

CANADA / JUDGMENT

The King v. The Shearwater Co. Ltd.

[1934] SCR 197

COURT

Supreme Court of Canada

DECIDED

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The King v. The Shearwater Co. Ltd.

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Supreme Court Judgments

Date

1934-02-06

Report

[1934] SCR 197

Judges

Duff, Lyman Poore; Rinfret, Thibaudeau; Smith, Robert; Crocket, Oswald Smith; Hughes, Frank Joseph

On appeal from

Canada

Subjects

Customs and excise

Decision Content

Supreme Court of Canada

The King v. The Shearwater Co. Ltd., [1934] S.C.R. 197

Date: 1934-02-06.

His Majesty The King Appellant;

and

The Shearwater Company Limited (Claimant) Respondent.

1933: October 16, 17; 1934: February 6.

Present: Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Customs—Shipping—Constitutional law—Regulations under ss. 13 and 125(3) of Customs Act of 1877 (40 Vict., c. 10)—Effectiveness—Nature of Legislation—Requirement, by s. 4(1) of Merchant Shipping (Colonial) Act, 1869, Imp. (32 Vict., c. 11), of suspending clause in Act or Ordinance of legislature of British possession “regulating (its) coasting trade”—Construction of regulations—Effect of non-publication of later substituted regulation in Canada Gazette (Customs Act, R.S.C. 1927, c. 42, s. 301).

Regulations 4 and 12 of those brought into force by Order in Council of April 17, 1883, which regulations 4 and 12 were made under ss. 13 and 125 (3) of the Customs Act, 1877 (40 Vict., c. 10, Dom.), and provided, inter alia, that an officer of customs might go on board a coasting vessel and if any goods had been unladen therefrom before the master had reported to a customs officer, the goods and vessel should be forfeited, etc., and that no goods should be put out of any coasting vessel while on her voyage by river, lake or sea, were legally operative, notwithstanding that the procedure described by s. 4 (1) of The Merchant Shipping (Colonial) Act, 1869, Imp. (32 Vict., c. 11), requiring that an Act or Ordinance of the legislature of a British possession regulating its coasting trade should contain a suspending clause providing that the Act or Ordinance should not come into operation until Her Majesty’s pleasure thereon had been publicly signified in the British possession, was not observed. The matters dealt with in said ss. 13 and 125 (3) of the Customs Act, 1877, and said regulations 4 and 12 were not “regulation of the coasting trade” within the meaning of said s. 4 (1) of the Imperial Act of 1869.

That s. 4 (1) of the Imperial Act of 1869 was not intended to apply to matters such as those dealt with in ss. 13 and 125 (3) of the Dominion Customs Act, 1877, or in said regulations, is indicated by its context, the effects and unreasonableness of a contrary construction, and especially from the circumstances in which it was passed. The Imperial Act of 1869 should be construed as an enabling statute creating legislative powers which did not previously exist, powers subject to prescribed conditions and exercisable according to a prescribed procedure. A statute of such a character, or even fairly capable of being so construed, should not be applied in such a way as to impose conditions upon the exercise of the plenary authority which had been conferred by the B.N.A. Act, 1867, upon the Dominion to legislate in respect of customs.

The word “goods” in the phrase “or if any goods had been unladen therefrom” in said regulation 4 should not be construed as limited to dutiable goods or goods prohibited or smuggled (mentioned previously in said regulation). By Order in Council of May 31, 1901, the regulations of April 17, 1883, were amended by rescinding regulation 12 and substituting a new regulation 12, which new regulation was not published in the Canada Gazette as required by what is now s. 301 of the Customs Act (R.S.C. 1927, c. 42). Held, that the part of the Order in Council rescinding the old regulation could not be severed from that part enacting the new one; the Order in Council was, in

substance, an amendment of the existing regulations and, as such, fell within s. 301; if any part of the amendment did not take effect by reason of non-publication, then the whole was inoperative; the present case stood to be decided on regulations 4 and 12 as they stood under the Order in Council of 1883.

Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 1, holding that the regulations in question, and the statutory provisions authorizing them, never became effective, and that the seizure of the vessel in question could not be maintained, reversed.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada[1], holding that the seizure of the steamship Vedas could not be maintained, and that the steamship should be released to its owner, the claimant (the present respondent).

The steamer Vedas is a British ship registered at Halifax, Nova Scotia, the registered owner being the claimant (respondent), which is a British company incorporated under The Nova Scotia Companies Act and has its registered office at Halifax. At all times material to this proceeding the ship was under verbal charter to one Low.

