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TEXT OF THE JUDGMENT

Delivered by Chief Justice Begbie in the Celebrated "Oscar and Hattie" Case.

Decision Against the Schooner Which is Confiscated to the Crown.

Below is given the text of the judgment, delivered on the 5th inst., in the celebrated "Oscar and Hattie" case, by Sir M. B. Begbie, C. J., sitting as local judge in Admiralty:

"In this case the Court is asked to condemn the Oscar and Hattie for a contravention of the Behring's Sea Act, 1891, chapter 19, section 1, sub-section 2 b: 'A British ship shall not be used in such killing, hunting or attempt,' i. e., killing or hunting or attempting to kill or hunt seals in the prohibited limits. By sub-section 5 of the same section of the act: 'If a British ship be found within the prohibited limits having on board fishing or shooting implements or seal skins, etc., the onus shall be on the owner or master to show that the ship was not used or employed in contravention of the act.'

"The Oscar and Hattie left Victoria on a sealing voyage on the 28th January last, and took a new departure from Yakima, in Oregon, on the 18th February. She was seized on Wednesday, the 31st August last (schooner's, i. e. Victoria, time, disregarding the 180 degree long. limit) in Gotzleb harbor, on the north side of Atu island, and so, within the prohibited waters; having on board a full equipment of arms and crew and 276 seal skins, and admittedly in all respects within the express terms of sub-section 5. And the sole defence is that the schooner was in that harbor, and in fact in Behring Sea at all, solely for the purpose of procuring water, for want of which she was quite unable to prosecute her return voyage to Victoria. The defence admits that the schooner had on the 17th June, 1892, been duly warned not to enter Behring Sea to fish there, and served with a copy of the act. The captain being examined on commission declared that the schooner had entered the prohibited limits the day before the seizure, but only in search of water. That all the seal skins on board had been secured outside those limits, viz.: a little to the southward of Copper Island, nearly 200 miles from Atu, and about 100 miles (roughly speaking) from the dividing line claimed by the United States, and which bounds the forbidden waters on the west, as the chain of the Aleutian Islands bounds them on the south. That, finding seals scarce, and the weather bad, and being besides short of water, he being then about 40 or 50 miles off the south-east end of Copper Island, determined to abandon further hunting and return to Victoria; but in order to procure water, he bore away for Gotzleb Harbor, in Atu Island, which he had known before of, and where he moored on Tuesday evening, 30th August, 6 30 p.m. The next morning he commenced watering, and took 1500 gallons on board that day, when at 5 p.m. he was seized by an officer from the United States ship Mohican

"In support of these allegations there were produced Captain Turtle's deposition, the log of the Oscar and Hattie, and Joseph Brown, a hunter. The evidence of this last witness was almost perfectly immaterial. He probably knew nothing—he certainly said nothing—as to the localities visited by the schooner in the course of the summer. Probably none of the crew except the master and the mate could speak with any knowledge of the matter, but only what they had heard from these two; and the mate was not examined.

