island than the *Annie Paint*. On the 22nd he saw her three or four times; they crossed each other in sailing between the 18th and 22nd (including the 22nd), and he saw her on the 22nd and 23rd. The weather he describes as hazy; though it would lift at times when he saw quite a way, perhaps seven or eight miles, and then it would as suddenly close down.

“I think (this witness said) I saw the loom of the land about 3 o'clock in the afternoon; I could not see the loom of the land on the 21st, 20th or any of the previous days back to the 17th.”

Here it is to be observed that when the various witnesses, speaking after the event, say they saw land, it does not follow, unless the fog lifts altogether, that they would stop to see more than the loom of the land to be assured of what land it is, for proximity to land



is likely to be avoided, especially by sailing vessels, in bad weather, and on a lee shore, from which, if they approached too close, they might not be able to claw off. And so it was here, for the official log of the *Ainoko*, which is evidence and was seen by the Russian officer, has an endorsement thereon from the Russian officers, in Russian and English, which proves that this was the case.

The orthography of the captain's entries in the official log is very phonetic; but the sense of it is like what I believe him to be, clear and honest. I tried and tested him in various ways, because the presumption, not only in law but in fact, was at first distinctly against him, and the *onus probandi* was upon him; and also because, the Russian officers not being present, it was the duty of the court to receive their testimony with the greatest faith and respect, as if they had been our own officers, subject of course, like all evidence, to be explained if the law called for it, possibly displaced upon that fuller inquiry under oath, which though allowed was not so convenient at sea, where surrounding circumstances were not so favourable for that full enquiry which has now taken place. But Capt. Heater has stood the ordeal well; and although uncultivated and plain in manner and speech, he has never varied in substance in his account of the explanations required of him, whether they were against him or for him, from first to last. The court therefore is compelled to regard him as a witness of the truth.

It is true (although he was not examined upon the point) that in the portions of the mate's or ship's log, on which he was cross-examined, and to which portions alone I considered myself—in the face of the plaintiff's recorded objection to its production as a whole—entitled to look, no mention is made of having sighted the land on the 21st (Western time).

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 —  
 Reasons  
 for  
 Judgment.  
 —

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

Probably this was because in the official log, which the Crown itself produced as evidence, we find it distinctly mentioned as one of the notable facts worthy of being recorded therein. For in that, under the head of July 22nd (Eastern time) the following occurs:—

“ This day commenced with strong wind from W.S.W. At 2 p.m., wind abating, fog clearing up, saw the land. Made all possible sail to get outside of limits. At 11 p.m. overtaken by Russian cruiser who ordered me to heave to and bring my papers on board, which I did without delay. When arrived on board of cruiser was informed I was inside of limits. Told him that I was driven there by strong wind and heavy sea, and that I did not know that I was inside of said limits, and did not come there on my own accord, but distress of weather, *and was making my way out when he seen me, which he owns was true.* But he told me that he should take my papers from me and order me to Yokohama ; went on board, made all possible sail for said port. Indian crew objected being carried to Yokohama, so I had to bring them to their home.”

“ Aug. 22, '93, at 1 p.m. arrived at Hesquiot for the purpose of landing my crew ; no other remarks worthy of note.”

“ Aug. 24, '93, sailed from Hesquiot for Victoria ; arrived in Victoria Aug. 24, '93.

(Sd) GEO. HEATER, Master.

(Sd) WILLIAM HEATER, Mate.

The only other entries in the official log worthy of note are :

“ July 15, '93, fog prevailing and strong wind ; no obs. of sun for four days.

“ July 20, '93, strong gale from W. S. W. and heavy sea ; ship's head to south ; no obs. of sun.

“ July 21, strong wind continues, with heavy sea.”

(Sd) GEO. HEATER, Master,

(Sd) WILLIAM HEATER, Mate.”

After a careful consideration of all the facts, the charts and the various bearings of the case now fully before the court, I have a clear opinion on three points: 1st. That until he espied the land as the fog lifted for a short while at 3 p.m., on the 22nd (Eastern time) he

had no idea that he was within the forbidden waters ; 2ndly, that the moment he did espy land he wore ship, set all sail to the S. W. to get out of the forbidden zone as quickly as possible by the only course then available for the purpose, and was honestly carrying out this intention to the best of his skill and ability when he was overhauled by the Russian steamer and sent into port ; and 3rdly, that when overhauled, although the weather had moderated, he was clearly not actually sealing or attempting to seal.

