Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Powell v. The Apollo Candle Company, Limited, from the Supreme Court of New South Wales: delivered 13th February 1885.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE main question in this case is, whether section 133 of the Customs Regulation Act of 1879 of the Colony is, or is not, *ultra vires* of the Colonial Legislature. The section is in these terms:—"Whenever any "article of merchandise then unknown to the "collector is imported, which, in the opinion of "the collector or the commissioners, is apparently "a substitute for any known dutiable article, or "is apparently designed to evade duty, but "possesses properties in the whole or in part "which can be used or were intended to be applied "for a similar purpose as such dutiable article, "it shall be lawful for the Governor to direct "that a duty be levied on such article at a rate "to be fixed in proportion to the degree in which "such unknown article approximates in its "qualities or uses to such dutiable article; and "such rate thus fixed shall be published in a "Treasury order in the Gazette, and one other "newspaper published in Sydney, and exhibited "in the Long Room or other public place in the "Custom-house, and a copy of all such Treasury "orders shall, without unnecessary delay, be "laid before both Houses of Parliament."

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The manner in which this question came before the Courts is this:—In pursuance of this section an Order in Council was issued imposing a duty on the importation of stearine, the Order following the words of the Act; whereupon the collector of customs insisted on a certain duty of a penny per pound, amounting to 92*l.* 1*s.* 9*d.*, being paid on the importation of some 1,500 barrels of stearine. The Plaintiffs paid that sum under protest, and, in pursuance of section 20 of the same Act, brought an action for the purpose of recovering it. The collector defended himself by a plea to this effect:—He recites that stearine is an article of merchandise, using the descriptive words in the Act which have been read; and goes on to say that "thereupon the "Governor, with the advice of the Executive "Council, duly and in acordance with the pro-"visions of the said Act directed that a duty "of one penny per pound weight should thence-"forth be levied on stearine;" and "the said "rate so fixed was duly published in a Treasury "order," and so on. There was a demurrer to this plea, on the ground that the 133rd section of the Customs Consolidation Act, was beyond the competence of the Legislature to enact. This demurrer raises the main question. There is a subsidiary question on the pleadings which will be referred to hereafter.

The powers of the Colonial Legislature depend upon a Colonial Act known as "the Constitution Act," to which Her Majesty assented by virtue of powers given to her by an Imperial Statute, the 18th & 19th Vict. cap. 54, to which the Colonial Act was a schedule. It may be as well to observe that the 4th section of the Imperial Act is in these terms:—"It shall be lawful for the Legis-"lature of New South Wales to make laws "altering or repealing all or any of the pro-

" visions of the said reserved bill in the same " manner as any other laws for the good govern- " ment of the said Colony, subject, however, " to the conditions imposed by the said reserved " bill on the alteration of the provisions thereof " in certain particulars until and unless the " said conditions shall be repealed or altered " by the authority of the said Legislature,"—a somewhat wide power.

The material sections in this Constitution Act are the following. Section 1:— " There shall be, in place of the Legis- " lative Council now subsisting, one Legis- " lative Council and one Legislative Assembly, " to be severally constituted and composed " in the manner herein-after prescribed; and " within the said Colony of New South Wales " Her Majesty shall have power, by and with " the advice and consent of the said Council " and Assembly, to make laws for the peace, " welfare, and good government of the said " Colony in all cases whatsoever." There follows a proviso, "that all bills for appro- " priating any part of the public revenue, or " for imposing any new rate, tax, or impost, " subject always to the limitation in contained " clause 62 of this Act," which clause is not to be found, and may be disregarded, "shall " originate in the Legislative Assembly of " the said Colony." Section 44 prohibits the Legislature of the Colony from levying duty upon articles imported *boná fide* for the supply of Her Majesty's land forces, or enforcing any duties or charges upon shipping at variance with any treaty of Her Majesty. Section 45 is in these terms:—" Subject to the provisions " of this Act, and notwithstanding any Act or " Acts of the Imperial Parliament now in force " to the contrary, it shall be lawful for the " Legislature of the Colony to impose and levy

" such duties of customs as to them may seem " fit, on the importation into the Colony of any " goods, wares, and merchandise whatsoever, " whether the produce of or exported from the " United Kingdom, or any of the colonies or " dependencies of the United Kingdom." And there follows a prohibition to impose differential duties.

It was held by the Supreme Court in the Colony that, under the terms of the Constitution Act, the Legislature had not the power to enact the clause in question. And the argument before us has been based on very much the same grounds as the Judgement, namely, that the Colonial Legislature had defined and limited powers which they could not exceed; that the power given to them to impose duties was to be executed by themselves only, and could not be entrusted by them wholly or in part to the Governor or any other person or body. It was further argued that the proviso in the first section, that all money bills should originate in the Legislative Assembly of the Colony, was an indication that the Imperial Legislature assumed that all legislation in the Colony with respect to taxation should be by Bill passed through both Houses.

Two cases have come before this Board in which the powers of Colonial Legislatures have been a good deal considered, but these cases are of too late a date to have been known to the Supreme Court when their Judgement was delivered. The first was the case of the *Queen* v. *Burah* (3rd Law Reports, Appeal Cases, page 889), in which the question was whether a section of an Indian Act conferring upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, should be applied to a certain district, was or was not *ultra vires*. In the Judgement of this

Board, given by the Lord Chancellor, the legislation is declared to be *intra vires*, and the Lord Chancellor lays down the general law in these terms:—"The Indian Legislature has "powers expressly limited by the Act of the "Imperial Parliament which created it, and it "can of course do nothing beyond the limits "which circumscribe these powers. But when "acting within those limits it is not in any sense "an agent or delegate of the Imperial Parliament, "but has, and was intended to have, plenary "powers of legislation as large, and of the "same nature, as those of Parliament itself."