On August 16, 1930, the Vedas reported outwards coastwise from Windsor, Ontario, for Montreal, Quebec, with a cargo consisting of 12,900 cases of beer and ale and one ton of steel, and before sailing its master signed a "Report Outwards Coastwise", which, after setting out particulars, read as follows:

I, the undersigned, Master of the above-named vessel, do solemnly declare that I am bound for and will proceed directly to the Port of Montreal and that I will not, during the said voyage, touch at any foreign port, nor take on board, nor land, nor put off from said vessel any goods liable to Customs duty or other Revenue Impost, before arriving at the above-named port of destination.

Between August 16 and August 30, 1930, after the Vedas had sailed from Windsor, and before she had arrived at Montreal, approximately 8,900 cases of the said beer and ale were put out of the vessel and lightered or transhipped. The vessel, after said Report Outwards Coastwise from Windsor, did not proceed directly to the port to which she was bound and the 8,900 cases of beer and ale were put out of the vessel and unladen as aforesaid while on her said voyage, without permit of the Collector or proper Officer of Customs. On August 30, 1930, the Vedas with her remaining cargo of approximately 4,000 bags or cases of beer and ale was seized by customs officers on Lake Erie about 20 miles southwest of Erieau, by reason of the matters and things above set forth, and upon such seizure was brought to Windsor, and the seizure reported to the Commissioner of Customs in accordance with s. 171 of the Customs Act, R.S.C. 1927, c. 42. Notice of seizure was given in accordance with s. 172 of said Act, which notice was in Department Form K. 30 and read in part as follows:

That contrary to the requirements of the Customs Act and Coasting regulations, the said vessel after report outwards coastwise from the port of Windsor, Ont., bound for Montreal, Que., on or about the 16th day of August, 1930, did not proceed directly to the port whither bound as declared; that goods were put out of the said vessel and unladen therefrom while on her voyage

without permit of the Collector or proper officer of Customs and before report by the Master to a Customs officer; and that goods were carried contrary to the Customs Act and Regulations made by the Governor in Council.

No penalties were paid and the vessel was detained under s. 245 of the Customs Act. The value of the vessel was appraised by a duly qualified appraiser at approximately \$50,000.

The matter came before the Exchequer Court by way of a reference by the Minister of National Revenue under s. 174 of the Customs Act.

By Order in Council of April 17, 1883, regulations were made respecting the Coasting Trade of Canada. These regulations were duly gazetted in the Canada Gazette. Secs. 4 and 12 of these regulations were as follows:

Sec. 4. The master of any such vessel or boat shall produce his licence to any officer of Customs, whenever the same shall be demanded, and answer all questions put to him, and such officer of Customs shall be at liberty to go on board any such coasting vessel when he may deem proper, and if he should find any dutiable goods therein which have not been entered at the Customs, or any prohibited or smuggled goods, or if any goods had been unladen therefrom before the master had reported to a Customs officer the goods and vessel shall be forfeited, and the master shall incur a penalty of \$100.

Sec. 12. No goods can be carried in any Coasting Vessel or Boat, except such as are laden to be so carried at some port or place in Canada, and no goods shall be taken into or put out of any Coasting Vessel or Boat while on her voyage by River, Lake or Sea. By Order in Council of May 31, 1901, the regulations made by Order in Council of April 17, 1883, were amended by rescinding s. 12 and substituting a new s. 12 which read in part as follows:

12. No goods shall be taken into or put out of any coasting vessel or boat, while on her voyage by river, lake or sea, without permit of the Collector or proper officer of Customs.

The substituted regulation was, however, never published in the Canada Gazette.

By the judgment now appealed from, Maclean J. held that the regulations in question never became effective, as neither they nor secs. 13 and 125 of the Customs Act of 1877 (Dom.) (40 Vic., c. 10), under which they were made, were enacted in the form required by the Imperial Act of 1869, The Merchant Shipping (Colonial) Act, 1869 (32 Vict., c. 11), as they did not contain the suspending clause required by s. 4 (1) of the said Imperial Act and they were never approved of and proclaimed as required by that Act. (Secs. 4 and 5 of the said Imperial Act of 1869 are set out in the judgment now reported).

It was contended on behalf of the Crown (appellant) that the provisions of the said Imperial Act of 1869 did not apply to ss. 13 and 125 of the said Customs Act of 1877, or to the regulations in question; that the Imperial Act of 1869 was by its very terms an enabling and not a restricting Act; its object was clearly not to restrict the power of the Dominion with regard to customs legislation or customs regulations, but to confer power under certain conditions upon the Dominions to

legislate with regard to a matter previously withheld from them, namely, the ships to be engaged in the coasting trade; that the regulations in question were in reality customs regulations with regard to the coasting trade, and power over such matters was conferred on the Dominion by the B.N.A. Act, 1867. An argument was also grounded upon s. 151 of the Imperial Customs Consolidation Act, 1876, c. 36, and it was contended that the sanction required thereby would be effectively given when the Governor General assented to a Canadian Customs Act on behalf of the Sovereign.

