55, 1932

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.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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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.*

RECORD OF PROCEEDINGS.

In the Supreme Court of Nova Scotia.

No. 1. Formal Judgment, 27th March 1930.

No. 1.
Formal Judgment.

IN THE SUPREME COURT.

BETWEEN

SYLVESTER DUNPHY - - - - - - - - *Plaintiff*

AND

E. R. CROFT - - - - - - - - - - *Defendant.*

This action having come on for trial at the Court House, Sydney, in the County of Cape Breton on the 9th, 10th, 11th, 12th and 14th days of October, A.D. 1929, before the Honorable Mr. Justice Paton with a jury and after hearing the evidence adduced and it having been agreed by counsel for the Plaintiff and Defendant that the only question to be submitted to the jury was the question hereinafter set out, and that all other questions of fact were to be decided by the learned Judge, and after hearing counsel as well for the Plaintiff as for the Defendant, the following question was submitted to the jury, to which the following answer was returned by the said jury, namely:—

Question: "Was the Schooner 'Dorothy M. Smart' at the time she was seized, within twelve marine miles of Flat Point lighthouse?"—*Answer:* "Yes."

and thereafter the Learned Judge, having heard counsel on the questions of law involved, reserved his decision herein and on the 5th day of March, A.D. 1930 was pleased to file his decision herein dismissing the Plaintiff's action with costs;

In the Supreme Court of Nova Scotia.

No. 1. Formal Judgment, 27th March 1930—*continued.*

NOW upon hearing counsel for the Plaintiff and for the Defendant and on motion;

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing by this action and that the same be and it is hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant recover against the Plaintiff the costs of action to be taxed.

DATED the 27th day of March, A.D. 1930.

(Sgd.) REGINALD V. HARRIS,
Prothonotary.

No. 2. Reasons for Judgment, Paton J.

No. 2.

Reasons for Judgment.

PATON J.

The ninety-six ton schooner DOROTHY M. SMART registered at Digby, N.S., was, with its cargo of assorted liquors, seized on June 13th, 1929, while jogging about in the waters off the Cape Breton coast of Nova Scotia. The seizure was made by the defendant in his capacity as master in charge of the Dominion Government Patrol boat No. 4. The defendant was an officer employed by the Dominion Government for the enforcement of the Customs Act, c. 42 R. S. of Canada, 1927 and had the powers of a Customs officer.

The plaintiff, a resident of North Sydney, N.S., was the owner of the schooner and its cargo. He alleges the seizure was illegal and claims a return of the vessel and cargo, or payment of their value and damages for their unlawful detention.

The value of the vessel and cargo and the amount of damages claimed are set forth in the Statement of Claim as follows:

Value of vessel - - - - - -	$16,000
Value of liquors - - - - - -	75,550
Damages for detention of vessel - - -	10,000
Damages for detention of cargo - - -	40,000

The defence is that the vessel had dutiable goods on board, was "hovering" within twelve miles of the coast, and was liable to seizure under sections 151 and 207 of The Customs Act (ante) as amended by c. 16 of the Acts of 1928. The material parts of those sections applicable to this case 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."

" 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."

On the trial a mass of evidence was taken upon the issue as to whether the schooner was within twelve miles of land at the time it was seized. The jury found it was three quarters of a mile inside that limit.

Counsel agreed that all other issues should be decided by the trial judge.

On the question of " hovering," the evidence shows that the " SMART " cleared on June 8th, 1929, and sailed on June 10th, 1929, from St. Pierre, with a cargo of assorted liquors and rum for the " High Seas ". The captain says the particular destination on the High Seas was a place about 15 miles N. E. of Flat Point Light House. That light house is at the eastern entrance to Sydney Harbour, and it would be the nearest point of land to a vessel lying in a N. E. direction therefrom. On the night of June 12th, the " SMART " arrived at its destination, and from that time until the next afternoon about 4 o'clock it was jogging about in various directions waiting for customers to come out in boats from shore.

There is no doubt the intention was to remain in such proximity to the coast as would enable customers or purchasers, under the cover of darkness or fog, to smuggle the liquor into Canada. Since the adoption of prohibition in Nova Scotia Halifax is the only entry port in Nova Scotia for alcoholic liquors, and lawful importation could not be made at North Sydney nor at Sydney.

The plaintiff, as owner of the schooner and cargo, and his captain must have known, and I find they did know, that any liquor that might be sold could only be to persons desiring to smuggle it into this country.

June 13th was foggy, with the exception of short intervals when the fog lifted. The " SMART " while jogging about in the fog got inside the twelve mile zone and was discovered by the patrol boat, but the latter's captain to make sure, went back to Flat Point Light, and returned to the schooner. He found according to his log that the distance was considerably less than twelve miles, and about 4.30 made the seizure. The captain of the schooner says he believed he was outside the twelve mile zone, and

In the Supreme Court of Nova Scotia.

No. 2. Reasons for Judgment, Paton J.— *continued.*

very likely he did. The distance was again measured by the logs of both the patrol boat and schooner when the latter was towed to port, and the distance was by both logs less than twelve miles.

I find that the schooner when seized was " hovering " within the meaning of that word as used in the Customs Act.

There still remains for consideration the very troublesome question as to the competency of the Dominion to pass the legislation under which the vessel was seized.

Plaintiff's counsel, for the purpose of showing that Canada possesses no extra territorial authority except in certain specified cases, such as Sea Coast fisheries and Coastal navigation, cited :—

McLeod v. *The Attorney General of N. S. W.*, 1891 A.C. 455;
The Merchants Shipping Act, 1894, sec. 735;
Cobett's International Law, Vol. 1, p. 144 and authorities there referred to;
Wheaton's International Law, p. 361;
Masterson's Jurisdiction in Marginal Seas, pp. 161, 162, 163 and 141 and especially this passage,—

" It may be held that the colonial jurisdiction seaward is bounded by the league, whether the Crown has any inherent jurisdiction beyond or not".

I think it is not necessary for the purposes of this decision to consider the question from the point of view of international law. The statute under discussion does not affect the rights of any foreign nation. It is expressly confined to vessels operating under a Canadian registry. The real question is: Has the Dominion, for the sole purpose of preventing smuggling by means of vessels registered in Canada, the power to regulate the conduct of such vessels within a reasonable distance from its coast, though beyond the marginal zone generally recognized by the law of nations?

If it were necessary to define a reasonable distance, I should say, it is that distance which it may be found necessary to control, in order to enforce its revenue laws with a reasonable degree of effectiveness. If this Dominion has such power, I think Canadian Courts must accept as reasonable such distance as parliament may determine. Canada not being a sovereign state, but a Dominion with conferred powers, we must go the sources from which its powers are derived, to find if we can, any authority for this particular legislation of 1928. In the *Attorney General for Canada* v. *Cain*, 1906 A. C. 542, Lord Atkinson in delivering the judgment of the Privy Council says, at p. 546, there are three ways by which powers may be delegated to one of the colonies :—

1. " . . . by royal proclamation which has the force of a statute."
2. " . . . or by a statute of the Imperial Parliament."
3. " . . . or by the statute of a local parliament to which the Crown has assented."

Lord Atkinson further says,—p. 546 :

> " If this delegation has taken place the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them."

It would appear that the assent by the Governor-General as the representative of the Crown is to be taken as the assent of His Majesty himself.

Lord Atkinson, at p. 547, in referring to the Alien Labour Act of Canada, says: " Has the Act . . . ASSENTED TO BY THE CROWN, clothed the Dominion Government with the power of the Crown itself . . . ? " The phrase " assented to by the Crown " is an adjectival clause, describing the Act as one that had been assented to by the Crown.

The assent to Canadian Acts is given under the provision of sections 55, 56 and 57 of the B. N. A. Act. Section 55 says :—

> " 55. Where a Bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure."

Lord Atkinson has made it clear that the assent in His Majesty's name by the Governor-General is, subject to the power of disallowance within two years, equivalent to the assent by His Majesty himself.

The assent of the Crown to The Customs Act is no different in form or effect than that given to the Alien Labour Act, and if such assent is one method of delegating or granting authority to the Dominion, as the Privy Council says it is, unless I am mistaken as to its meaning, the validity of Sections 151 and 207 now under consideration must be upheld. Cape Breton was part of the territory ceded to the British Crown in 1763, and of this Lord Atkinson in the *Attorney General* v. *Cain* (*ante*), at p. 545, says :—

> " In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain; *St. Catherine's Milling and Lumber Co.* v. *Reg.* (1888) 14 App. Cas. 46, at p. 53. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them."

In the Supreme Court of Nova Scotia.

No. 2. Reasons for Judgment, Paton J.— *continued.*

The Crown has not parted with its sovereignty over the territory so ceded to it, except in so far as it may have done so to this Dominion or to the Provinces of Canada under the B. N. A. Act.

Upon the authority of the *Attorney General* v. *Cain* (*ante*) it would seem that in granting power to the Federal Government of Canada to enact revenue laws, as it has done under Section 91 of that Act, there was included the right to do such things beyond territorial limits as are reasonably necessary to effectively enforce such laws or prevent their violation. The Imperial Parliament undoubtedly had the power to confer such authority and there is no good reason why such authority should have been reserved or withheld. On the other hand there are the strongest reasons why Canada should possess such right. The legislation of 1928 is not at variance with any Imperial Act that is made applicable to this Dominion and I cannot imagine circumstances which might give rise to conflicting Imperial legislation. I prefer to consider that the B. N. A. Act conferred authority to pass the legislation under review, but if it did not, I think it may be upheld by reason of the assent given to it by the Crown.

It is therefore my opinion that it was within the legislative competency of the Dominion Parliament to enact, and, in the absence of conflicting Imperial legislation, it may enforce the provisions found in sections 151 and 207 of The Customs Act.

I am pleased to say that I am fortified in the conclusion I have come to by a decision of my brother Mr. Justice Ross in *Trenholm* v. *McCarthy*, a case recently tried before him, where a vessel was seized while " hovering " outside the three mile zone and within twelve miles of the sea coast.