There remain therefore only three points to be considered, one of which only is of specific importance to enable me to apply the law as applicable on a consideration of all the findings—to which the evidence must be my guide—for a determination of the whole case.

These three points are : —1st. The fact of the attempt to kill or take seals on the 18th ; 2nd. the position of the lights of the ship when the steamer approached her ; and 3rd. the statement of the master on board the *Yakout* and endorsed on the protocol in his own handwriting, apparently at variance with not only his own evidence on the point, but that of all the witnesses from his own ship, speaking of 68 instead of 46 skins.

And first, as to the attempt to hunt seals on the 18th, Captain Heater made no concealment whatever of the fact that he on that day let down the stern boat with himself and two sailors with guns, trying to catch seals ahead of the schooner for (he thought one, his mate said two) two and a half hours, when, on account of the heavy weather, he returned completely unsuccessful. This makes the presumption of law against him under the Act ; and unless he discharges that presumption by sufficient evidence, and shifts the *onus* to the plaintiff, the condemnation of his ship is certain.

But what are the facts ? It has already been proved beyond a peradventure, and it is not for a moment

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 \_\_\_\_\_  
**Reasons  
 for  
 Judgment.**  
 \_\_\_\_\_

denied, that on July 17th the *Ainoko* was, by observation by sextant, in latitude 54 deg. 9 min. N. and longitude 165 deg. 14 min. E; in other words, by the dividers, sixty miles off Behring Island and fully ninety-six miles off Copper Island.

It is in evidence, and none is adduced to the contrary, that the weather on that occasion had moderated so much as even to induce the captain to lower the stern boat for sealing; the wind was strong but fine all day, and the ship we are told heading W.N.W., whether they knew it or not—somewhat against the easterly trend of the current, and the ship laying up to the W.N.W., and that had been her course the greater part of the day before when the observations were taken. The current, Capt. Bissett testifies, has the least influence upon a ship the further it is away from Copper Island, towards the east end of which it sets. They had, therefore, some thirty or forty miles to veer and haul upon before they were drawn within the limit of the forbidden zone. It is more than probable, therefore, that from 4 to 6 o'clock on the 18th they were well outside the limits, and if so, were entitled to fish there without let or hindrance. But, assuming it were not so, I think the evidence is irresistible, that he was under the honest and complete conviction that they were well beyond those limits at the time; and if wrong, was under an honest mistake at the time, and so has fairly discharged the presumption of law against him as to this particular point—and the more so that no evidence has been adduced by the plaintiff to the contrary.

The marking on the ship's chart on that day shows this; and the captain swears positively, as the ship's chart on inspection itself shows,—that not a single marking on it, though of course much used, was rubbed out or defaced on it,—and I believe him. That gives

the position at noon as in latitude 53 deg. 48m. N., longitude 165 deg. 23m. E., or further away from Copper Island, whither the current trended, than on the day before. That was, in all probability, not exactly correct; but that was their honest conclusion to the best of their experience and judgment, qualities in which they appeared by no means deficient, and as their calculations were founded on accurate observations at noon on the previous day, and on the course and progress of the ship and the weather in the interval, I consider the fair and reasonable presumption, one which sitting as a jury I ought to entertain, is that they were at the time still outside the forbidden limits.

The next question to be disposed of is as to the lights the *Ainoko* carried at the time she was overtaken.

In the Russian protocol it is stated that the *Yakout* at 11 p.m. saw the British schooner *Ainoko* under sail and carrying no lights. From this it would naturally be inferred that, contrary to the universal requirements in mercantile marine, she was taking advantage of the darkness to screen herself from observation; especially after Captain Heafer's evidence that at 3 p.m. of the same day he had caught sight, in however transient a manner, of Copper Island, and consequently knew he was within the prohibited limits. No evidence appears to have been taken by the Russian authorities on that point, as might have been done under sec. 3, sub-sec. 2 of the Act. He was, therefore, closely examined by the learned counsel for the plaintiff on that point.

Q. "What were you doing without lights?"

A. "The lights were out (which, he explained to the court meant were exhibited in their proper position and manner). That's the way they (the Russian vessel) picked the vessel out. If they say none, the statement is incorrect. We always have lights out. The lights were out that night. I don't know when they were put out. The steamer could not see."

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

In another part of the evidence it was stated that she passed first astern of the schooner, and then after going some little distance rounded to, and crossed the schooner's bows, and then must have seen the lights. "Then she whistled and brought her to, and ordered her to send a boat on board. They were out when she crossed ahead of us if not before. It was just getting dark then in that latitude. It was in the month of July."

