Privy Council Appeal No. 131 *of* 1931.

E. R. Croft - - - - - - - - - *Appellant*

v.

Sylvester Dunphy - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1932.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD MACMILLAN.]

On the 10th June, 1929, the schooner "Dorothy M. Smart" sailed for "the high seas" from the French island of St. Pierre with a cargo on board of rum and other liquors, which are dutiable under Canadian law. The vessel was registered in Nova Scotia and with her cargo was the property of the respondent, who is resident in Nova Scotia.

On the 13th June, 1929, the schooner, when at a distance of $11\frac{1}{2}$ miles from the coast of Nova Scotia, was boarded by the appellant, an officer in the Customs service of the Canadian Government. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into port.

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada, Revised Statutes of Canada, 1927, c. 42, as amended by 18 & 19 Geo. V, c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

The enactments impugned are contained in sections 151 and 207 of the statute as amended.

Section 151 provides as follows :—

"(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 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 case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada."

Section 207 enacts as follows :—

"(1) If upon the examination of 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 . . . cargo shall be seized and forfeited. . . ."

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of 12 miles from the coast of Canada. To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the Customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial Judge upheld the validity of the legislation and consequently of the seizure, and his decision was affirmed by five Judges of the Supreme Court of Nova Scotia *en banco*. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Duff, Rinfret and Lamont JJ., Newcombe and Cannon JJ. dissenting. The matter now comes before their Lordships on the defendant's appeal.

It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in the case of *Le Louis*, 1817, 2 Dodson 210, at p. 245 : "Maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining to their shores which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for

fiscal or defence regulations more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination."

This special latitude of legislation in such matters is a familiar topic in the text-books on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says at p. 265 that a state in matters of revenue and health "exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports."

In Halleck's "International Law," 4th ed., p. 168, it is pointed out that beyond the generally accepted limits of territorial waters "states may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts.'"

Again, in Hall's "Foreign Powers and Jurisdiction of the British Crown," it is stated in para. 108 that "the justice and necessity of taking precautionary measures outside territorial waters in order that infractions of revenue laws shall not occur upon the territory itself is in principle uncontested." Without further multiplying quotations it may be sufficient to add references to Phillimore's "International Law," para. 198, and Wheaton's "International Law," 6th ed., Vol. I, p. 367.

But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.

In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in Section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

In the well-known case of *The Queen* v. *Burah*, 1878, 3 App. Cas. 889, Lord Selborne, in expressing the views of the Board in the comparable instance of India, uses at p. 904 this very significant language: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe

those powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament itself." Again, speaking of the Provincial Legislature of Ontario, Sir Barnes Peacock, in giving the judgment of this Board in *Hodge* v. *The Queen*, 1883, 9 App. Cas. 117, said at p. 132 : " When the British North America Act enacted that there should be a legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow." To the Dominion Parliament these words apply *a fortiori*, with the substitution of Section 91 for Section 92. Their Lordships also recall the language used by Lord Chancellor Halsbury, in expressing the views of the Board on the power of the Dominion Parliament to legislate for the peace, order and good government of Canada, in the case of *Riel* v. *The Queen* (1885), 10 App. Cas. 675, at p. 678 : " The words of the statute," said his Lordship, " are apt to authorise the utmost discretion of enactment for the attainment of the object pointed to."

Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the courts of this country, for in these courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires* (*per* Lord Justice-General Dunedin in *Mortensen* v. *Peters* 1906, 8 F. (J.C.) 93, at p. 101). It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognised as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. The question is a domestic one between the Imperial Parliament and the Dominion Parliament.

When in the course of the hearing it became clear that this was the nature of the controversy, their Lordships deemed it proper that intimation should be made to His Majesty's Attorney-General in order that he might, if so advised, intervene on behalf

of the Imperial Government. The Attorney-General attended at their Lordships' bar and stated that, having considered the issue raised in the case, he did not deem it his duty to offer any argument on the matter. It may therefore be taken that the appellant's contention in support of the validity of this Canadian legislation is not regarded as contrary to any Imperial interest. This of course does not affect in any way the pure question of law arising on the interpretation of the British North America Act, as that question has been defined above.

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency," it was considered relevant to discuss the usual contents of bankruptcy statutes (*Royal Bank of Canada* v. *Larue* [1928], A.C. 187). Now from early times the customs legislation of the Imperial Parliament has contained anti-smuggling provisions authorising the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of the ordinary territorial limits. So far back as 1736 there is to be found in the statute 9 Geo. III, c. 9, s. 22, legislation authorising the forfeiture of dutiable goods found in vessels "hovering" within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act of 1876, by section 179, authorised the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the coast. The previous Imperial Act of 1853 (16 and 17 Vict. c. 107), which was in force when the British North America Act was passed, dealt, in section 212, with even greater distances from the coast. It is not without interest to note as a matter of history that the risk of illicit trade between the French island of St. Pierre and His Majesty's North American possessions was the subject of special legislation in a statute of 1763, 4 Geo. III, c. 15, by section 35 of which any British ship "hovering" within two leagues of St. Pierre and Miquelon might be seized and forfeited.

It will thus be seen that when the Imperial Parliament in

1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against "hovering" were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy. (Cf. *Attorney-General for Canada* v. *Cain* [1906], A.C. 542.) The British North America Act imposed no such restriction in terms and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not *in pari materia*.

Their Lordships' attention was drawn to Section 3 of the Statute of Westminster, 1931, by which it is "declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation," and it was suggested that this section had retrospective effect. In the view which their Lordships have taken of the present case it is not necessary to say anything on this point beyond observing that the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

The result is that their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Supreme Court of Canada reversed, and the judgment of the Supreme Court of Nova Scotia restored. The appellant will have the costs of the appeal and in the Supreme Court of Canada.

In the Privy Council.

E. R. CROFT

v.

SYLVESTER DUNPHY.

DELIVERED BY LORD MACMILLAN.

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