I find that the defendant acted upon probable cause within the meaning of section 160 of The Customs Act, and I so certify. I also find that the notice required by Section 157 of that Act was not delivered to nor left at the usual place of abode of the defendant.

The plaintiff's action will be dismissed with costs.

(Sgd.) PATON, J.

December 27th, 1930.

I, George Muggah, Prothonotary of the Supreme Court of Sydney, do hereby certify that the foregoing is a true and correct copy of the Decision of Mr. Justice Paton on file in the office of the Prothonotary of the Supreme Court of Sydney, in the County of Cape Breton, in the above cause.

DATED the 27th day of December, A.D. 1930.

GEORGE D. MUGGAH,
Prothonotary.

In the Supreme Court of Nova Scotia En Banco.

No. 3. Notice of Appeal, 29th March 1930.

No. 3.

Notice of Appeal.

Take notice that the Plaintiff herein intends to appeal and hereby does appeal from the decision of The Honourable Mr. Justice Paton filed herein and the order for judgment granted thereon wherein the Plaintiff's action was dismissed with costs to the Supreme Court of Nova Scotia sitting en banco.

And take further notice that on Wednesday, the second day of April, A.D. 1930, at the hour of 10 o'clock, in the forenoon or as soon thereafter as Counsel can be heard, a motion will be made by D. A. Cameron, K.C. of Counsel for Plaintiff for an order reversing, setting aside and vacating the said judgment and the order granted thereon. The whole of the said order for judgment and decision is appealed from.

DATED at Sydney, County of Cape Breton, the 29th day of March, A.D. 1930.

To F. D. SMITH, Esq., K.C.,
Counsel for the Defendant.

D. A. CAMERON,
Solicitor for Plaintiff.

No. 4. Formal Judgment, 10th May 1930.

No. 4.

Formal Judgment.

BETWEEN

SYLVESTER DUNPHY - - - - - - - - *Plaintiff*

AND

E. R. CROFT - - - - - - - - - - *Defendant.*

Before the Honourable the CHIEF JUSTICE, the Honourable Mr. Justic CHISHOLM, The Honourable Mr. Justice MELLISH, The Honourable Mr. Justice GRAHAM and the Honourable Mr. Justice Ross.

UPON HEARING READ the Printed Case on the appeal from the decision and Order for Judgment of the Honourable Mr. Justice Paton and upon hearing counsel as well for the Plaintiff as for the Defendant, the Court was pleased to reserve Judgment and having subsequently delivered Judgment herein;

Now upon motion:

IT IS ORDERED AND ADJUDGED that the said appeal be and is hereby dismissed with costs to be taxed and paid by the Plaintiff to the Defendant.

DATED this 10th day of May, A.D. 1930.

(Sgd.) REGINALD V. HARRIS,
By The Court.

Prothonotary.

In the Supreme Court of Nova Scotia En Banco.

No. 5.
Reasons for Judgment, Chisholm, J. (concurred in by Harris C.J., Mellish, Graham and Ross JJ.).

No. 5.

Reasons for Judgment.

CHISHOLM, J. (concurred in by HARRIS C.J., MELLISH, GRAHAM and ROSS JJ.).

The sole question for determination on this appeal is whether the Parliament of Canada has power to enact the legislation embodied in the Customs Act (c. 42, R. S. C.) and amendments thereof relating to the seizure of vessels registered in Canada which are found hovering in waters adjacent to its shores.

The sections of the Statute mentioned, touching the question are sections 151 and 207. By chapter 16 of the Statutes of 1928, section 1, the term " Territorial waters of Canada " is extended to include a belt of twelve miles from the shore, and the operation of the Statute outside the three mile limit and within the twelve mile limit is made applicable only to vessels registered in Canada.

The learned trial judge decided that the Parliament of Canada had power to pass chapter 16, section 1 of the Statutes of 1928; and he dismissed the plaintiff's action.

I agree in that result. I take it to be undisputed that the Parliament of the United Kingdom has power to pass such legislation as to its own littoral. The question then is whether power so to legislate as to Canadian territorial waters has been granted to the Parliament of Canada. The learned judge suggests that evidence of a grant of such power may be found in the fact that His Excellency the Governor General has assented to the Statutes, which are impugned; but he prefers to rely on the provisions of the British North America Act. I find myself in entire agreement with him in respect to the scope of the British North America Act. The Parliament of the United Kingdom has given express power to the Parliament of Canada to make laws for the peace order and good government of Canada in relation to matters not exclusively assigned by the Act to the Provinces; and it is declared that it shall have exclusive power to raise revenue by any mode or system of taxation. Implied in this, is power to enact any such laws as may be reasonably necessary to make revenue laws of the country effective. The sections under discussion in this case fall within that category, and I see no need to elaborate the reasons.

The appeal will be dismissed with costs.

J.

HARRIS, C.J.—I concur.

MELLISH, GRAHAM, and ROSS, JJ., concur.

In the Supreme Court of Canada.

No. 6. Statement of Case on Appeal.

No. 6.

Statement of Case on Appeal.

IN THE SUPREME COURT OF CANADA.
ON APPEAL FROM THE SUPREME COURT,
OF NOVA SCOTIA EN BANCO.

BETWEEN

SYLVESTER DUNPHY - - - - - *Plaintiff (Appellant)*

AND

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

This is a case arising out of the seizure of the Schooner Dorothy M. Smart, with a cargo of liquor on board on the 13th day of June, 1929, at a point eleven and one-quarter miles off the coast of the island of Cape Breton, in the Province of Nova Scotia, by Patrol Boat No. 4 in the employ of the Department of National Revenue of Canada, and of which the defendant, Captain Croft, was the commander.

The case was tried at the October (1929) term of the Supreme Court at Sydney, with a Jury, the Honourable Mr. Justice Paton, presiding.

It was agreed between Counsel, that the only question to be submitted to the Jury, was the distance of the Schooner from the shores of that part of Canada, at the time of the seizure; all other questions of fact, were left to the presiding Judge. The Jury found that the Schooner was eleven and one-quarter miles off the coast of Canada, or to put it in their own words: eleven and one-quarter miles of Flat Point light (a light house at the entrance to Sydney Harbor, in the County of Cape Breton).

The Appellant is the owner of the schooner and cargo, and he brought his action in the Supreme Court of Nova Scotia, for the return of the ship, and her cargo, or in the alternative, payment of the value of the ship and cargo, and damages for their detention.

On the trial, it was contended on behalf of the plaintiff, that the Dorothy M. Smart, and her cargo, were seized upon the High Seas, and that the provisions of Chapter 42, Section 151 of the Revised Statutes of Canada, " The Customs Act," as amended by 18–19 George V, Chapter 16, 1928, defining the territorial waters of Canada, as applied to vessels of Canadian register, as being within twelve marine miles, was *ultra vires* of the Parliament of Canada.

The Honourable Mr. Justice Paton, the trial Judge, found against this contention, and in his Decision, held that this provision was within the power of the Dominion Parliament, and that it was quite competent to the Parliament of the Dominion of Canada to pass such legislation, the same being a reasonable exercise of the powers conferred upon the Dominion of Canada, under Section 91 of the B. N. A. Act. From that decision, on that particular point, and none other, the Plaintiff appealed to the Supreme

In the Supreme Court of Canada.

No. 6. Statement of Case on Appeal—*continued.*

Court of Nova Scotia, and the Supreme Court of Nova Scotia, after hearing argument unanimously confirmed the Decision of Mr. Justice Chisholm, pronouncing the judgment of the Court.

From this latter decision, the Plaintiff Appellant, now appeals to the Supreme Court of Canada, and by agreement between Counsel for Appellant and Respondent, the only question to be argued before the Supreme Court of Canada is the validity of Section 151, as amended by Chapter 16 of the Acts, 1928, particularly subsection 7 :

> " For the purpose of this section and Section 207 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."

D. A. CAMERON,
327 Charlotte St., Sydney, N.S.
Solicitor for Plaintiff (Appellant)

No. 7. Notice of Appeal, 12th June 1930.

No. 7.

Notice of Appeal.

TAKE NOTICE that the Plaintiff Appellant herein intends to appeal, and hereby does appeal from the Decision of the Supreme Court of Nova Scotia, sitting En Banco, filed herein on the 3rd day of May, A.D. 1930, and the Order for Judgment granted thereon, on the 10th day of May, A.D. 1930, to the Supreme Court of Canada.

AND TAKE FURTHER NOTICE that on Tuesday, the 7th day of October, A.D. 1930, the said Supreme Court will be moved for an Order reversing and setting aside the Decision of the said Supreme Court of Nova Scotia and the Order granted thereon.

DATED at Sydney, in the County of Cape Breton, the 12th day of June, A.D. 1930.

D. A. CAMERON,
327 Charlotte St., Sydney, N.S.,
Solicitor for Plaintiff Appellant.

To C. J. BURCHELL, Esq., K.C.,
Halifax, N.S.
Solicitor for Defendant Respondent.

In the Supreme Court of Canada.

No. 8.
Bond on Appeal, 26th June 1930.

No. 8.

Bond on Appeal.

CANADA :

PROVINCE OF NOVA SCOTIA,
COUNTY OF CAPE BRETON.

KNOW ALL MEN BY THESE PRESENTS, that we, Sylvester Dunphy, of the Town of North Sydney, in the County of Cape Breton, and Province of Nova Scotia, Merchant, and William Strickland, also of the Town of North Sydney aforesaid, Inspector, and George McNeil, of the Town of North Sydney aforesaid, Druggist, are jointly and severally held, and firmly bound unto E. R. Croft, in the penal sum of Five Hundred Dollars good and lawful money of Canada to be paid to the said E. R. Croft, his Attorney, Executors, Administrators or Assigns, for which payment well and truly to be made, we bind ourselves and each of us binds himself, our and each of our Heirs, Executors and Administrators firmly by These Presents, sealed with our seals and dated this 26th day of June, A.D. 1930.

