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THE SHIP "MINNIE" APPELLANT ;

*May 21.

AND

HER MAJESTY THE QUEEN...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA
(BRITISH COLUMBIA ADMIRALTY DISTRICT).

Seal Fishery (North Pacific) Act 1893, 56 & 57 Vic. c. 23 (Imp.) secs. 1. 3 and 4—Judicial notice of order in council thereunder—Protocol of examination of offending ship by Russian war vessel sufficiency of—Presence within prohibited zone—Eona fides—Statutory presumption of liability—Evidence—Question of fact.

The Admiralty Court is bound to take judicial notice of an order in council from which the court derives its jurisdiction, issued under the authority of the act of the Imperial Parliament, 56 & 57 Vic. c. 23. The Seal Fishery (North Pacific) Act 1893.

A Russian cruiser manned by a crew in the pay of the Russian Government and in command of an officer of the Russian navy is a "war vessel" within the meaning of the said order in council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the Admiralty court in an action for condemnation under the said Seal Fishery (North Pacific) Act 1893, and is proof of its contents.

The ship in question in this case having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the *onus* cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order in council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order in council.

Judgment of the court below affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (British Columbia Admiralty District) (1) by which judgment the ship "Minnie," her equipment and everything on board of her, and the proceeds

*PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau, Sedgewick and King JJ.

thereof, were condemned for violation of the provisions and requirements of the "Seal Fishery (North Pacific) Act," an imperial statute passed by the Parliament of Great Britain and Ireland, on the 29th June, 1893, and of the Imperial Order in Council, passed in pursuance of the said act on the 4th July, 1894.

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

The following are the material facts in the case :

The sealing schooner "Minnie" set sail from the Port of Victoria, British Columbia, on the 27th of February, 1893, fully equipped and manned for a hunting and sealing voyage in the North Pacific Ocean. On the 22nd of June, 1893, the owner of the vessel, Victor Jacobson, appointed one Julius Mohrhouse as the master of the said ship, and the said Mohrhouse was master at the time of the seizure of the vessel.

On the evening of the 17th July, 1893, about nine o'clock, the schooner was seized by the officers of the Russian cruiser "Yacoute" as being within the thirty mile zone round the Komandorsky Islands, of which group Copper Island is one. The said Komandorsky Islands are referred to in the second sub-clause of clause one, in the order in council of the 4th July, 1894.

At the time of the seizure, the master of the "Minnie" was aware of the requirements of the order in council, and of the necessity of keeping outside of the limits of the zone so prescribed by the said order in council. After the seizure the ship was searched by the officers of the Russian cruiser, and a full equipment of guns and other seal-hunting implements were found on board, together with one seal-skin. The catch of the vessel had been transferred to the "Borealis" some time previously. On the day of the seizure all the boats of the "Minnie" were lowered, for the purpose alleged by

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Captain Mohrhouse of washing the decks ; but as a matter of fact, two persons expert in sealing were placed in each boat.

The sections of the statute 56 & 57 Vic. ch. 23 (Imp.) bearing on the case are the following :—

“(1). Her Majesty the Queen may, by order in council prohibit during the period specified by the order the catching of seals by British ships in such parts of the seas to which this act applies as are specified by the order.

“(2). While an order in council under this Act is in force.

“(a). A person belonging to a British ship shall not kill, take or hunt, or attempt to kill or take, any seal during the period and within the seas specified by the order.

“(6). If during the period and within the seas specified by the order, a British ship is found having on board thereof fishing or shooting implements or seal-skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this act.

“Subsection 3. (1). A statement in writing, purporting to be signed by an officer having power in pursuance of this act to stop and examine a ship, as to the circumstances under which, or grounds on which, he stopped and examined the ship, shall be admissible in any proceedings, civil or criminal, as evidence of the facts or matters therein stated.”

The clauses of the said Imperial Order in Council bearing upon this case are as follows :

“1. From and after the fourth day of July, one thousand eight hundred and ninety-three, until the first day of January, one thousand eight hundred and ninety-four, the catching of seals by British ships is hereby prohibited within such parts of the seas to

which the recited act applies, as are comprised within the following zones, that is to say (1) a zone of ten marine miles on all the Russian coasts of Behring Sea and the North Pacific Ocean, and (2) a zone of thirty marine miles round the Komandorsky Islands and Tulénew (Robben Islands)."

"2. The powers which under the recited act may be exercised by any commissioned officer on full pay in the Naval Service of Her Majesty, may be exercised by the captain or other officer in command of any war vessel of His Imperial Majesty the Emperor of Russia in relation to a British ship, and the equipment and crew and certificate thereof."

The following is a copy of the protocol signed by the captain :

"Protocol of the examination of the schooner "Minnie."

"On this 17th day of July in the year 1893, in latitude 54° 21' N., and longitude 168° 38' E. at a distance of twenty-two miles from the southern extremity of Copper Island, a schooner under sail was seen at 9 o'clock in the evening by His Imperial Majesty's Transport "Yacout," cruising off the Commander Islands.