(Another witness places the time of the *Yakout's* hailing at half an hour earlier, viz.: 10.30.) No further cross-examination thereon was made or any contrary evidence adduced, and the explanation of how the *Yakout* did not see the lights at first was quite probable and satisfactory—and the statement that the schooner was without lights was disproved.

As to the number of seal-skins. This was stated in the protocol as sixty-eight, but the evidence goes to show that the Russian officer who was searching the vessel did not count the skins or the number of them. He was told that only forty-six had been caught, and those he did examine were salted and dried and old, and he made no note of what was told him while on the schooner, and when called on for the number on coming on board, no doubt by mistake, put sixty-eight. He had been informed that none had been caught within the prohibited limits or since the 16th July, when there was no question that the *Ainoko* was well without the zone round Copper Island. Against this conclusion was adduced the endorsement put by Capt. Heater in his own handwriting on the back of the protocol: "Only 46 seal-skins taken on this coast, having 68 on board, some taken on way over, George Heater, Master," and construed as a distinct admission in writing on a document which he knew was "the paper which was to go against him," and formed an admission which he could not now contradict, and

was cited as an indication that his other evidence was not to be relied upon.

But I do not so view it, but consider that his explanation was true and satisfactory.

He knew that none had been taken within the limits and that the only skins taken were, on the 12th July one; on the 13th, ten; on the 14th, five; on the 16th, thirty. In all forty-six, and every one taken well outside the limit created by the Act. Capt. Bissett proved that the weather for the five days was not fit for hunting seals and that he put no boat down. They could not therefore hunt. The only short attempt to do so on the 18th was abortive.

The reason Capt. Heater gives for making that note on the back of the protocol respecting the number of skins was, that he thought it just possible that as the Russian officer reported they had searched and found sixty-eight skins, the Indians might possibly have concealed twenty-two in some place he had no knowledge of; if so, being anxious to assure the Russian commander, as the truth and fact was, that the vessel had not taken a single skin within the proscribed limits, and on the supposition that they had found the extra twenty-two, desired to note that they could only have been taken on the way up the coast, and before the forty-six (of the taking of every one of which he swore to the date) were obtained. The Russian officer did not want him to write anything at all on the back of the protocol, and in the hurry and confusion of the arrest, being as we see, however good and honest a sailor, a very poor scribe, he put it down as we find it. Had he put, "If there are sixty-eight on board, some must have been taken on the way over," he would have been exactly right; and not a word could have been said. And that I think is the true and simple explanation and does not really affect his credibility.