WHEREAS, a certain action was brought in the Supreme Court of Nova Scotia by the said Sylvester Dunphy *versus* E. R. Croft. And whereas judgment was given in the said Court against the said Sylvester Dunphy, who appealed from the said judgment to the Court of Appeal, to the Supreme Court of Nova Scotia, sitting en banco. And whereas, judgment was given in the said action in the said last mentioned Court on the 3rd day of May, A.D. 1930.

AND WHEREAS, the said Sylvester Dunphy complains that in giving of the last mentioned judgment in the said action upon the said appeal manifest error hath intervened, wherefore the said Sylvester Dunphy desires to appeal from the said judgment to the Supreme Court of Canada.

NOW THE CONDITION of this obligation is such, that if the said Sylvester Dunphy shall effectually prosecute his said appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect.

Signed, sealed and delivered in presence of

(Sgd.) SYLVESTER DUNPHY (Seal).
(Sgd.) WILLIAM STRICKLAND (Seal).
(Sgd.) GEORGE McNEIL (Seal).

(Sgd.) THERESA PISTONE.

In the Supreme Court of Canada.

No. 9. Affidavit of justification of bond, 26th June 1930.

No. 9.

Affidavit of justification of bond.

I, WILLIAM STRICKLAND, of the Town of North Sydney, in the County of Cape Breton, and Province of Nova Scotia, Inspector, make oath and say :

That I am a resident inhabitant of the Province of Nova Scotia, and am a freeholder in the Town of North Sydney aforesaid, that I am worth the sum of One Thousand Dollars, over and above what will pay all my debts.

And I, GEORGE MCNEIL, of North Sydney, in the County of Cape Breton, and Province of Nova Scotia, Druggist, make oath and say :

That I am a resident inhabitant of the said Province of Nova Scotia, and am a freeholder in the Town of North Sydney aforesaid, and that I am worth the sum of One Thousand Dollars, over and above what will pay all my debts.

(Sgd.) WILLIAM STRICKLAND,
(Sgd.) GEORGE McNEIL.

The above named deponents, WILLIAM STRICKLAND, and GEORGE MCNEIL, were severally sworn before me at the City of Sydney, in the County of Cape Breton, this 26th day of June, A.D. 1930.

(Sgd.) ROD MACDONALD,
A Commissioner of the Supreme and County Courts in and for the County of Cape Breton.

In the Supreme Court of Canada.

No. 10. Affidavit of execution of bond, 26th June 1930.

No. 10.

Affidavit of execution of bond.

PROVINCE OF NOVA SCOTIA,
COUNTY OF CAPE BRETON.

To wit :

I, THERESA PISTONE, of Sydney, in the County of Cape Breton, and Province of Nova Scotia, Stenographer, make oath and say :

1. That I was personally present and did see the within instrument duly signed, sealed and executed by Sylvester Dunphy, George McNeil and William Strickland, three of the parties thereto.

2. That the said instrument was executed at Sydney, aforesaid.

3. That I know the said parties.

4. That I am a subscribing witness to the said instrument.

Sworn before me at the City of Sydney,
in the County of Cape Breton, this
26th day of June, A.D. 1930. (Sgd.) THERESA PISTONE.

(Sgd.) ROD MACDONALD,
A Commissioner of the Supreme
and County Courts in and for
the County of Cape Breton.

No. 11. Order approving security, 26th June 1930.

No. 11.

Order approving security.

UPON HEARING, read the Notice of Appeal herein, the Bond submitted on appeal, with the Affidavits of Justification, and the other papers on file in this Honourable Court.

I DO ORDER AND ADJUDGE that the said Bond be approved, and the same is hereby approved by me, one of the judges of the Supreme Court of Nova Scotia, and one of the Judges presiding at the hearing of the Appeal on which the judgment appealed from herein was delivered.

DATED at Sydney, in the County of Cape Breton, this 26th day of June, A.D. 1930.

(Sgd.) J. A. CHISHOLM,
Judge of the Supreme Court
of Nova Scotia.

In the Supreme Court of Canada.

No. 12. Agreement as to contents of Case, 11th December 1930.

No. 12.

Agreement as to contents of Case.

IT IS HEREBY AGREED by and between Counsel on behalf of the Appellant and Respondent herein that the Printed Case on Appeal to the Supreme Court of Canada shall consist of the following material viz. :—

1. Statement of Case.
2. Decision of His Lordship, Mr. Justice Paton.
3. Order for Judgment.
4. Notice of Appeal to the Supreme Court of Nova Scotia.
5. Opinion of Mr. Justice Chisholm.
6. Order of the Supreme Court of Nova Scotia dismissing Appeal.
7. Notice of Appeal to the Supreme Court of Canada.
8. Bond on Appeal together with Affidavits of execution and justification.
9. Order approving security.
10. This Agreement.
11. Certificate of Prothonotary.
12. Necessary Index.

DATED this 11th day of December, A.D. 1930.

D. A. CAMERON,
Of Counsel with Appellant.

C. B. SMITH,
Of Counsel with Respondent.

In the Supreme Court of Canada.

No. 13. Certificate of security, 27th December 1930.

No. 13.

Certificate of security.

I hereby certify that Sylvester Dunphy, the Appellant herein, has given proper security to the satisfaction of a Judge of the Supreme Court of Nova Scotia, and that such security consists of a Bond, with two sureties in the sum of Five Hundred Dollars, each, both of whom have justified.

AND I FURTHER CERTIFY that the purpose of the said Bond is to be security for costs in connection with the Appeal to the Supreme Court of Canada.

I FURTHER CERTIFY that the reasons for judgment, included in the printed book, contain all the reasons pronounced by the Judges of the Supreme Court of Nova Scotia, whose Decision is appealed from.

DATED at Sydney, in the County of Cape Breton, this 27th day of December, A.D. 1930.

HUGH ROSS,
Judge of the Supreme Court
of Nova Scotia.

No. 14. Certificate as to correctness of Case, 7th January 1931.

No. 14.

Certificate as to correctness of Case.

I DUNCAN KENNETH MACTAVISH, of the City of Ottawa, in the County of Carleton and Province of Ontario, a member of the firm of Henderson, Herridge & Gowling, Ottawa Agents for the Solicitor for the Plaintiff Appellant, Sylvester Dunphy, herein hereby certify that I have personally compared the annexed print of the Case in Appeal to the Supreme Court, with the originals, and that the same is a true and correct duplicate of such originals.

DATED at Ottawa this 7th day of January, 1931.

DUNCAN K. MACTAVISH,
Ottawa Agent for the Appellant's Solicitors.

In the Supreme Court of Canada.

No. 15. Certificate verifying Case.

No. 15.

Certificate verifying Case.

I, the undersigned REGINALD V. HARRIS, Prothonotary of the Supreme Court of Nova Scotia, do hereby certify that the foregoing printed document from Pages 1 to 17 inclusive, is a true copy of the case as agreed to between the Parties.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Supreme Court of Nova Scotia.

REGINALD V. HARRIS,
Prothonotary of the Supreme Court of Nova Scotia. 10

No. 16. Certificate verifying Case and of security, January 1931.

No. 16.

Certificate verifying Case and of security.

I, the undersigned REGINALD V. HARRIS, Prothonotary of the Supreme Court of Nova Scotia, do hereby certify that the foregoing printed document from Pages one to seventeen, inclusive, is a true copy of the Case as agreed to between the Parties.

AND I further certify that the Appellant, Sylvester Dunphy, has given proper security to the satisfaction of the Honourable Hugh Ross, one of the Judges of the Supreme Court of Nova Scotia, and that such security 20 consists of a Bond with two sureties in the sum of $500.00 each, both of whom have justified, a copy of which security and a copy of the Order of the Honourable Mr. Justice Chisholm allowing the same, may be found on Pages 13 and 15.

AND I do further certify that I have applied to the Judges the Supreme Court of Nova Scotia for their opinions or reasons for judgment in this case and the only reasons delivered to me are those of the Honourable Mr. Justice Chisholm.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the Seal of the said Supreme Court of the Province of Nova Scotia, 30 at the City of Halifax, this day of January, A.D. 1931.

REGINALD V. HARRIS,
Prothonotary of the Supreme Court of Nova Scotia.

No. 17.

Factum of E. R. Croft.

PART I.

STATEMENT OF FACTS.

This is an appeal from the judgment of the Supreme Court of Nova Scotia en banc dated the 10th day of May, 1930, unanimously affirming the judgment of the Honourable Mr. Justice Paton, after trial with a jury, dismissing the action with costs.

The action is one for damages for seizure of the schooner " Dorothy M. Smart," and her cargo of liquor, while hovering within twelve marine miles of the Dominion of Canada. The vessel was registered in Canada at the time of the seizure. The plaintiff, owner of both vessel and cargo, resided in North Sydney in the Province of Nova Scotia. The seizure was made on June 13th, 1929 by the defendant as master in charge of the Dominion Government Patrol Boat No. 4.

On the trial much evidence was presented by both sides upon the issue as to the location of the schooner at the time she was seized. The jury found that the schooner at the time of the seizure was within twelve marine miles of the land. Counsel at the trial agreed that all other issues should be decided by the trial judge.

On the appeal to the Supreme Court of Nova Scotia en banc it was agreed that the appellant was not appealing from the finding of the jury and further that all relevant facts were as found in the decision of the trial judge, Mr. Justice Paton.

The trial judge found that the schooner sailed from St. Pierre, with a cargo of assorted liquors and rum, bound for the High Seas with the intention of lying off Sydney Harbour, and selling the cargo to customers or purchasers who would come out in boats from the shore and who, under cover of darkness and fog, would smuggle the liquor into Canada. The judge also found that both the captain of the schooner and the appellant, owner of the schooner and cargo, knew that any liquor that might be sold could only be to persons desiring to smuggle it into Canada. He also finds that the schooner when seized was " hovering " within the meaning of that word as used in the Customs Act.