"There seemed to be during the argument some misconception on both sides as to the nature of the charge and the facts which would exonerate the schooner. The prosecution seemed to treat the presence within the forbidden limits of a British ship fully equipped for sealing as a substantive offence. That is not so. A perfectly innocent man may be found standing over a newly slain corpse with a bloody knife in his hand. That would arouse vehement suspicion, but is not a crime in itself. Again, the defence seemed to suppose that if they showed that the schooner was not actually hunting when seized, but, on the contrary, had a very good and innocent reason for being there at that time, she was bound to be returned to the owners. That assumes in favor of the ship, the narrower meaning of the words of the act. For the question then immediately arises, do the words 'used or employed in contravention of the act' refer to the use or employment on that particular occasion, or do they not rather mean employment generally on the voyage? I think it must have the latter and the wider meaning. For otherwise, any ship seized in Behring Sea, especially if near the land (unless seized in active pursuit of seals), could easily contrive an excuse—none perhaps more easily contrived or established than a scarcity of water—to show that he had, at the time of capture, a lawful, indeed a necessary intention. And in the case of seizure of a ship actually engaged in hunting, it seems quite improbable that the legislature should enact that merely an inference, liable to rebuttal, is to be drawn from that. I think the section means that a ship seized with arms, etc., was to be deemed to have offended against the Act, and forfeitable, unless the contrary were shown. The particular purpose on which the ship was actually engaged when seized may have been, and probably would be, occasioned by, or necessary for, the prosecution of her general purpose; of which, indeed, it thus becomes a part; and though colorless and indifferent in itself, becomes illegal, just as much as lowering a boat, if performed as a part of the illegal use or employment of the ship. In a word if the schooner was short of water on August 31, it would be necessary for her to take a fresh supply, whatever she had been doing or was about to do, whether engaged in sealing or on her return to Victoria; and the taking of such supply throws no light whatever upon her plans or purposes or employment. The question therefore recurs. What is the evidence offered in rebuttal? At the end of the argument I reserved my decision: intimating at the same time that the conduct of the schooner had at the very least been so suspicious as fully to warrant the seizure on the part of the naval officers of both services. I wished also to examine the log and the courses it records for the whole voyage, about which really nothing had been said in argument. And the log produced certainly throws a strong light on the truth of the case. In Captain Turtle's evidence the only statement in exoneration is in ambiguous terms—'I never lowered a boat in Behring's Sea,' is his expression, which he again repeats, and a third time adopts when repeated to him by his counsel, excepting, of course, the boats in Gotzleb harbor on the 31st August. He uses no other expression of denial. I do not wish to attribute to him any desire to deceive the court or his owners, but many of his statements—nearly all of them—are so flatly contradicted by the statements in the log, by Commander Johnson, and even by his own evidence, that all his words are to be carefully weighed, and it is impossible to carry them further than the dry meaning they express. It is evident that he does not, in express terms, contradict the charge that he was in Behring Sea attempting to hunt seals, and that the schooner was employed for that purpose. All he says is that he himself never lowered a boat there. To understand the accuracy of Capt. Turtle's memory, and the credit his statements deserve, we must compare them with the log, with his own statements, and with the other evidence in the case. Now his own statement, made on oath, is that he made up his mind to get water on Friday, the 26th August, when 40 or 50 miles south of Copper Island, immediately before bearing away for Atu Island; that he could not make the south side of Atu Island on account of the wind, and that his want of water was the only reason why he was found within Behring's Sea at all. Every one of these statements is contradicted by the entries in the log. On the 26th the log makes no mention of scarcity of water, but states that at noon that day they sighted Copper Island 20 miles off, ran for six hours north west, which must have taken them pretty well up the coast of Copper I.; and then, i.e., 6 p.m. on August 26, commenced a south-easterly course, on the average, for about 60 hours. Then the log for the first time mentions a shortness not of water only but of fuel also, and that Captain Turtle resolved to find a supply of both (i. e.: water and drift wood) "here." This was at noon on the 29th, up to which time their course seems to have been well enough directed for Victoria. The distance run each day, as well as the rate per hour, is entirely omitted from the log; but it seems reasonable that on the 29th August they should be well to the southward and eastward, not of Atu Island merely, but of Aguttou, an island 15 or 20 miles south of Atu; an appreciable distance on the return to Victoria. Then, according to the log, the master, making for water and fuel, turns his course completely round, viz., westward, in consequence of which manœuvre, about 10 p. m. Aguttou Island is stated in the log to be abeam; and they double the west end of Atu Island the following morning, the 30th. So completely does the log contradict the master's statement that he could not make the south side of Atu Island for the wind, whereas he had just come from the south side. Of course, it may be that there is no convenient watering place either on Aguttou or the south side of Atu; but that is not what the master says was his reason for making Gotzleb Harbor. The master's evidence is also contradicted as to the state of the weather on Gotzleb Harbor. The log alleges the wind to be strong northerly; cloudy and rainy; the master describes the way as an open roadstead facing due north, but that he was protected against the heavy swell—"rough, stormy, with a heavy sea,"—by a *westerly* bluff, which could hardly protect him from the north. The log says nothing of this. Commander Johnson's evidence contradicts it; and the state of the weather on this lee shore did not prevent the schooner taking on board 1,500 gallons of water in two or three hours when he once commenced operations. Captain Turtle's evidence (in itself not very probable) as to the statements of Commander Johnson, immediately after the capture, concerning the steamer's previous movements, of which the Commander could, of course, absolutely know nothing, is completely contradicted by the Commander himself. Nor does Captain Turtle fail to contradict himself apparently. 'Gotzleb is the harbor I know' (p. 2) 'I did not want to go into Tschitschogoff harbor but Gotzleb' (p. 3). But at p. 11 he has forgotten this preference, and says he went into Gotzleb as the only one he could make with safety. By his evidence also on the same p. 11, Captain Turtle appears never to have been in Behring's Sea in his life, except on this unfortunate occasion. How did he know these two harbors so well as to distinguish between their characters? He says he had no chart except the general chart of Behring's Sea, on a scale, I suppose, of some 40 miles to the inch; and his deposition leads one to suppose that he had no other sources of information; and (p. 11) he had never been on a sealing voyage before. How then did he know? This seems to have struck even himself a little, for when asked why he went into that particular harbor, he says in the same page, after giving a very bad account of the weather: 'It was the only harbor I could make out that I thought it safe to go into.' And this witness is very cautious about his statements, for, at p. 13, he for long declines to commit himself to the statement that the Aleutian Islands are the south boundary of Behring Sea, though he was warned by the United States steamship Adams, and furnished with copy Proclamation, Act of Parliament, and Order-in-Council. Clearly none of these statements by Capt. Turtle can be relied on for rebutting the statutory inference which I am commanded to draw from the equipment of the schooner.

