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In the Privy Council.

No. 131 of 1931.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

BETWEEN :

E. R. CROFT - - - - - (*Defendant*) *Appellant*

AND

SYLVESTER DUNPHY - - - - - (*Plaintiff*) *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal by the Defendant, by special leave, from a Judgment of the Supreme Court of Canada (Duff, Rinfret and Lamont, JJ. —Newcombe and Cannon, JJ., dissenting) dated the 30th June 1931 reversing the unanimous Judgment of the Supreme Court of Nova Scotia, *in banco*, dated the 10th May 1930 affirming the decision at the trial (Paton, J. with a Jury) whereby the Respondent's action had been dismissed.

p. 45.
p. 38.
p. 9.
p. 3.

2. The action was commenced in the Supreme Court of Nova Scotia by the Respondent, a resident of North Sydney in Nova Scotia as owner of the Schooner "Dorothy M. Smart" and her cargo against the Appellant, the Commander of Patrol Boat No. 4 in the employ of the Department of National Revenue of Canada for the return of the said Vessel and her cargo which had been seized by the Appellant as Master of said Patrol Boat for an alleged violation of the Customs Act of Canada, or in the alternative for payment of the value of the Vessel and cargo and damages for their detention.

p. 11, l. 25.
p. 4, l. 21.
p. 11, l. 25.
p. 11, l. 13.
p. 11, l. 26.
p. 4, ll. 31 *et seq.*

3. The seizure in question was made on the 13th June 1929 at a point 11½ miles off the Coast of Nova Scotia, under the provisions of Sections 151 and 207 of the Customs Act, Chap. 42 R.S.C. 1927, as amended by Chap. 16 of the Acts of 1928.

p. 11, l. 10.
p. 11, l. 21.
p. 11, l. 31.
p. 4, l. 33.

CASE FOR THE APPELLANT

RECORD.

The material parts of these Sections as amended are as follows :—

“ **151.**—(1) If any vessel is hovering in territorial waters of Canada, any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and may bring the vessel into port.

“ (6) The evidence of the officer that the vessel was within territorial waters of Canada, shall be prima facie evidence of the fact.

“ (7) For the purposes of this section and section two hundred and seven of this Act ‘Territorial waters of Canada’ shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada.” 10

“ **207.**—(1) If upon the examination by any officer of the cargo of any vessel hovering in territorial waters of Canada, any dutiable goods or any goods the importation of which into Canada is prohibited are found on board, such vessel with her apparel, rigging, tackle, furniture, stores and cargo shall be seized and forfeited and if the master or person in charge refuses to comply with the lawful directions of such officer or does not truly answer such questions as are put to him respecting such vessel or her cargo or her voyage, he shall be liable to a penalty of not less than four hundred dollars.” 20

p. 4, l. 13. 4. The said Schooner “Dorothy M. Smart” was at the time of the seizure registered at Digby in the Province of Nova Scotia, Canada.

p. 3. 5. The action was tried in October 1929 before Paton, J., with a Jury. The Jury found that the seizure took place within twelve marine miles of Flat Point Light House. It was agreed that all other questions of fact were to be determined by the learned trial Judge. 30

p. 3, l. 11.
p. 5, l. 18. 6. On March 5th 1930 the trial Judge delivered his decision dismissing the action. He found that the “Dorothy M. Smart,” when seized, was “hovering” within the meaning of that word as used in the Customs Act, and held that Sections 151 and 207 of the Act were within the legislative competency of the Parliament of Canada.

p. 9.
p. 9, l. 19. 7. From this decision the Respondent appealed to the Supreme Court of Nova Scotia, *in banco*, and on the 10th May 1930 the unanimous decision of the Court, consisting of Harris, C.J., and Chisholm, Mellish, Graham and Ross, JJ., was delivered by Chisholm, J., who held that the sole question for determination on the Appeal was whether the Parliament of Canada had power to enact the legislation embodied in the Customs Act and amendments relating to the seizure of vessels registered in Canada found hovering in waters adjacent to its shores. He was of the opinion that the 40

p. 10, l. 3.

p. 10, l. 26.

express power given to the Parliament of Canada to make laws for the peace, order and good Government of Canada and to raise revenue by any mode or system of taxation, carried with it the implied power to enact any such laws as may be reasonably necessary to make the revenue laws of the Country effective. RECORD. p. 10, l. 32.

8. From this latter decision the Respondent appealed to the Supreme Court of Canada and it was agreed between Counsel for the parties that the only question to be argued on such Appeal was the validity of Section 151 of the Customs Act (as amended by Chap. 16 of the Statutes of 1928) which is printed so far as material in paragraph 3 of this Case. p. 12, l. 19.
p. 12, l. 5.

9. The Appeal came on for hearing in the Supreme Court of Canada on the 16th and 17th days of February, 1931, before a Court composed of Duff, Newcombe, Rinfret, Lamont and Cannon, JJ., who (Newcombe and Cannon, JJ. dissenting), on the 30th of June 1931 gave formal judgment allowing the Respondent's Appeal and directing that the action should be remitted to the Supreme Court of Nova Scotia for disposition pursuant to the principle of the Judgment of the majority of the Court. p. 38, l. 33.
p. 38, l. 14.
p. 39, l. 1.

10. Duff, J. (with whom Lamont, J., concurred), held that the legislation in question was *ultra vires*. p. 39, l. 13.
p. 41, l. 28.