The question for determination on the appeal to the Supreme Court of Nova Scotia en banc, as it is on the appeal to this court, was whether or not the provisions of the Customs Act, under which the seizure was made, are *intra vires* of the Parliament of Canada, and as to the competency of Parliament to pass the sections of the Customs Act under which the schooner and her cargo were admittedly seized.

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The sections of the Customs Act to be considered are sections 151 and 207, Chap. 42, R. S. C. 1927 as amended by Chap. 16 of the Acts of 1928. 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 persons 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 purpose 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."

" 207.—(1) If, upon examination by any officer of the cargo of any vessel found 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, tackel, 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 ship or vessel or her cargo, he shall incur a penalty of not less than four hundred dollars."

The trial judge, Mr. Justice Paton, on the question of law, stated that he preferred to consider that the British North America Act conferred authority to pass the legislation under review and that he was fortified in the conclusion at which he arrived by the decision of Mr. Justice Ross of the Supreme Court of Nova Scotia in a similar case of *Trenhom* v. *McCarthy* 1930 1 D. L. R., p. 674. Mr. Justice Paton also considered that the legislation in question might be upheld because of the assent given to the Act by the Crown.

The Supreme Court of Nova Scotia en banc on the appeal consisted of the following judges :

The Honourable the Chief Justice.
The Honourable Mr. Justice Chisholm.
The Honorable Mr. Justice Mellish.
The Honorable Mr. Justice Graham, and
The Honorable Mr. Justice Ross.

The decision of the court, which was unanimous, was delivered by the Honorable Mr. Justice Chisholm. Mr. Justice Chisholm states that he finds himself in entire agreement with the trial judge in respect of the scope of the British North America Act. He considers that the Parliament of the

United Kingdom has given express power to the Parliament of Canada to make laws for the peace, order and good government of Canada in relation to matters not exclusively assigned by the Act to the provinces, and it is declared that it shall have exclusive power to raise revenue by any mode or system of taxation and implied in this is power to enact any such laws as may be reasonably necessary to make the revenue laws of the country effective. He finds that the sections under discussion in this case fall within that category and sees no need to elaborate the reasons. The appeal was therefore dismissed with costs.

The appellant now appeals to this court from the unanimous decision of the Supreme Court of Nova Scotia en banc, which confirmed the opinion of the trial judge.

The trial judge also found that the defendant acted upon probable cause within the meaning of section 160 of the Customs Act and so certified. He also finds that the notice required by section 157 of that Act was not delivered to nor left at the usual place of abode of the defendant.

These sections of the Customs Act are as follows:

" 157. No action, suit or proceeding shall be commenced, and no writ shall be sued out against, or copy of any process served upon any officer, or person employed for the prevention of smuggling, for anything done in the exercise of his office or duty, or against or upon any person in possession of goods under authority of any officer, so long as any proceeding for the enforcement of this Act in relation to the matter forming the ground of such action, suit, proceeding, writ or process is pending, nor until one month after notice in writing containing the particulars by this section required has been delivered to such officer or person, or left at his usual place of abode, by the person who intends to sue out such writ or process, his attorney or agent.

2. In such notice shall be clearly and explicitly contained a statement of the cause of the action, the name and place of abode of the person who is to bring such action, and the name and place of abode of his attorney or agent.

3. No evidence of any cause of action shall be produced except of such cause of action as is contained in such notice, and no verdict or judgment shall be given for the plaintiff, unless he proves on the trial that such notice was given, in default of which proof, the defendant shall be entitled to a verdict or judgment and costs."

" 160. If, in any such action, suit or proceeding, the court or judge before whom the trial takes place certifies that the defendant acted upon probable cause, the plaintiff shall not be entitled to more than twenty cents damages nor to any costs of suit, nor in case of a seizure, shall the person who made the seizure be liable to any civil or criminal suit or proceedings on account thereof."

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PART II.

The point in issue on this appeal is as to the validity of the sections of the Customs Act under which the seizure was made.

The respondent claims that the legislation is valid and intra vires of the Parliament of Canada.

In the event of the Act being held ultra vires the respondent relies upon the provisions of sections 157 and 160 of the Customs Act as a defence to the action.

PART III.

Brief of Argument.

In this case the schooner which was seized was registered in Canada, and both schooner and cargo were under the same ownership, that of a British subject, a resident of Canada, living at North Sydney near the place of seizure. The vessel was hovering off the entrance to Sydney Harbor with the intention of selling the cargo to customers who, under the cover of darkness or fog, were to smuggle the liquor in small boats into Canada—all to the knowledge of the plaintiff, the owner of the schooner and cargo.

The issue as to the constitutional authority of the Parliament of Canada to authorise the seizure of vessel and cargo under such circumstances, within twelve marine miles from the land, is therefore directly presented, free from any complication as to foreign ownership.

The extension of the limit from three miles to twelve miles in the case of a Canadian registered vessel was made in the year 1928 by Chapter 16 of the Dominion Statutes of that year.

The question as to whether or not the three mile belt actually forms part of the territory of Canada may perhaps still be regarded as not definitely settled. The Judicial Committee of the Privy Council have reserved this point for future consideration as follows:

> " In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league. The importance of claims based upon such a proprietary title arises from the fact that they would not be affected by the grant of the lands within the railway belt. But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three-mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.
>
> " They desire, however, to point out that the three-mile limit is something very different from the ' narrow seas ' limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone

comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *Reg.* v. *Keyn* is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, C.J. in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone."

Attorney-General for British Columbia v. *Attorney-General for Canada*, 1914 A. C., p. 174.

Referring to the same case in a later case in the year 1921 the Judicial Committee stated as follows:

> " As to the sea between low-water mark and the three-mile limit, although no doubt was raised as to the right of the public to fish there, it was pointed out that the question of the title to the subjacent soil within this zone stood in a very different position. The topic was not one that belonged to municipal law alone, for rights of foreign nations might be in question, and accordingly their Lordships did not deem it desirable that they should deal with it judicially, sitting as they did for the purpose of deciding the question of municipal law only."

Attorney-General for Canada v. *Attorney-General for Quebec* 1921, A. C. p. 421.

It should however be noted that with respect to India the Judicial Committee, in the year 1916, decided that the solum underlying the water of the ocean whether within the narrow seas or from the coast outward to the three mile limit and also the minerals beneath it, are vested in the Crown.

Secretary of State for India v. *Sir Roger Chellikani* (1916) 85 L. J. P. C. 222, 32 T. L. R. 652.

So far as foreign owned vessels are concerned it is generally conceded that under the principles of International Law, three miles from the land is the limit within which they should be seized for violation of the laws of any country, except in special circumstances, as in hot pursuit and

unless by treaty between particular nations it is otherwise agreed. Thus in the liquor treaty of 1924 between the United States and the British Governments, to which Canada was a party, it was agreed that Great Britain would raise no objection to the right of search and seizure of British private vessels at a distance from the coast of the United States which can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. The High Contracting parties to this treaty however declare that " it is their firm intention to uphold the principle that three marine miles extending from the coast-line outwards and measured from low water mark constitute the proper limits of territorial waters." Jessup " Law of Territorial Waters," p. 289.

The right of all nations to seize their own ships, or ships belonging to their own citizens on the high seas beyond the three mile limit is also generally conceded. Since the year 1799 the United States has had on its statute books a law authorizing the exercise of certain customs control and jurisdiction within a twelve mile zone. Jessup, p. 80.

In the case of Great Britain from very early days hovering acts were passed authorizing seizure beyond the three mile limit of vessels suspected of smuggling. In 1763 the distance was six miles. In 1784 this was increased to twelve miles, and in 1802 a further increase was made to 24 miles. These early acts made no distinction between British and foreign vessels. In 1853 for the first time was this distinction made. The Act passed that year (16 and 17 Vict. Chap. 107) provided that if any ship belonging " wholly or in part to Her Majesty's subjects, or having half the persons on board subjects of Her Majesty " is found with prohibited articles on board within twelve or twenty-four miles of the coast (varying with different regions) it should be forfeited. Any foreign ship having one or more British subjects on board was penalized if found within nine miles and any other foreign ship within three miles. Jessup p. 77.

This distinction is preserved in the Customs Consolidation Act of 1876 (Imp.) (39 and 40 Vict. Chap. 36 s. 179) which repealed the prior hovering acts. The nine mile limit applies under this statute if the vessel belongs wholly or in part to British subjects or has half the persons on board British subjects, while the three mile limit is applied to such vessels as are not British. But within the three mile limit foreign vessels are penalized for unlading or breaking bulk within nine miles.

There cannot be any doubt that such acts passed by the Parliament at Westminster, authorizing seizure beyond the three mile limit, of either British or foreign vessels, will be enforced by the courts in England. The defence of ultra vires in respect of any enactment of the Imperial Parliament will not in any circumstances be sustained by the Courts in England.

The question for consideration and decision in the present appeal is as to whether jurisdiction on the high seas in the twelve mile zone surrounding the Dominion of Canada has been so completely withheld by His Majesty the King and the Imperial Parliament from the Parliament

of Canada as that Canada cannot police the same in the enforcement of its revenue laws.

It is submitted that the Parliament of Great Britain by the British North America Act conferred upon the Parliament of Canada ample powers for the raising of a revenue by the imposition of import duties and that any power reasonably necessary or ancillary thereto must also be considered as having been conferred. Police protection and the right to seize vessels found " hovering " on the coast with dutiable goods on board in the manner provided by the Customs Act is essential for the protection of the revenue of Canada.

More specifically stated the submission is that the British North America Act provides that the Parliament of Canada has authority " 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 that its legislative authority " extends to all matters " coming within the classes of subjects enumerated including " the raising of money by any mode or system of taxation," and " navigation and shipping " and that this authority includes also the incidental or ancillary power of imposing extra-territorial constraint on a Canadian registered vessel within such reasonable distance of the shore as may be deemed necessary to prevent smuggling and to protect the national revenue.