"Then I was referred to the log, and certainly the entries there show, if they can be relied on, that the Oscar and Hattie did not during the month of August enter on the forbidden limits, except with an innocent purpose. But upon the log, as produced, there are many remarks to be made. In the first place I apprehend that in these proceedings the statements in the log, like the entries in a merchant's ledger or day books, may be evidence against the owners but not for them. In the next place, on examining the hand writing, the whole appears to have been written by Peters, the mate, as it professes to be; certainly, I think, by a German; and the last entry states their arrival at Ounalaska on the 5th September. The original log book ought surely to have been taken into the possession of the captors when the schooner herself was seized, and carefully retained by them. Then the entries would have been beyond suspicion, and would, perhaps, have contained much information which is now wanting.

"I do not quite understand how the log-book has been treated since August 31. At p. 5 the master says it was seized by Ensign Harrison on August 31; but it must have been returned immediately, for Peters, the mate, continues to make entries up to the arrival, on September 5, at Ounalaska. The master's statement is either untrue or disingenuous in not stating this clearly; if he and Peters had contemplated the construction of a fictitious log, they had most ample opportunity. And the production of a log book of this character, under the circumstances, merely adds to the suspicious nature of the whole case for the defence. But the curious thing about this log book is that, although it is called on the title page, "Log of the Schooner Oscar and Hattie on a voyage from Victoria to the North Pacific," a title which is repeated at the head of each page up to the 26th or 27th August, and although we are told that the schooner first left Victoria on the 28th January, and received her present master and sailed from Yaquina on the 18th February, the log produced commences on the 30th July at some point off Copper Island. There are six months unaccounted for, and this is the only log book referred to or mentioned in argument. Under the circumstances it seems very doubtful whether Captain Turtle's statement in his deposition or the mate's in the log as to the transactions in August is the less entitled to credit. But even if one of them be exactly true, I do not see how it proves more than this, that during one month out of the seven, from the 26th January to the 30th August, the schooner did not contravene the act. Neither the log nor Captain Turtle speak of the other six months. There is therefore no rebutting evidence at all except Captain Turtle's wide declaration that except on the 30th August, he never 'lowered a boat' in Behring's sea. This does not even amount to a point blank denial that the ship was employed in hunting in contravention of the act. And for the reasons above given, the case being otherwise full of suspicion—no log book for June or July, no tender of Peters for examination, no explanation of the direct contradiction between the log and the master's statements in examination, I do not think this sufficient to rebut the statutory presumption, though if these proceedings had been against individuals, a jury might have hesitated *in favorem libertatis* to find them guilty of a misdemeanor. I therefore declare for the condemnation of the schooner, tackle and cargo under the Act. Any application respecting the fund in court or other fruits of the capture may be made to me in Chambers. I suppose the successful captors do not apply for the costs. If they do I must award them against the owners.