It was also contended on behalf of the Crown that s. 12 of the regulations as amended in 1901 was not ineffective by reason of failure to publish it in the Canada Gazette; that it was not a general regulation requiring publication within the intent of what is now s. 301 of the Customs Act (R.S.C. 1927, c. 42); that if, however, s. 12 of the regulations as amended never became effective by reason of the fact that it was not gazetted, the amendment was effective for no purpose and could not repeal the original s. 12, which was therefore still in effect and sufficient to justify the seizure and detention in question; and that in any case the seizure and detention could be justified under s. 4 of the regulations, which was not affected by the Order in Council of 1901.

It was contended on behalf of the claimant (respondent) that ss. 13 and 125 (3) of the Canadian Customs Act of 1877 and the regulations made thereunder were regulation of coasting trade within the meaning of the said Imperial Act of 1869, and as the Canadian Act did not contain a suspending clause and Her Majesty's pleasure thereon was not publicly signified in Canada, the said sections of the Canadian Act and regulations thereunder never came into operation; that regulation 12 as passed by the Order in Council of May 31, 1901, never came into force because of failure to publish it in the Canada Gazette, as required by what is now s. 301 of the Customs Act (R.S.C. 1927, c. 42); that said Order in Council was effective to rescind regulation 12 as it then stood, even though the new regulation 12 did not come into operation; that regulation 4 in question could not support the seizure because the words "any goods" (in the phrase "or if any goods had been unladen therefrom" etc.) in the regulation must be read as meaning dutiable or prohibited or smuggled goods, in the light of the earlier portion of the regulation and the wording of the forms of the "Report Outwards Coastwise" and the "Report Inwards"; and it was conceded that the goods on the Vedas were not dutiable or prohibited or smuggled goods; that regulation 4 was not applicable to goods unladen from a coasting vessel "while on her voyage by river, lake or sea" (the words in regulation 12) but was intended to apply only to a coasting vessel while in port; that regulation 4 was ultra vires in so far as it purported to impose forfeiture of a vessel of the value of \$400 or upwards.

By the judgment now reported, the appeal was allowed and the claim of the respondent dismissed with costs throughout. J. McG. Stewart K.C. for the appellant.

A. W. Greene K.C. for the respondent.

The judgment of the court was delivered by

Duff C.J.—We shall consider presently the view advanced that this case does not fall within the regulations in question, (4) and (12), brought into force by the Order in Council of the 17th of April, 1883. The important question is whether or not these regulations are legally operative. The learned President of the Exchequer Court has held they are not so, on the ground that the statute under which they were promulgated (ss. 13 and 125 (3) of c. 10, 40 Vict.) had no legal effect because the procedure described by c. 11, 32 Vict., The Merchant Shipping (Colonial) Act, (1869), s. 4 (1), was not observed.

It is, perhaps, most convenient to reproduce verbatim ss. 4 and 5 of the statute of 1869. They are as follows:

Coasting Trade

4. After the commencement of this Act the legislature of a British possession, by any Act or Ordinance, from time to time, may regulate the coasting trade of that British possession, subject in every case to the following conditions:
 - (1) The Act or Ordinance shall contain a suspending clause, providing that such Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.
 - (2) The Act or Ordinance shall treat all British ships (including the ships of any British possession) in exactly the same manner as ships of the British possession in which it is made.
 - (3) Where by treaty made before the passing of this Act Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.
5. The following sections of The Customs Consolidation Act, 1853, are hereby repealed; namely,

Section three hundred and twenty-eight as from the commencement of this Act:

Section one hundred and sixty-three as from the date in the case of each British possession at which either an Act or Ordinance with respect to the coasting trade made within two years after the commencement of this Act in such British possession comes into operation, or if there is no such Act or Ordinance, at which the said two years expire.