The question as to whether or not the three mile limit belt forms part of the territory of Canada apparently still remains undecided, according at least to the dicta of the Judicial Committee, as above quoted, and yet the courts have uniformly held that seizure within the three mile limit even of a foreign vessel found violating Canadian laws is valid. *The King* vs. *Boutilier* 1929 2 D. L. R. 849. *The Ship North* 37 S. C. R. 385.

The jurisdiction of Parliament over Canadian registered ships for the purpose of providing for the observance of the customs laws of the Dominion should not therefor by analogy to the so-called zone of territorial waters be limited to three miles but should extend to such distance as is deemed necessary for the protection of the revenue of Canada, and as ancillary to the express powers conferred in the British North America Act.

In *Attorney-General for Canada* vs. *Cain* 1906 A. C. p. 542, the argument was that the act authorizing the expulsion of undesirable aliens and their return to their own country was ultra vires because it involves extra-territorial constraint. The Privy Council held that the Act was valid on the ground that the power of expulsion and deportation was an essential part of the power to control emigration. Their Lordships said at p. 547 :

> " In *Hodge* vs. *Reg.* 9 A. C. 117 it was decided that a colonial Legislature has within the limits prescribed by the statute which created it ' an authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and

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could bestow.' If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed."

In *the Ship North* 37 S. C. R. 385 the Supreme Court of Canada held that a foreign vessel found violating the fishery laws of Canada within three miles of the coast may be immediately pursued beyond the three mile zone and lawfully seized on the high seas. In that case the Court held that Canada was entitled to the same privileges as any other nation to protect its fisheries by exercising extra-territorial constraint in the case of hot pursuit. This case clearly illustrates the ancillary or incidental power conferred upon the Parliament of Canada to exercise extra-territorial jurisdiction in the case of its fisheries.

Mr. Justice Chisholm very concisely summarizes the argument in delivering the judgment in the Court below in this case as follows:

> " The Parliament of the United Kingdom has given express power to the Parliament of Canada to make laws for the peace, order and good government of Canada in relation to matters not exclusively assigned by the Act to the provinces; and it is declared that it shall have exclusive power to raise revenue by any mode or system of taxation. Implied in this is power to enact any such laws as may be reasonably necessary to make the revenue laws of the country effective. The sections under discussion in this case fall within that category and I see no need to elaborate the reasons."

While it is perhaps unnecessary in this appeal to consider the wider authority of the Parliament of Canada, with respect to extra-territorial jurisdiction, apart from its ancillary or incidental powers, it is respectfully submitted that the British North America Act does not contain any express territorial restriction on the authority of the Canadian Parliament and that none should be implied.

It is submitted that any Act passed by the Parliament of Canada is valid and enforcible by the Courts of Canada if it complies with the following three requirements:

1. It must be a statute for the peace, order and good government of Canada;

2. It must be a statute relating to a matter not exclusively assigned to the provincial Legislatures.

3. It must not be repugnant to an Act of Parliament of the United Kingdom.

The fact must be kept in mind that the question is not one of private or public international law, but what the Court has to consider in a case like the present is the validity, in Canada, of a statute of the Parliament of Canada, and not the extent to which such statute may or may not be enforceable in some other country.

Several decisions of this court and of the Judicial Committee emphasize the fact that the Parliament of Canada has, within the limits prescribed by the British North America Act, authority as plenary and as ample as the Imperial Parliament in the plenitude of its powers possessed or could bestow.

In *Valin* v. *Langlois*, 3 S. C. R. at p. 16, Ritchie, C. J., said—

> " The British North America Act vests in the Dominion Parliament plenary power of legislation in no way limited or circumscribed and as large and of the same nature and extent as the Parliament of Great Britain by whom the power to legislate was conferred, itself had."

In *Attorney-General for Ontario* v. *Attorney-General for Canada* (1912) A. C. 571, Lord Loreburn, L. C., said :

> " In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.
>
> Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively . . . In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

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In *Edwards* v. *Attorney-General for Canada* (1930) A. C. 136, the Judicial Committee said :

> " Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."

The leading case usually quoted as the authority for the principle that the Parliament of Canada cannot validly pass legislation having any extra-territorial operation is *Macleod* v. *Attorney-General for New South Wales* (1891), A. C. 455.

In that case the colony of New South Wales had enacted that " whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years."

Their Lordships construed the words " whosoever being married " to mean " whosoever being married and who is amenable, at the time of the offence committed, to the jurisdiction of the colony of New South Wales." They also construed the word " wheresoever " to mean " wheresoever in this colony the offence is committed."

Their Lordships, however, having so construed the Act, then proceeded to give the following secondary opinion :

> " Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, ' Extra territorium jus dicenti impune non paretur,' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey*, 4 H. L. R. 815, expresses the same proposition in very terse language. He says, 4 H. L. R. 926 : ' The Legislature has no power over any persons except its own subjects—that is, persons natural born subjects, or resident, or whilst they are within the limits of the Kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, prima facie, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.' All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute

necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony."

There can be no criticism of the first part of the decision of their Lordships in the *MacLeod* case, which, in accordance with well recognized principles of construction, held that the act in question was not one which was intended to have extra-territorial operation. It is however respectfully submitted that the secondary opinion, which was wholly unnecessary for the decision of the case, is not one which is binding upon the Courts in Canada.

It will be noted that in their secondary opinion their Lordships appear to throw doubt upon the authority of even the Imperial Parliament to enact legislation having extra-territorial operation with respect to crime. The authority of the Imperial Parliament to direct punishment for crimes committed in other countries by foreigners is denied, as is also the authority of the legislature of New South Wales. No distinction however is made between the authority of the Imperial Parliament and that of a colonial legislature. The maxim " Extra territorium jus dicenti impune non paretur " is apparently considered by their Lordships to be applicable both to the laws of the Imperial Parliament and of colonial legislatures.

Apparently even as late as the year 1891, when the *Macleod* case was decided, the doctrine of the sovereignty of the Imperial Parliament does not appear to have been clearly understood. Two years before this date, in the year 1889, the sovereignty of the Imperial Parliament was denied in the case of *Russell* v. *Cambefort* 23, Q. B. D. p. 526. In that case the English Court of Appeal set aside the service of a writ made under provisions of Order IX, Rule 6 which authorized service on the manager of a foreign partnership at the principal place of business within the jurisdiction. The firm was carrying on business in England but the members of the firm were foreigners resident out of the jurisdiction. The Court of Appeal held that service on the manager was not good service on the firm although this was authorized by the rule.

Cotton, L. J., said at p. 528 :

" No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of

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Parliament can give jurisdiction to the Court against British subjects, as to foreigners Parliament has not and does not assume to have jurisdiction against those who are residing abroad and have not submitted to the jurisdiction of the English Courts."

Lopes, L. J., said at p. 530:

"I think that the rule does not give jurisdiction as against foreign subjects. The rule cannot have a greater effect than an Act of Parliament and Parliament itself could not give such jurisdiction."

This same doubt as to the sovereignty of the Imperial Parliament is expressed by Cotton, L. J. in the case of *ex parte Blain* (1879) 12 C. D., page 531, where he says:

"We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in England, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be, and however foreign nations might object, to say, This is an English statute, and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard. I do not say that would be so, because, if the act had clearly gone beyond the power of the English legislature there might be a question."

The decision in the foregoing case of *ex parte Blain* was that the English Bankruptcy Act should not be construed as applicable to foreigners domiciled and residing abroad who had never been in England. The decision was approved by the House of Lords in *Cook* v. *Vogler Company* (1901), A. C. 102, but the Earl of Halsbury in that case was careful to uphold the sovereignty of the Imperial Parliament. At page 107 he states as follows:

"If the law has intended, and has expressed its intentions, that a foreigner may be made a bankrupt under the circumstances of this case, no court has any jurisdiction to disregard what the legislature has enacted."

The present day understanding of the sovereignty of the Imperial Parliament is stated by Dicey, "Law of the Constitution" 7th Edition, p. 60.

"A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral or because it went beyond the limits of Parliamentary authority. The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesi* a law and therefore entitled to obedience by the courts."

" DeLolme has summed up the matter in a grostesque expression which has become almost proverbial. ' It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman '." Dicey, p. 41.

It is respectfully submitted that at the present day the courts in England would not uphold the doctrine laid down by their Lordships in the *Macleod* case that " the jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever."

It is submitted that the misinterpretation by their Lordships as to the complete sovereignty of the Imperial Legislature, carries with it the same misinterpretation as to the powers of a colonial legislature to pass any legislation having extra-territorial operation. Indeed the argument seems to be, that the Imperial Parliament has not such power as was claimed, therefore a colonial legislature cannot have it.

Moreover the status of a Dominion such as Canada in the year 1928, when the Act with respect to the twelve mile limit was passed, must be considered as being much higher than that of a colony such as New South Wales in the year 1883 when the legislation under consideration in the *Macleod* case was passed.

In *R.* v. *Circuit Judge for Cork* (1925) 2 Ir., Fitzgibbon, J., at p. 193, said :

" As at present advised, I am not prepared to hold that legislation in this country making it a crime for persons to conspire elsewhere against the peace, order and good government of this country, or to defraud our Customs, or to violate our laws is necessarily invalid because of the secondary opinion of the Judicial Committee in *Macleod's* case, nor that our courts would not have full jurisdiction to deal with such offenders if they should happen to come within the limits of the Saorstat. The Free State would not, in the cases I have supposed, be enacting laws for places outside its limits but would be enacting laws for itself with regard to persons or acts beyond its limits and if those laws were essential to the peace, order and good government of the Free State, I see no ground for doubting that they would be valid."

Reference will also be made to the following cases :

Ashbury v. *Ellis* (1893) A. C. 339
In re Criminal Code, Bigamy Sections (1897) 27 Can. S. C. R. 461
King v. *Brinkley* 14 O. L. R. 434 (1907)
Trenholm v. *McCarthy* (1930) I. D. L. R. 674
Reg v. *Brierly* (1887) 14 O. R. 525

CHARLES J. BURCHELL.
FRANCIS D. SMITH.
of Counsel with the Respondent.