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1894  
 ~~~~~  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 -----  
 Reasons  
 for  
 Judgment.  
 -----

As to the change from Yokohama to Victoria, it is observable that the section of the Act on that point which makes him as well as the owner each finable in £100 (which in this instance has not been asked) contemplates also a possible change of direction under circumstances easily conceivable, though it retains his liability in all other respects. In this instance the real reason, no doubt, is given. The Indians would not allow him to carry them to Yokohama. They were fifteen to four, carried knives and were experts in the use of arms, and spoke a language they only understood, and which favoured secret combination. \*  
 Capt. Clarence Cox tells us they never go or will go to Yokohama, and gives one instance within his knowledge, where they took the command of a vessel and forced her back to their homes; and the Hesquot Indians, as we know by experience in this court in the case of *The Queen v. Anaytsachist* when I was attorney-general, are a bold and daring race if their blood is once aroused and their fears excited lest they should not be able to return home. It is impossible not to consider that under the circumstances Capt. Heater did what was most prudent and even necessary for their safety, although there was and is a competent court for the purpose of trying the case at Yokohama as well as at Victoria.

From the frank and courteous manner in which the *Yakout* conducted the seizure, it is not too much to infer that had they anticipated the danger which afterwards arose from the Indians in ordering the vessel to Yokohama, they might have insisted on Capt. Heater bringing his schooner to this port. Capt. Heater, under the circumstances, was amply justified in the course he took in this particular; and I am of opinion he could not, with safety, have adopted any other course.

The Act itself does not confine the direction to proceed to one particular port for adjudication. The



words in sec. 2 are directory " may direct the ship by an addition to the provisional certificate, or to the endorsement, to proceed forthwith to a specified port " (the real condition of this part of the section is contained in the words following) " being a port where there is a British court having authority to adjudicate in the matter "—a condition which Victoria fulfils. Yokohama is not named in the Act, though it is quite within its purview. The breach of the direction is punishable by a heavy fine, £100—\$500 *each*, on the owner and master, who would not without pressing necessity incur such a penalty. The payment of this fine for such a change of direction is without prejudice to any other liability, such, for instance, as the liability of the ship and her equipment to forfeiture in case it should be so adjudicated. And I am clearly of opinion that it is within the intent and meaning of this portion of the Act, that in case of some emergency, such as stress of weather, danger to life or to the ship; or other circumstances of equal importance arising, beyond the master's control, good faith would still be kept with the Russian authorities by taking her to some attainable British port, having a court with the indispensable requisite, the jurisdiction to adjudicate in the matter.

The plaintiff's counsel suggested that Yokohama was probably the most desirable port for the Russian authorities for collection of evidence ; but experience hitherto has not shown that, and in this case all the evidence was on the *Ainoko* and *Yakout*. The witnesses were within their reach, open to them for examination right on the spot (under sec. 2, sub-sec. 2 of the Act), which would have made their examination evidence, when embodied in or annexed to the protocol ; and the officers spoke excellent English.

Two cases, one under this Act, that of the *Maud S.* (decided in an able judgment by the court at Yokohama) and that of the *Oscar & Hattie*, (1) decided here

(1) 3 Ex. C. R. 241.

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

under the *Seal Fishery (Behring Sea) Act*, 1893, were referred to—but the circumstances of each of these cases were different in several respects from the present one; and, as the learned counsel for the plaintiff justly observed, each case must be tried on its own merits.

We may gather from the reported statements of the officers seizing and searching the *Ainoko*, that they quite recognized the stress of weather, inability to take observations for determining position, which have been sworn to, and the unsuspected current forcing them silently towards Copper Island, as the real causes of the vessel being within the zone prohibited by the Act. They leave it indeed to us to infer that they base the report of the commission and the subsequent decision of the captain of the *Yakout*, to which the report forms the preamble, upon sec. 9 of His Imperial Russian Majesty's Government's "Instructions" (an instrument which, with any explanation of its purport or importance was not laid before the court) for they make no specific mention of our Sealing Act or order in council in the protocol; although for the purpose of seizure, search and sending the *Ainoko* for adjudication they use the powers these enactments confer—but they base *their* decision of seizure expressly on the reason of her (the *Ainoko*) being found within the limits of "territorial waters." And when Capt. Heater is sent away he is directed to leave, without delay, the limits of the "territorial waters," and not the limit of the thirty mile zone prohibited only to British subjects by the British Act and order in council of 1893.

I only note this to show that the court acts and decides in the present case solely and exclusively under the provisions of those two enactments, and recognizes them, as interpreted by the law, as the sole guide, upon the evidence adduced, to its decision.

I have entered into the particulars of this case at considerable length because of the issues involved,

and the numerous points which have arisen during the trial. Upon a careful consideration of all the circumstances of the case, I am of opinion that the master, of whose truthfulness I have no doubt, has given an honest account of the matter, and that he was under a *bonâ fide* mistake in his calculations, as to his real position on, at least, the last four days before the seizure; and that this mistake was owing to the continued stress of heavy weather, and the unsuspected influence of a heavy current setting him on to the south end of Copper Island; and this was the reason, and none other, of his involuntary presence within the prohibited zone, and that he did not discover or had not the means of discovering his mistake, until he caught a glimpse of the land on the 22nd; and that such a *bonâ fide* mistake is not in the law a contravention of the Act. Also that immediately on making this discovery he wore round and made all sail out of the prohibited waters, and had seven hours battling with the wind and sea in order to get out when he was overhauled by the *Yakout*.

The several questions of lights, number of skins on board, dropping a boat on the 18th for a couple of hours to seal, and the change of route to Victoria were all satisfactorily explained. I am, therefore, of opinion on a full review of the facts, and a proper construction of the law applicable thereto, that neither Capt. Heater nor the *Ainoko* was, according to the true meaning of the Act, within the prohibited zone, sealing or attempting to seal, or otherwise there in contravention of the Act. I, therefore, pronounce in favour of the ship and dismiss the action, and order that each party do pay their own costs.

*Judgment accordingly.*

Solicitor for plaintiff: *H. D. Helmcken.*

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

1894  
 THE  
 QUEEN  
 v.  
 THE SHIP  
 AINOKO.  
 —  
 Reasons  
 for  
 Judgment.  
 —