20 Subordinate legislatures do not possess extra-territorial jurisdiction unless it has been granted in express terms or by necessary implication, and a general authority to arrest ships extra-territorially does not pass under the formula "peace, order and good Government" nor does the fullest enjoyment of the powers given under the heads navigation and shipping, trade and commerce, and taxation, necessitate, in the pertinent sense, the possession of such authority. The limitation of the impeached enactment to ships of Canadian registry did not affect the matter, nor could the Colonial Laws Validity Act be construed as imparting extra-territorial validity to the enactments of a colonial legislature professing to operate extra-territorially, where the legislature is not otherwise endowed with power to pass such legislation. p. 39, l. 25.
p. 40, l. 1.
p. 41, l. 8.
p. 41, l. 22.

11. Rinfret, J., agreed with Duff, J., that the impugned section was *ultra vires*.

12. Newcombe, J., delivered a dissenting judgment, concurred in by Cannon, J., in which he held that the legislation in question in its application to the case was *intra vires*, as being within the specific power of Parliament to legislate for the regulation of trade and commerce, the raising of money by any mode or system of taxation, defence, navigation and shipping and the criminal law and for the peace, order and good Government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislatures of the Provinces, as well as the latent powers exercisable in cases of emergency. No question of international or of alien rights or of conflict between Dominion and provincial powers was involved. The learned Judge compared the project of the Respondent in using his vessel in opposition to the Customs Act, the executive power and the pp. 41-45.
p. 45, l. 13.
p. 43,
ll. 24-32.
p. 43, l. 10.
p. 43, l. 14.

RECORD. preventive service, on the outer margin of Canadian territorial waters, contiguous to his place of residence, as a depot of supply of intoxicating liquors to boats engaged in the smuggling of liquor into the Province with that of a pirate prowling on the coast or of an enemy in time of war using his vessel to supply an enemy squadron attempting to blockade a Canadian port, and thought it inconceivable that the powers of the Parliament of Canada would be found inadequate to sanction the suppression or removal of such a menace. The learned Judge also referred to the provisions of the Colonial Laws Validity Act (Chap. 63 of 1865 Imp.) and held that there was no repugnancy between the legislation in question in this appeal and any Imperial Act and that consequently Sections 151 and 207 of the Customs Act were clearly not "absolutely void and inoperative" by reason of the Colonial Laws Validity Act. Both the vessel and her owner were locally situate in Canada and the legislation in question in its application to the facts of the case was "legislation within the general scope of the affirmative words" of the British North America Act and certainly that "it violates no express condition or restriction by which that power is limited."

p. 43, l. 20.
p. 43, l. 22.
p. 43, l. 36.
p. 44, l. 1.
p. 44, l. 37.
p. 44, l. 44
et seq.

13. The provisions of the British North America Act relied on by the Appellant are as follows:—

" 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the classes of Subjects next hereinafter enumerated; that is to say,—

" 2. The Regulation of Trade and Commerce.

" 3. The raising of Money by any Mode or System of Taxation.

" 7. Militia, Military and Naval Service and Defence.

" 10. Navigation and Shipping.

" 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

" 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

" And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

14. The Sections of the Colonial Laws Validity Act (28 & 29 Vic. c. 63) relied upon by the Appellant are as follows :— RECORD.

10 “ (2) Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

“ (3) No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid.”

15. It is respectfully submitted that the Judgment of the majority of the Supreme Court of Canada is based upon an erroneous assumption that the Parliament of Canada is, in respect to the legislation under review, a subordinate legislature, a conception entirely irreconcilable with the status of the British Dominions as autonomous communities within the British Empire as defined by the Imperial Conference of 1926, and as since recognized, and irreconcilable also with the decisions of the Judicial Committee. p. 39, ll. 18, 24.

16. It is also respectfully submitted that the Statute of Westminster (22 Geo. V. c. 4) assented to on the 11th day of December 1931, which in effect declares that the Parliaments of the Dominions have full power to make laws having extra-territorial operation, is to be construed retrospectively and so construed confirms the authority of the Parliament of Canada to pass the attacked Sections of the Customs Act.

30 17. The Appellant, therefore, respectfully submits that the Appeal should be allowed and the Judgment of the Supreme Court of Canada reversed for the following, amongst other,

REASONS

1. Because Sections 151 and 207 of the Customs Act were validly enacted by Parliament as being for the peace, order and good Government of Canada.
 2. Because the said Sections were validly enacted as falling within the following enumerated heads of Section 91 of the British North America Act, that is to say, the regulation of trade and commerce, the raising of money by any mode or system of taxation, defence, navigation and shipping, the criminal law.
- 40

3. Because the legislation attacked is within the general scope of the affirmative words conferring legislative power in the British North America Act and violates no express condition or restriction by which that power is limited.
4. Because the legislation in question, restricted as it is in its operation, is necessarily incidental, in its application to the facts of this case, to the effective enforcement of other provisions of the Customs Act the validity of which is not and cannot successfully be questioned.
5. Because the Sections attacked are not in any sense repugnant to the provisions of any Imperial Statute and are therefore, by virtue of the provisions of The Colonial Laws Validity Act, valid. 10
6. Because if the power to pass the impugned Sections had not previously been delegated to the Parliament of Canada it was so delegated by the act of the Crown in assenting to the Statutes containing these Sections.
7. Because by virtue of the Statute of Westminster (22 Geo. V. c. 4) the Parliament of Canada has power and must be deemed at all material times to have had power to enact the Sections in question. 20
8. Because the majority of the Supreme Court of Canada erred in assuming that the Parliament of Canada is a subordinate legislature.
9. Because the Judgments of Newcombe and Cannon JJ., in the Supreme Court of Canada, the Judgment of the Supreme Court of Nova Scotia, *in banco*, and the Judgment of Paton J. are right.

C. B. SMITH.

J. McG. STEWART. 30

FRANK GAHAN.

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CASE FOR THE APPELLANT.

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