In the Supreme Court of Canada.

No. 18. Factum of Sylvester Dunphy.

No. 18.

Factum of Sylvester Dunphy.

PART I.

STATEMENT OF FACTS.

This is an appeal from the Supreme Court of Nova Scotia consisting of The Honorable Robert E. Harris, Chief Justice, The Honorable Mr. Justice Chisholm, The Honorable Mr. Justice Mellish, The Honorable Mr. Justice Graham, and The Honorable Mr. Justice Ross, affirming the Judgment of The Honorable Mr. Justice Paton, dismissing the Plaintiff-Appellant's action upon the trial.

Appellant's claim arises on the following facts which are succinctly set out in the decision of The Honorable Mr. Justice Paton, Record P. 4, Line 10, and P. 5, Lines 1 to 14.

" The ninety-six ton schooner ' Dorothy M. Smart ' registered at Digby, N.S., was, with its cargo of assorted liquors, seized on June 13th, 1929, while jogging about in the waters off the Cape Breton coast of Nova Scotia. The seizure was made by the defendant in his capacity as master in charge of the Dominion Government Patrol Boat No. 4. The Defendant was an officer employed by the Dominion Government for the enforcement of the Customs Act, c. 42 R. S. of Canada, 1927, and had the powers of a Customs Officer.

" The Plaintiff, a resident of North Sydney, N.S., was the owner of the schooner and its cargo. He alleges the seizure was illegal and claims a return of the vessel and cargo, or payment of their value, and damages for their unlawful detention.

" The value of the vessel and cargo, and the amount of damages claimed are set forth in the Statement of Claim as follows :

" Value of vessel - - - - - -	$16,000
Value of liquors - - - - - -	75,550
Damages for detention of Vessel - - -	10,000
Damages for detention of cargo - - -	40,000

" The defence is that the vessel had dutiable goods on board, was ' hovering ' within twelve miles of the coast, and was liable to seizure under sections 151 and 207 of The Customs Act (ante) as amended by c. 16 of the Acts of 1928. The material parts of those sections applicable to this case 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.

" 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 . . . "

The case was tried at Sydney with a Jury, the only question submitted to the Jury being as to the exact location of the schooner, the ' Dorothy M. Smart ' at the time of said seizure on the 13th of June, 1929.

The Jury found the position of the schooner to be $11\frac{1}{4}$ miles off Flat Point Light.

All other questions involved in the trial of the action were by agreement of Counsel left to the determination of the learned trial Judge, and from these several findings as set out in the learned Judge's opinion no appeal has been asserted.

The learned trial Judge upon said findings of the Jury decided that the aforesaid seizure was effected within the territorial waters of Canada as defined in Chapter 16, section 1, sub-section 7 of the Acts of the Dominion of Canada, 1928, S.s. 7. " For the purposes of this section and section 207 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."

The Plaintiff contended on the trial that the said sub-section was *ultra vires* of the Parliament of the Dominion of Canada, the learned trial Judge holding in his decision that the said sub-section was *intra vires* of the Dominion Parliament.

From that decision the Plaintiff appealed to the Supreme Court of Nova Scotia and the said Court confirmed the decision of the trial Judge. The present appeal is from that decision.

PART II.

The Appellant contends that the judgment appealed from is erroneous—

1. Because it determines in effect that it is competent to the parliament of Canada so to legislate as to extend the territorial jurisdiction of Canada over the waters adjacent to the territory of Canada a distance of twelve marine miles.

In the Supreme Court of Canada.

No. 18. Factum of Sylvester Dunphy—*continued.*

2. Because it determines that the giving by the Parliament of the United Kingdom to the Parliament of Canada of express power to make laws for the peace, order and good government of Canada and to have exclusive power to raise revenues by any mode or system of taxation, implies the power to enact this legislation on the ground that it is reasonably necessary in order to make the revenue laws of the Country effective.

3. Because the conferring by the Parliament of the United Kingdom of the power to legislate for the peace, order and good government of Canada in relation to matters not exclusively assigned to the provinces, and the exclusive power to raise revenue by any mode or system of taxation, does not either expressly or by implication confer the power upon the Dominion of Canada to extend the territorial jurisdiction beyond the confines of the Canadian territory.

4. Because the extension of such extra-territorial powers can only be done by the parliament of a Sovereign State and the Dominion of Canada being a Dominion with conferred powers it is not competent to its Parliament to pass such legislation.

PART III.

ARGUMENT.

Sub-section 7 above quoted, as well as many other parts of the Customs Act, is part of the Criminal Law of the Dominion, first, by virtue of its own provisions, and that is particularly true of the amended Section 151 which makes the offence of hovering an indictable one and under certain circumstances punishable with imprisonment for, from one to seven years. It is also part of the Criminal Law by virtue of Section 164 of the Criminal Code of Canada—

> " Everyone is guilty of an indictable offence and liable to one year's imprisonment, who without lawful excuse disobeys any Act of the Parliament of Canada or any legislation in Canada, by willfully doing any act which is prohibited, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law."

R. vs. *Durroche*, 21 C. C. C. 382.

The decision in *Rex* vs. *Keyn*, L.R. 2 Exch. Div. page 66, defines the open sea, as beginning at low water mark.

To cure the difficulty which arose in the case of *Rex* vs. *Keyn* the Territorial Waters Jurisdiction Act was passed being 41–42 Victoria, Ch. 73. Section 7 in part is as follows :—

> " The territorial waters of Her Majesty's Dominions in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's Dominion as is deemed by International Law to be within the

territorial sovereignity of Her Majesty, and for the purposes of any offence declared by this Act to be within the jurisdiction of the Admiral any part of the open sea within one marine league of the coast, measured from low water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's Dominion."

It is submitted that whatever jurisdiction was conferred by the Provisions of the British North America Act on the Dominion of Canada to legislate with regard to any of the powers conferred upon it in section 91 there is no jurisdiction granted to the Dominion greater than one Marine league referred to in the above quoted section. That is to say the Dominion of Canada cannot legislate extra-territorially beyond the three marine miles from low water mark.

The preamble to the Territorial Waters Jurisdiction Act states that " It is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's Dominion by whomsoever committed should be dealt with according to law."

It is submitted that the design of the Act was to deal with all offences committed on territorial waters, and the Imperial Parliament then prescribed what are territorial waters and fixed the limit thereof at three miles, and legislation by the Canadian Parliament fixing the limit at twelve miles is void because repugnant to the Imperial Statute.

Colonial Laws Validity Act, 28–29 Victoria C. A. P. 63.

As to similar legislation, in the Commonwealths of New Zealand, Australia and Africa, *see* Masterson's jurisdiction in International Seas, pages 168–173. *See also* Report of Imperial Conference, Operation of Dominion Legislation, pages 21, 22, 34. The Conference suggests the following enactment by the Parliament of the United Kingdom, with the consent of all the Dominions.

" It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."—Conference Report, p. 22.

By the generally accepted doctrine of International Law three miles from low water mark has been accepted as the limit of the territory of the State, and it is submitted that nothing short of an enactment by the Parliament of the United Kingdom would enable Canada to pass such legislation as is in question on this Appeal.

Pitt Cobbett, leading cases on International Law, Vol. 1, p. 143, and also page 224.

Sir Henry Jenkins, British Rule and Jurisdiction beyond the Seas. 1902.

Lefroy, Canada's Federal System (1913), page 104, note 22.

Lefroy, Short Treatise on Canadian Constitutional Law (1918), page 79.

Outlines of Constitutional Law, by Chalmers and Asquith, 1930, page 730.

Minty, Constitutional Laws of the British Empire, 1928 (London), page 65.

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Dicey, Laws of the Constitution, 1908, page 99, Note 1.

Keith, Responsible Governments in the Dominions, 1928, Vol. 1, page 333.

The doctrine of reasonable necessity cannot under the circumstances be invoked in order to confer Sovereign Power on the Dominion so far as this legislation is concerned.

The provisions of the Customs Act can be as effectively enforced against Canadian ships within three marine miles as those provisions can be enforced against ships of any other registry.

The most that can be said for this proposition in the Judgment appealed from is, that the provisions might be more convenient.

It is submitted that even with regard to subjects of the Dominion on board ships registered in the Dominion the Jurisdiction of Parliament is at the very most confined to three miles from low water mark :

Attorney General, N.S.W., vs. *McLeod*, 1891 Appeal Cases 463.

Lowe vs. *Rutledge*, L.R. 3 H.L. 100.

The case of the *Attorney General of Canada* vs. *Cain*, 1906 App. cases, 542.

And " *In re : Bigamy Sections* " 27 S. C. R. 461, while apparently at variance with the decision in the *McLeod* case are it is submitted distinguishable on the ground that both these decisions have in them the element of the offence having been committed in Canada or the intention to commit the offence having been formed in Canada.

Peninsula & Oriental Steamship Navigation v. *Kingston*, 1903, App. Cases 471.

On the question of the Sovereign Powers of the Dominion, see article by Rt. Hon. Sir Robert Borden, Canadian Bar Review, November 1929, page 629.

Dealing with the contention of the author whose work is being reviewed Sir Robert Borden says as follows :

> " The complete and absolute independence and sovereignty which Mr. Schlosberg envisages are hardly consistent with the legislative control exercisable by the Parliament of Great Britain. Witness the committee of experts presently engaged in considering reservation of Dominion legislation; its extra-territorial operation; the Colonial Laws Validity Act, and the Merchants Shipping Act."

The Earl Russell case, 1901, A. C. 446, reveals the difference between Imperial Legislation and Colonial Legislation.

Pitt Cobett's leading cases on International Law, Vol. 1, pages 227 and 228.

As to the territorial application of criminal law.

Pitt Cobbett's vol. 1, 224 also at page 240.