The same doctrine has been laid down in a later case of *Hodge* v. *The Queen* (9th Law Reports, Appeal Cases, page 117), where the question arose whether the Legislature of Ontario had or had not the power of entrusting to a local authority,—a Board of Commissioners,—the power of enacting regulations with respect to their Liquor Licence Act of 1877, of creating offences for the breach of those regulations, and annexing penalties thereto. Their Lordships held that they had that power. It was argued then, as it has been argued to-day, that the local Legislature is in the nature of an agent or delegate, and, on the principle *delegatus non potest delegare*, the local Legislature must exercise all its functions itself, and can delegate or entrust none of them to other persons or parties. But the Judgement, after reciting that such had been the contention, goes on to say, "It appears to "their Lordships, however, that the objection thus "raised by the Appellants is founded on an entire "misconception of the true character and position "of the Provincial Legislatures. They are in "no sense delegates of or acting under any "mandate from the Imperial Parliament. When "the British North America Act enacted that "there should be a Legislature for Ontario, and "that its Legislative Assembly should have ex-

" clusive authority to make laws for the Province
" and for provincial purposes in relation to the
" matters enumerated in section 92, it conferred
" powers, not in any sense to be exercised by
" delegation from or as agents of the Imperial
" Parliament, but authority as plenary and as
" ample, within the limits prescribed by section
" 92, as the Imperial Parliament in the plenitude
" of its power possessed or could bestow. Within
" these limits of subjects and areas the local
" Legislature is supreme, and has the same
" authority as the Imperial Parliament."

These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate.

Applying these principles to the present case, it appears to their Lordships that the general terms of the first section of the Constitution Act, giving power to make laws "for the peace, " welfare, and good government of the Colony in " all cases whatsoever," and section 45, to the effect that it shall be lawful for the Legislature of New South Wales to impose and levy such duties and customs as to them may seem fit, confer plenary powers of legislation comprising within their scope the section of the Customs Consolidation Act now in question. Those sections are subject to some limitations in sections 44 and 45, which admittedly do not apply to the present case. But it has been argued that the proviso in section 1, that all bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost, shall originate in the Legislative Assembly in the Colony, is at the least a direction, on the part of the Imperial Parliament, that all levying of taxes in the Colony shall be by bill

originating, as in this country, in the Lower House. It may be that the Legislature assumed that, with respect to customs duties, such a course would be pursued as undoubtedly is in accordance with the usages and traditions of this country; but it appears to their Lordships impossible to hold that the words of an Act, which do no more than prescribe the mode of procedure with respect to certain bills, should have the effect of limiting the operation of those bills. The Customs Act containing the clause now in question may be presumed to have been introduced in the Lower House according to the directions of the statute. But if without the proviso it would be competent to insert this clause in the bill, it is difficult to see how the proviso, which merely requires that the bill shall be introduced in one house and not in the other, can have the effect of making the clause *ultra vires*. It appears to their Lordships to have no such effect.

It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances their Lordships are of opinion that the Judgement of the Supreme Court was wrong in declaring section 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature.

The only question remaining arises also upon the pleadings. The Plaintiffs demurred to the plea of the collector, among other things, on this ground,—that it stated merely the opinion of

the collector, and not the fact that the stearine was a substitute for a dutiable article, and so on; and they raised the same question further in the third replication, which is in these terms :—"The article of merchandise known as stearine "did not in fact possess properties in whole or in "part which could be used or were intended to be "applied for a similar purpose as a certain "known dutiable article known as candles." The effect of this replication is to raise the question whether, under section 133, the opinion of the collector is the condition precedent of the action of the Governor, or whether the fact is such a condition precedent. The words are, "Whenever any article of merchandise then "unknown to the collector is imported, which, "in the opinion of the collector or of the com-"missioners, is apparently a substitute for any "known dutiable article, or is apparently designed "to evade duty, but possesses properties in the "whole or in part which can be used or were "intended to be applied for a similar purpose "as such dutiable article." It seems to their Lordships that the words, "in the opinion of the collector," govern the whole of this clause, and that if the collector is of opinion that the "article is apparently a substitute for any known "dutiable article, or is apparently designed to "evade duty," and is of opinion further that it "possesses properties," &c., this opinion, whether right or wrong, authorises the action of the Governor. The replication therefore admitting the opinion of the collector, but alleging the fact to be at variance with it, is bad, and the plea is not bad for averring only the opinion and not the fact.

With respect to an argument which has been raised to the effect that the latter part of the section, directing "that a duty be levied on such "article at a rate to be fixed in proportion to

" the degree in which such unknown article " approximates in its qualities to such dutiable " article," does not apply if the allegation in the third replication be treated as admitted,—as it must be on demurrer—it appears to their Lordships enough to say that this point does not appear to be raised by the replication.

Under these circumstances their Lordships will humbly advise Her Majesty that the Judgement appealed against be reversed, that Judgement on the demurrers be entered for the Defendant, and that the Defendant have the cost of the demurrers in the Supreme Court. He will also have the costs of this Appeal.