"On nearing her she was ordered by the transport to bring to, which was promptly done. A whale boat at once put off from the schooner to the transport with the mate, who explained that the schooner was English, (that she was) from Victoria (that) her name was "Minnie." For six days he had taken no observations."

"The Midshipman, Michaelof Raslovlef, was sent for the examination of the aforesaid schooner, who on his return to the transport with the schooner's skipper, Julius Mohrhouse, brought with him the log-book and ship's papers and reported (that) they had on the schooner 12 whale-boats, 23 shot-guns and one rifle, and in the hold only a few seal-skins and salt.

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“ After an inspection of the aforesaid log-book and papers, the ship’s Commission, appointed by order of the commander of the transport, on the 5th July, in accordance with N.42 consisting of the President, Lieutenant Ginter, and of the members Lieutenant Dedenef and Midshipman Michaelof Raslovlef, found that the schooner “Minnie,” (sailing) under the flag of Great Britain, belonging to Victor Jacobson, (and) under the command of Julius Mohrhouse, from Victoria, is sailing for the purpose of sealing by the way (i. e. is engaged in pelagic sealing) and called before her arrest by the transport, at San Juan, Yakoutat, and Sand Point, from which last port she sent the seal-skins she had procured to Victoria.

“ The crew on the schooner consisted of 25 men. In accordance with the finding of the whole of the aforesaid commission, in compliance with the principle, s.s. 9 of the instructions to a war cruiser in the year 1893, for the protection of the Russian maritime industries in the Behring Sea, it was decided that after having seized the ship’s documents, a temporary certificate be given to skipper Julius Mohrhouse, with an inscription upon it of the number and description of the documents seized, and that he be ordered to leave the territorial waters at once and go to Yokohama and there present himself to H. B. M.’s Consul and inform him that the documents of the schooner “Minnie” would be forwarded to the authorities of Great Britain.

(Members signed).

“ Midshipman MICHAELOF RASLOVLEF.

“ Lieutenant DEDENEF.

(Sgd.) “ President, Lieutenant GINTER.

“ I confirm this document.

(Sgd.) “ Captain (2 Rapa) SCHMELEVSKY.”

Belyea for the appellant.

Hogg Q.C. for the respondent.

THE CHIEF JUSTICE.—(Oral) We all think that this appeal should be dismissed.

The first question is: Was the order in council sufficiently proved? I think that the judge was bound to take judicial notice of this order in council issued under the authority of the act of the Imperial Parliament from which the court derived its jurisdiction. The objection that the protocol was improperly admitted as evidence also fails. There can be no doubt that the "Yacout" was a "war vessel" though not a regular man-of-war. She was a cruiser employed in the service of the Emperor of Russia to prevent the catching of seals within the prohibited zone of the Komandorsky Islands, was in command of a commissioned officer of the Russian Navy, and officered and manned by a crew in the pay of the Russian Government and therefore *pro hac vice* was a "war vessel" of the Emperor of Russia within the meaning of that term as used in the order in council. The document was therefore clearly admissible in evidence under the statute as a statement in writing purporting to be signed by an officer having power under the act to stop and examine the ship as to the circumstances under which he actually did stop and examine her, and is proof of its contents, and that the officer who signed it was, as he purports to have been, the officer in command of the "Yacout" at the time of the seizure.

There still remains the question as to whether the "Minnie" having been seized in prohibited waters fulfils the onus cast upon her by the statute. I do not think she does. She must prove that, being fully equipped and manned for sealing, she was not "used or employed in killing or attempting to kill any seal within the seas specified in the Imperial Order in Council." The only evidence adduced for this purpose is the evidence of Captain Mohrhouse. If we were to

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say that we gave full credit to this witness we should be overruling the learned judge in whose presence he was examined, and who had the opportunity of observing his demeanour whilst under examination and had therefore means of judging of his credibility which no Court of Appeal can have. The learned judge says most distinctly that he did not believe Captain Mohrhouse, when he stated that he was in the locality where the "Minnie" was seized by accident, and that must be conclusive. From the documents and from the circumstances in evidence, I am of opinion that not only was not the statutory presumption displaced but it was proved that the "Minnie" was a sealing vessel, fully equipped and manned and in pursuit of seals and was sailing in the neighbourhood of the islands for no other purpose except to catch seals.

In giving effect to the statute we are only called upon to find whether or not the vessel, having been taken in prohibited waters, has proved that she was there for a lawful purpose. The learned judge who heard the evidence says she was not, and the evidence of Captain Mohrhouse being discarded for the reason above given that conclusion is inevitable.

The presumption of the liability of the "Minnie" as declared by the statute has not been rebutted and for this reason alone we could not reverse the finding of the learned judge; but, I repeat, even if the onus was upon the crown, the circumstantial evidence is sufficient to prove that the "Minnie" was guilty of an infraction of the statute and order in council.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *Arthur Louis Belyea.*

Solicitor for respondent: *Chs. E. Pooley.*