"If I am wrong in my construction of the inference to be drawn under section 5, there is now a cheap and ready appeal court at Ottawa; it is no longer necessary to have recourse to the costly and tardy appeal to the Privy Council."

MARINE MOVEMENTS.

The Sabrina Arrives at Vancouver—Possible Loss of the Bark Majestic.

Several sealing schooners, which were anchored at the head of the harbor, came alongside the wharves yesterday to fit out for their voyages. Janion's and Porter's wharves were literally surrounded by these vessels and on each and every one are men employed at fixing the rigging or doing some other work in connection with the boats. In and around the Shipping Master's office stand crowds of men almost every afternoon, each anxiously waiting to sign on some schooner. Sealing men in general expect better luck this season, if the weather is fine, for, although the fleet is larger, the vessels will be more divided, in consequence of so many leaving for the Japan coast. In this way the schooners which will remain on this coast will be fewer and the chances of getting close to the wary seals better.

THE SABRINA ARRIVES.

The British bark Sabrina, 747 tons, Capt. Organ, was towed up to Vancouver on Monday by the American tug Wanderer, just six months out to a day from London, Eng. She left there on July 9, and has had a very rough passage. She was off Cape Horn on September 9, and it was over five weeks before she rounded it, being driven back about 500 miles. Several of her sails were split, but no serious damage was done. She put into Valparaiso on November 15, as her water tank was leaking, and sailed again on the 17th. The balance of the passage was made in quick time, the weather being fine all the way. On December 21 she spoke the British ship Micronesia, 20 days out from San Francisco to Cork, in Lat. 10 N., Long. 121 W. On the 22nd she spoke the British bark Lindores Abbey, in Lat. 12, 29 N., Long. 123 W., 15 days out from Astoria to Galway. The Sabrina is consigned to Bell-Irving & Patterson and has on board a cargo of about 1,100 tons dead weight of general merchandise. The bulk of it is for the Canada Paint Company, of Victoria, and consists of machinery and supplies. The Sabrina has already been chartered to carry a cargo of lumber from Vancouver to Valparaiso.

LORENTZEN MAY BE LOST.

A San Francisco telegram of yesterday says "there is considerable apprehension for the safety of the bark Majestic, Lorentzen, master. The vessel, which is an old one and carries a crew of thirteen men, left Seattle twenty-four days ago with coal cargo."

Go to Morris', Colonist block, for pipes and cigar holders for Christmas presents.

INCENDIARY FIRES.

Insured Furniture That Did Not Burn, Though Saturated With Coal Oil.

A Very Suspicious Blaze on Frederick Street—An Unoccupied House on Fire.

Another fire inquest was held yesterday, the present inquiry having reference to a blaze which occurred on the 4th November last, at the house, 23 Frederick street, held by William Jones. The house and furniture were fully insured, and soon after the fire, an inspection showed marked traces of incendiarism; several articles being saturated with coal oil. So suspicious were the circumstances attending the fire, that it was deemed advisable to hold an investigation. Police Magistrate Macrae presided, and the following jury were sworn: Messrs George Maynard, Jas Menier, John Whitfield, T. Wilson and B Levy.

William J. McKeon was the first witness called: He resides at 53 Frederick street, and on the night of November 4, was going home about 12 o'clock. Turning the corner of Quadra street he met a man whom he asked if there was not a fire, and the man said no, that it was a fog setting in. On reaching the house, 23 Frederick, he found it to be on fire, and gave the alarm by telephone. The man to whom he spoke at Quadra street was running in an opposite direction to the fire. The man was about 5 ft. 7 in. in height, with full whiskers tinged with grey, and he wore a light overcoat. Witness knocked at the door of the burning house to give the alarm, but there was no person inside—the house was unoccupied. The fire was coming from the southeast corner of the house between the second and fourth windows.

Wm. Monteith deposed that he was the agent of the City of London Insurance Company. He insured the furniture and effects of William Jones in the house, 23 Frederick street—$750 on the furniture; $150 on organ, and $100 on wearing apparel. The insurance was effected on February 11, 1892, and was for one year. The insurance was effected by a sub-agent, named Oliver.