The Commonwealth of Australia Constitution Act 1900, gives the Australian Parliament power to make laws for the peace, order and good Government of the Commonwealth with respect to fisheries in Australian

waters, beyond territorial limits. Why the necessity for this, if the Commonwealth had the power, by implication, as the Supreme Court of Nova Scotia suggests, although under its constitution the Commonwealth has the right to make laws governing :—

1. " Trade and commerce in other countries and among the States."

2. " Taxation, but not so as to discriminate between States and parts of States."

As to the doctrine of Sovereign Power of the Dominion 33-34 Victoria, ch. 90 (The Foreign Enlistment Act 1870)

Sec. 2 " This Act, shall extend to all the Dominions of Her Majesty, including the adjacent territorial waters."

The whole Act covers many offences over which it is made clear, the Parliament of the United Kingdom exercises sovereign control.

57–58 Victoria Chapter 60 particularly Section 735.

As between the United States and Great Britain, the so-called Rum Treaty makes these specific declarations :

" Article 1.—The high contracting parties declare that it is their firm intention to uphold the principle that three marine miles, extending from the coast line outward, and measured from low water mark, constitute the proper limit of territorial waters."

This provision is binding on Canada and all Dominions. So also, are the provisions, extending the privilege of search to the United States, a distance of twelve miles from low water mark. If it is necessary for a sovereign power, such as the United States, to obtain this right by treaty, surely, a Dominion cannot extend the limits of territorial waters merely by its own legislation.

When the counter part of the present Section 591 of the Criminal Code of Canada was under discussion in Parliament, the late Hon. Mr. Mills contended that a criminal offence, committed beyond the limits of Canada, on board a Canadian ship, would not come under Canadian law, but would be subject to the law of England; relying on the decision in *Lowe* v. *Rutledge*, already cited, while the late Sir John Thompson remarked that if the offender in such a case were to come to Canada, he could be tried here.

See comments in Crankshaw, 3rd ed. pages 653–654–655.

The fact that the twelve mile limit is applicable only to vessels registered in Canada, does not help the situation.

It is submitted that once a Canadian vessel goes beyond the limits of Canada, on the high seas, she becomes a British vessel.

57-58 Victoria, ch. 60, section 686.

J. H. Morgan, Article in Dalhousie Review, July, 1929.

Keith, Responsible Governments in the Dominions, 1928, vol. 1.

In the Supreme Court of Canada.

No. 18. Factum of Sylvester Dunphy—*continued.*

The section in question, it is submitted, can be justified only on one ground, if at all, viz., that it is necessarily incidental to the Customs Law—not merely helpful. It must be the exercise of such a power that without it, the authority—to regulate customs in Canada, granted by the B. N. A. Act would be useless.

If jurisdiction can be extended twelve miles, why not one hundred or more?

D. A. CAMERON,
Solicitor for Appellant.

Sydney, January, 1931.

No. 19. Formal Judgment, 30th June 1931.

No. 19.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

Tuesday, the 30th day of June, A.D. 1931.

PRESENT:

The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice NEWCOMBE, C.M.G.
The Honourable Mr. Justice LAMONT.
The Honourable Mr. Justice CANNON.

The Honourable Mr. Justice Rinfret being absent, his Judgment was announced by the Right Honourable Mr. Justice Duff, pursuant to the Statute in that behalf.

BETWEEN

SYLVESTER DUNPHY - - - - - (*Plaintiff*) *Appellant*

AND

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

The appeal of the above named Appellant from the judgment of the Supreme Court of Nova Scotia sitting *in banco*, pronounced in the above cause on the tenth day of May in the year of our Lord one thousand nine hundred and thirty, dismissing the Plaintiff's appeal from the judgment of The Honourable Mr. Justice Paton, rendered in the said cause on the fifth day of March in the year of our Lord one thousand nine hundred and thirty, having come on to be heard before this Court on the sixteenth and seventeenth days of February in the year of our Lord one thousand nine hundred and thirty-one, in the presence of counsel as well for the Appellant as the Respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment.

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed, and 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 this Court.

In the Supreme Court of Canada.

No. 19. Formal Judgment, 30th June 1931—*continued.*

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondent should and do pay to the said Appellant the costs incurred by the said Appellant, as well in the Supreme Court of Nova Scotia *en banco*, as in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

No. 20.

No. 20. Reasons for Judgment. (*a*) Duff J. (concurred in by Lamont J.).

Reasons for Judgment.

(*a*) DUFF J. (Concurred in by LAMONT J.)

The phrase " peace, order and good government " is found generally in the English Colonial charters, and, unless the constitution set up is federal or quasi federal, it commonly is employed to designate, as regards subject matter, the scope of the Legislative authority conferred. It is an accepted principle that *prima facie* the jurisdiction of subordinate legislatures is territorially limited. It may be considered as axiomatic that a grant of legislative authority to a British colony for " the peace, order and good government " of the colony, does not, as a general rule, empower the colonial legislature to enact laws penalizing acts, otherwise lawful, done beyond the territory of the colony, or legalizing such acts when otherwise unlawful. Broadly, it may be laid down, as a rule of construction, that subordinate legislatures do not possess such extra-territorial jurisdiction unless it has been granted in express terms or by necessary implication. The restriction is a restriction of power, and enactments framed in disregard of it not only will be ignored by foreign countries, but will be treated as *pro tanto* inoperative by the courts of the colony itself; in this regard differing in its effect from the restrictions imposed upon a sovereign state by international law and the competing jurisdictions of other sovereign states, which, at the command of the supreme legislative authority of the state, will be ignored by its courts.

When the subject matter of a power possessed by the Crown falls within " peace, order and good government," and is consequently within the scope of a grant of legislative authority by the Imperial Parliament, then, if that power necessarily involves, in its complete enjoyment, the authority to execute extra-territorial acts of sovereignty, such as acts of constraint upon the person, this complementary authority also passes with it. *Attorney General* v. *Cain*, 1906 A.C. 542, is an application of this principle.

In the Supreme Court of Canada.

No. 20. Reasons for Judgment. (a) Duff J. (concurred in by Lamont J.) —*continued.*

I see no reason whatever to think that a general authority to detain and arrest ships extra-territorially, passes under the formula " peace, order and good government " nor do I think that the fullest enjoyment of the powers given under the heads navigation and shipping, trade and commerce, and taxation necessitates, in the pertinent sense, the possession of such authority. As a rule, indeed, legislative authority in respect of taxation is limited strictly, in its exercise, by the territorial boundaries. *Commercial* v. *Attorney General of Newfoundland*, 1912 A.C. at 826. I shall assume that the question, under this topic, is precisely the same as if the regulation of imports were explicitly included among the enumerated items of section 91.

One must emphasize here the distinction between the necessity from which a legal implication proceeds, and those considerations which merely go to establish the convenience, amounting even, in judicial opinion, to practical necessity from the political point of view, of extending a power admittedly given. The law implies the grant of all proper means necessary for the execution of the power itself as given, but that is the only necessity of which, for this purpose, the law takes notice. The courts have no authority to extend the scope of an admitted power merely because the power as given is not sufficiently comprehensive to attain an object never so important or urgent, in the judicial view. The implied power must, to use the language of the Privy Council in *Cain's* case, be " the complement " in the sense just explained, of the power expressly conferred. There is no general test for determining that this condition is satisfied, but it seems abundantly clear that no such necessity can be affirmed of the power to maintain at large on the high seas, a preventive service with authority to detain British ships destined for Canadian ports, for the purpose of ascertaining whether they carry non-admissible goods or non-admissible persons. It is nothing to the purpose that the statute applies only to ships of Canadian registry. If the argument of the Crown is sound, the statute would be equally within the scope of Canadian jurisdiction if the reference to Canadian registry were absent. Nothing in *Cain's* case countenances such a procedure in relation to immigrants.

The judgment in *Nadan's* case, 1926 A.C., 482, exemplifies the rigour which governs the courts in examining this question of necessary implication. The subject of that judgment is the ambit and effect of the item of section 91 that is concerned with criminal law and criminal procedure. By that section, Parliament is empowered to make laws " in relation to " these subjects; and, within the territorial bounds of its jurisdiction, these powers are subject to no limitation or qualification. " But, however widely these powers are construed, they are confined to action to be taken in the Dominion." *Nadan* v. *The King*, 1926 A.C., at p. 492.

Plenary legislative authority, for Canada, in relation to criminal law and procedure in the entire scope of those subjects, it might have been argued, not without force, would embrace authority to declare the finality of Canadian judgments and sentences in criminal proceedings; and that for the purpose of making such declarations effective, the legislative authority

must extend so far as to enable Canada to deal with the operation, in Canada, of the jurisdiction of His Majesty in Council in respect of the review of colonial judicial proceedings. But since such a review by His Majesty's order does not fall within the category of " action to be taken within the Dominion," the principle of grant by necessary implication does not take effect. This is not the only ground of the judgment, but it is an independent one, and of co-ordinate authority with the others.

There remains to consider the limitation of the enactment to ships of Canadian registry. This does not, so far as I can see, affect the matter. It may be assumed that section 735 of the Merchants' Shipping Act presupposes colonial authority to establish a system of colonial registration and to prescribe conditions therefor; but I can find nothing in that section, which, by implication, creates or recognizes a general authority to regulate ships of colonial registry by requiring them to submit to such extra-territorial acts as those authorized by the legislation before us.

There is no occasion to consider the extent of the authority given or recognized by this section in relation to subject matters dealt with by the Merchants' Shipping Act. Nor need we discuss the scope of such authority, in respect of conditions of registration, precedent or subsequent; that is not the character, in substance or in form, of the enactment with which we are concerned.

I do not enter upon a discussion of the effect of the Colonial Laws' Validity Act. It would, I think, be a new reading, and, it would seem to me, a misreading, of that statute, to construe it 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.

In my view, the legislation is *ultra vires*.

The appeal should be allowed with costs and the action remitted to the Supreme Court of Nova Scotia to be disposed of in accordance with the view herein expressed.

(*b*) RINFRET J.