The Magistrate asked what the sub-agent's report was.

Witness replied that Oliver reported that this amount of insurance was required, and that he had inspected the premises and had satisfied himself that the goods insured were value for the amounts. When Mr. Jones left the premises he removed the organ and wearing apparel—at least so it was reported.

Examination continued—After the fire Mr. Jones reported the matter, claiming $750 for furniture destroyed. The claim was not paid. Witness visited the place after the fire and found that it had been confined to a limited portion of the building—the pantry and bath-room. In a closet in one of the bed-rooms he found a quantity of charred timber saturated with oil. It was impossible that a fire in this closet could have been the result of the fire in the bath-room or pantry, as they were separated by a passage.

A sheet was produced, saturated with oil, and identified by witness as one from which he had torn a piece. This piece he lit with a match and it burned quickly. The sheet was taken from one of the beds, and there was a quantity of paper lying round also saturated with oil. Pillows, mattresses, etc., in different rooms also presented the appearance of having been soaked in oil.

The Magistrate—Have you any doubt in your mind that these things were saturated with coal oil?

Witness said he had no doubt whatever on the point—it was coal oil. He subsequently had the furniture of the house appraised, and the appraiser, who acted for both parties, valued the damage at $240—that was the furniture remaining after the fire.

The Magistrate—Was there any furniture destroyed by fire in any of the rooms of the house except the bathroom and pantry?

Witness said that he did not notice any other damage by fire, and for the contents of the bathroom and pantry, which were destroyed, Mr. Jones was allowed $80 by the company and $240 for other damage.

Chief Deasy—Did Mr. Jones come down the morning after the fire and report the removal of the organ?

Witness replied that he could not remember the exact date or time at which the report was made, and added, in reply to a further question:

"I expressed my surprise at seeing the house so meagrely furnished, considering the amount of insurance."

"Mr. Oliver has insured quite a number of buildings for your company?" suggested the Chief.

Witness answered in the affirmative, and said that Mr. Oliver had secured the insurance on A. S. Richardson's property on Johnson street, on Seivertz's premises, Spring Ridge, on J. A. Sayyea's, North Park street, and on St. George's Inn, Esquimalt road. All these claims had been adjusted by the company.

Arthur William Jones, representing the Caledonian Insurance Co., deposed that he had insured the house 23 Frederick street for Wm. Jones for $1,500. The insurance was effected in March last, and was for three years. Some days after the fire in the house Mr. Lapointe came to him and claimed the amount, saying that he was the owner of the house. Mr. Jones, twelve days afterwards, put in a claim, but having parted with his interest in the property without notifying the company the amount was not paid.

To Chief Deasy: I do not consider the building was worth $1,500; I would not have written $900 on it had I seen it before the fire. I think that about $200 or $250 would have put the house in good repair after the fire.

Murdoch A. Morris, a carpenter and builder, deposed that he knew William Jones, and lived with him in the house, 23 Frederick street, for three months previous to November 1, three days before the fire. He rented the house furnished.

Witness described the furniture of the house in detail. He said there was no organ on the premises, and only two small coal oil cans. One produced in court, and found in the house after the fire, was not there during witness' tenancy. When about one month in the house, Mr. Lapointe informed him that having purchased the property, the rent was to be paid to him.

John Oliver, Custom house officer at Esquimalt, deposed that during spare time he acted as an insurance agent for Mr. Monteith. He knew Mr. William Jones, and secured the insurance of his house, 23 Frederick street, in February last, for $1,000, made up as follows: $750 on household furniture, $150 on organ and $100 on wearing apparel. When Jones left the house and went to the Clarence hotel, there was no insurance taken off the total. At the time the place was insured it was a well furnished house, worth fully $1,000. After the fire Jones informed witness that he had removed the organ and wearing apparel. After the fire witness visited the house, and such furniture as was there appeared to him to be that which he had originally insured. There did not appear to have been near so much furniture in the house as when it was first insured.