I agree with Mr. Justice Duff that the impugned section is *ultra vires* and that the appeal should be allowed with costs and the action remitted to the Supreme Court of Nova Scotia to be disposed of in accordance with the view herein expressed.

(Sgd.) T. RINFRET J.

NEWCOMBE J. (concurred in by CANNON J.).

The Plaintiff, who is a master mariner, brings this action as owner of the schooner, " Dorothy M. Smart," registered at Digby, in Nova Scotia. The Defendant is a Canadian Customs Officer, employed for the prevention of smuggling and the enforcement of the Customs Act, c. 42 of the R.S.C., 1927. The Plaintiff alleges in his statement of claim that he " was engaged in the business of buying liquors for the purpose of sale upon the high seas," having cleared from St. Pierre Miquelon, and that his vessel was

In the Supreme Court of Canada.

No. 20. Reasons for Judgment. (c) Newcombe J. (concurred in by Cannon J.) —*continued.*

seized by the Defendant while lawfully engaged in that business. We are told in the statement of case that the seizure was made at a point eleven and one-quarter miles off Flat Point light (a lighthouse at the entrance of Sydney Harbour, in Cape Breton) by a patrol boat in the employ of the Department of National Revenue of Canada, and under the Defendant's command.

The Defendant justifies the seizure under authority of section 151 of the Customs Act, c. 42 R.S.C., 1927, as enacted by section 1 of c. 16 of the Dominion Acts of 1928. The provisions of this section material to the case 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.
>
> . . . . .
>
> (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."

By Section 207, as enacted by c. 16 of 1928, it is provided that :—

> " 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 . . ."

The action was tried by Paton, J., of the Supreme Court of Nova Scotia, who found that the vessel cleared on 8th June, 1929, from St. Pierre Miquelon, for the high seas, with a cargo of assorted liquor and rum; the particular destination being a place about fifteen miles north-east of the lighthouse, and the nearest point of land to a vessel lying in that direction; that, on the night of 12th June the vessel arrived at its destination, " and from that time until the next afternoon about four o'clock, it was jogging about in various directions, waiting for customers to come out in boats from shore." The learned Judge also found that—

> " There is no doubt the intention was to remain in such proximity to the coast as would enable customers or purchasers, under the cover of darkness or fog, to smuggle the liquor into Canada. Since the adoption of prohibition in Nova Scotia, Halifax is the only entry port in Nova Scotia for alcoholic liquors, and lawful importation could not be made at North Sydney nor at Sydney.

No. 20.
Reasons for Judgment.
(c) Newcombe J. (concurred in by Cannon J.) —*continued.*

"The Plaintiff, as owner of the schooner and cargo, and his captain must have known, and I find they did know, that any liquor that might be sold could only be to persons desiring to smuggle it into this country."

The learned Judge upheld the legislation and dismissed the action. His judgment was unanimously affirmed by the Supreme Court *en banc*; and it now comes before this Court upon the single objection that the above quoted provisions of the Customs Act are *ultra vires* of the parliament of Canada.

There is no question of international or of alien rights. The Plaintiff is a British subject resident at North Sydney, in Nova Scotia; and his schooner is registered in the same province. It is not suggested that the Dominion legislation conflicts with provincial powers. The rights, such as they are, are all *intra familiam*. All that is conceded. But what the Plaintiff seeks to justify in opposition to the Customs Act, the executive power and the preventive service of Canada, is the use of his vessel upon 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 the liquor into the province.

If the defendant were a pirate prowling on the coast, or if he were, in time of war, using his vessel to supply an enemy squadron attempting to blockade the port of Sydney, is it conceivable that the powers of the Parliament of Canada would be found inadequate to sanction the seizure? Parliament is specifically empowered 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; also to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces; and there are, moreover, the latent powers which, as explained in *Toronto Electric Commissioners* v. *Snider*, 1925 A.C., p. 412, are exercisable in cases of emergency.

The Hovering Acts of Great Britain have been justified in principle and practice, and the enactments now in contest exemplify provisions which are reasonable, and, it seems, necessary, for the protection of the country.

The Act, to remove doubts as to the validity of Colonial Laws, c. 63 of the United Kingdom, 1865, which is described by Mr. Dicey as the charter of colonial legislative independence (Law of the Constitution, 8th Ed., 101), enacts, by Section 2, that—

"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."

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No. 20. Reasons for Judgment. (c) Newcombe J. (concurred in by Cannon J.) —*continued.*

There is no repugnancy found or suggested as between the legislation upon which the Crown relies and any imperial Act, order or regulation having force or effect in Canada; and, therefore, whatever operation sections 151 and 207 of the Canadian Customs Act may have, it would seem, according to express enactment, that they shall not " be and remain absolutely void and inoperative."

It is unnecessary to repeat the well known rule enunciated by Lord Selborne in *The Queen* v. *Burah* (1878) 3 A.C., 903–5, and restated in *Hodge* v. *The Queen* (1883) 9 A.C., 131–2.

Upon the reference to this Court of the Bigamy Sections of the Criminal Code (1897) 27 S.C.R., 461, the point considered was whether these sections were, by reason of their extra territorial operation, *ultra vires* of the Dominion to legislate for the criminal law, and the legislation was upheld by the majority of the Court; but the learned Chief Justice (Strong), although he dissented in the particular case, gave expression in his judgment to the view which, I think, is not controverted, that—

> " As the Imperial Parliament is a sovereign legislature I do not for a moment dispute the proposition that it may confer upon a colonial legislature powers in this respect co-equal with its own, by granting it authority to enact the personal liability of all British subjects resident within its jurisdiction, or indeed of all British subjects generally, for crimes committed without the jurisdiction. The question to be dealt with here is not as to the power of Parliament in this respect, but as to whether such authority has actually been conferred."

Referring to the general powers of the Dominion to legislate for the peace, order and good government of Canada, Lord Halsbury held in *Riel* v. *Regina* (1885) 10 A.C., 678–9, that these words " are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to ". And by the preamble of the British North America Act, 1867, it is recited that the project is union of the provinces under the Crown, " with a constitution similar in principle to that of the United Kingdom ", and that " such a union would conduce to the welfare of the provinces and promote the interests of the British Empire ".

The case, as submitted, does not disclose the port of departure of the plaintiff's vessel upon the voyage to St. Pierre Miquelon for the lading of the cargo in respect of which the seizure took place; but, seeing that both the plaintiff and his vessel were locally situate in Nova Scotia, it is not a violent presumption that they cleared, or at any rate went, from that province upon the voyage in question. When, therefore, a British subject resident and being in Canada sets himself up to defeat the Customs laws by contriving to evade them, to defraud the revenue and illegally to introduce into the country a prohibited commodity which has been found a menace to the national life, threatening disaster; and when the Parliament of Canada, having the powers to which I have alluded, finds a remedy in the

enactments of which the appellant complains, is that not, in the words of Lord Selborne, in the case of this Dominion constituted as it is, " legislation within the general scope of the affirmative words which give the power " to legislate for the peace order and good government of Canada? Certainly, " it violates no express condition or restriction by which that power is limited " ; and any limitation, to be effective, must, according to the rule laid down, be express. It may also be regarded as significant that, while the enumerations of provincial powers in Section 92 of the British North America Act, 1867, are usually, or not infrequently, qualified by the words " in the province ", or a like restriction, there is not, in a single instance, a corresponding qualification to be found in Section 91, which describes the powers of Parliament.

I conclude therefore that the legislation now the subject of attack is, in its application to the facts of this case, *intra vires*, and that this appeal should be dismissed.

No. 21.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE

The 17th day of December, 1931.

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
SIR FREDERICK PONSONBY
SIR BOLTON EYRES-MONSELL
MR. CHANCELLOR OF THE DUCHY OF LANCASTER.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 8th day of December 1931 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of E. R. Croft in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and Sylvester Dunphy Respondent setting forth (amongst other matters) that the Petitioner desires to obtain special leave to appeal from a Judgment of the Supreme Court of Canada delivered on the 30th June 1931 allowing the Respondent's Appeal from a Judgment of the Supreme Court of Nova Scotia delivered on the 10th May 1930 : that the Action was commenced in the Supreme Court of Nova Scotia : that the Appellant was the Commander of a

In the Privy Council.

No. 21. Order in Council granting special leave to appeal to His Majesty in Council, 17th December 1931 —*continued.*

patrol boat in the employ of the Department of National Revenue of Canada: that the Respondent was the owner of the schooner "Dorothy M. Smart" registered in Canada and her cargo: that the schooner was seized by the patrol boat for an alleged breach of the provisions of the Customs Act which provided for the forfeiture of a vessel found hovering within 12 marine miles of the coast of Canada and having on board any prohibited or dutiable goods: that the Action was tried by Paton J. with a jury: that the Respondent sought the return of the vessel and cargo on the ground that the seizure and detention were unlawful: that the jury found that the seizure took place 11¼ miles from the coast of Canada: that all other issues were by agreement left to the trial Judge who on the 5th March 1930 dismissed the Action, holding that the provisions of the Customs Act in question were validly enacted: that on appeal to the Supreme Court of Nova Scotia *in banco* the decision of the trial Judge was unanimously affirmed: that from this Judgment 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 was as to the validity of Ss. 151 and 207 of the Customs Act (R.S.C. 1927, chap. 42) as amended by c. 16 of the Statutes of 1928: that the Supreme Court by a majority of three Judges to two (Duff Lamont and Rinfret JJ. Newcombe and Cannon JJ. dissenting) allowed the Appeal: that the Petitioner submits that the Judgments of Paton J. and of the Supreme Court of Nova Scotia *in banco* and the dissenting Judgments of the Supreme Court of Canada are right and that the legislation was competently enacted by Parliament as being for the peace order and good government of Canada and as being within the following classes of subjects 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 and the criminal law: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 30th June 1931 or that Your Majesty may be pleased to make such further or other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 30th day of June 1931: And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

In the Privy Council.

Order in Council granting special leave to appeal to His Majesty in Council, 17th December 1931 *-continued.*

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.*

RECORD OF PROCEEDINGS.

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