To Chief Deasy:—I had several fires in property insured by me. At Seivertz' I had $500, at Sayward's $800, St. George's Inn $1,500. Parties insuring furniture should report before removing any portion of it, but the practice is not strictly adhered to. I have had insurance on other property belonging to Mr. Jones, but not on the Clarence Hotel since Mr. Jones took it. After a fire the insurance company or the owner of the property put a watchman on. In this case, I believe, some one was looking after the property for the first few days, but what happened after that I don't know. My commission is 15 per cent. on premiums on insurances secured.

To the Magistrate:—It is quite possible that a policy would be issued on information given by me to a clerk in the office of Mr. Monteith.

Cross-examined by Mr. Jones:—Witness said that he had been in the insurance business for twenty years and when he insured the house, 23 Frederick, he considered that all the furniture was included. He believed the risk to be a very safe one.

At this stage of the proceedings the court was adjourned until 2 p. m. on Friday, for the hearing of further evidence.

OVERCROWDED LODGINGS.

Sir Matthew B. Begbie's Judgment in the Case of Wing Kee.

He Had no Guilty Knowledge of His Tenants' Breach of the Law.

SUPREME COURT.

(Before Sir M. B. Begbie, C. J.)

Re. Wing Kee—Case stated by Farquahar Macrae, a police magistrate, to the Supreme court, under Consolidated Statutes, 53 Vic., Cap. 37, section 28, in effect as follows:

Wing Kee was, on the 15th December last, convicted upon an information charging that "he, at the city of Victoria, unlawfully did suffer to be occupied as a dwelling or lodging a certain room which does not contain at least 384 cubic feet of space for each person occupying the same, contrary to Consolidated Health by-law, 1886," and fined $10 and costs.

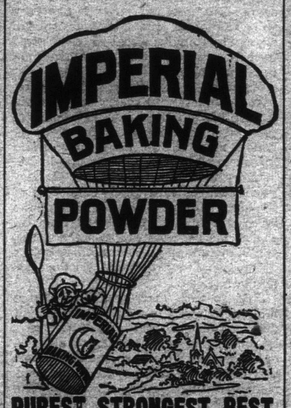
It was proved that the room in question was occupied as a lodging by such a number of Chinamen; that there was not 384 cubic feet of space in the room to each; that Wing Kee is a lessee of the building, which is divided into about 54 rooms utilized for lodgings, and had sublet the room in question to another Chinaman at a monthly rental of $1 50, which tenancy subsisted at the time of the alleged offence. All money paid by other persons for the use and occupation of the said room were paid to and received by the tenant and not by Wing Kee. Wing Kee was not in possession or occupation of said room at time of offence. Wing Kee is a merchant residing and carrying on business in premises different to those where the offence occurred and did not himself or by his agents superintend the internal management or arrangements of said rooms when let. At the time of letting said room Wing Kee had notified said tenant that said room could not lawfully contain more than three lodgers and had requested him to comply with said by-law.

The clause in the by-law is as follows: Consolidated Health By-law 1886.

"17. No person shall let, occupy, or suffer to be occupied, as a dwelling or lodging, any room which (a) does not contain at least 384 cubic feet of space for each person occupying the same."

Lindley Crease for the appeal contended that the overcrowding was not shown to have been with the privity or consent of the defendant. His lessee of the room was not his agent for any purpose, nor is he bound in any way by his wrongful acts in the management of the room, certainly not by his breaches of the law. The case of master and servant, or principal and agent, might be different, but even then, unless there was conduct which would make him *particeps criminis*, or a principal to the offence, there would be no liability. Wing Kee cannot be said to have suffered the room to have been occupied by the number of lodgers of his sub-tenant as proved. The sub-tenant suffered that. It is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that the offence is being committed on his premises, from which it can be inferred that he connived at what was going on.—Bosley v. Davies, 1 Q.B.D. 84. D. M. Eberts contra:—The intention of the bye-law is to throw upon the owners of premises the responsibility of seeing that they are not occupied so as to infringe the provisions against overcrowding. Constructive knowledge will be imputed to them. Constructive knowledge is sufficient. A man may be said to suffer a thing to be done if it is done through his negligence. The dominion of a house is in the landlord. Halligan v Ganly, 19 L.T.N.S., 268.

Begbie, C. J.: The facts are insufficient to fix the landlord with guilty knowledge or participation in the commission of the offence.—Appeal allowed with costs, and conviction quashed.



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