The controversy as to the validity of the regulations, as it was envisaged by the learned President, turns almost entirely upon the point whether the contention of the respondents is well founded that, in enacting sections 13 and 125 (3) of the Customs Act of 1877, the Dominion Parliament was, as a condition of the validity of the legislation, required to observe the procedure laid down

in s. 4(1) of the Act of 1869, in respect of Acts and ordinances falling within the statute; in conformity with which the Act or ordinance must contain a suspending clause providing that it shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

It will be desirable at the outset to understand clearly what it is that the respondents put forward as the construction of the enactment of 1869. This is that the procedure laid down in s. 4 (1). was, down to the date of the Statute of Westminster, imperative in respect of all legislation by the Parliament of Canada enacting or sanctioning, as applied to the coasting trade, (we quote from the factum)

regulations usually made under Customs Acts, dealing with what goods shall be carried in such trade, the reports inwards and outwards which must be made to Customs officers, the examination by Customs officers of a ship, the warehousing of goods unladen from ships, and other matters;

that is to say, by the contention of the respondents, an Imperial statute of 1869 subjected the legislative jurisdiction of the Parliament of Canada with regard to these ordinary matters of customs regulation to this condition, that such regulations must contain the suspending clause prescribed, if they were to be operative in respect of coastwise trade. This, of course, is a very sweeping proposition and the acceptance of it, as the respondents present the argument, would have the effect of invalidating most of the provisions of the Customs Acts passed by the Parliament of Canada since Confederation, as respects their application to the coasting trade.

The underlying assumption of the contention of the respondents is that where you have a regulation which in its nature is a customs regulation of the usual character, dealing, for example, with customs entries, with reports inwards and outwards and so on, that applies to the coasting trade, then you have a "regulation of coasting trade" within the meaning of the Act of 1869, which could only be competently enacted or sanctioned by complying with the procedure laid down in the statute.

On this point we do not find the argument of the respondents entirely convincing. As a rule, customs regulations do, no doubt, affect trade. It does not follow that every customs regulation applying to goods or ships in overseas trade, in coasting trade or in inland waters trade, is necessarily a regulation of that particular phase of trade within the intendment of a particular statute.

The respondents rest their argument upon two Imperial statutes. The Act of 1853, upon which they chiefly rely, is entitled "The Customs Consolidation Act, 1853", and deals primarily, of course, and almost entirely with customs matters. There are sections, such, for example, as ss. 163 and 328, which plainly regulate trade directly but the long title of the Act itself which is in these words,

An Act to amend and consolidate the Laws relating to the Customs of the United Kingdom and of the Isle of Man, and certain Laws relating to Trade and Navigation and the British Possessions,

is sufficient evidence that, in legislative practice, the distinction is not overlooked between legislation in relation to customs and legislation in relation to navigation and trade. The line, no doubt, is not drawn with rigour, but it seems an extraordinary procedure to take a section which is obviously a regulation of customs matters, and, merely because it is found in juxtaposition with a section which deals with trade generally, to treat the customs regulation as the evidentiary basis of a definition of the phrase “regulate the coasting trade” in the Act of 1869. There is a group of clauses in the Act of 1853 under the heading “As to the Coasting Trade of the United Kingdom” and among these clauses there are some which are obviously customs regulations. There are others which deal with trade directly: s. 152, for example, prohibits the carriage of goods or passengers coastwise from one part of the United Kingdom to another except in British ships. But one is a little puzzled to find a good reason for holding that a customs regulation under such a heading, and, therefore, presumably a customs regulation specially applicable to the coasting trade, in an Act consolidating the laws with regard to customs, and dealing (inter alia) with customs matters as affecting the coasting trade of the United Kingdom, provides a solid basis for a definition of the phrase we are considering, in the Act of 1869. The statutes referred to by the respondents contain a variety of provisions upon a variety of subjects, but we are quite unable to discover in them anything which would justify the conclusion that the phrase “regulate the coasting trade” necessarily includes minute regulations as to customs entries and the like; or imposes upon that phrase, in the statute of 1869, a reading which requires the procedure of s. 4 (1) to be followed whenever a customs regulation touching matters of detail, such as those mentioned above, is to be amended in any British possession.

The Act must, of course, be construed in light of the history of the legislation upon the subjects with which it specifically deals, as well as in light of the circumstances in which it was passed. Subs. 1 of s. 4 must be read together with subss. 2 and 3 and with s. 5. S. 5 repeals two former enactments, s. 163 and s. 328, of the Customs Consolidation Act of 1853. These two sections both deal with the coasting trade in the aspect in which the regulation of it was of importance to the United Kingdom, in respect, that is to say, to the vessels eligible to engage in it. S. 328, which applied to all Her Majesty’s British possessions abroad, enabled Her Majesty, by Order in Council, on petition from a legislative authority of a British possession, to regulate the coasting trade as between two ports of the same possession, or between two possessions, “so far as relates to the vessels in which it is to be carried on. The repeal of s. 328 was to take effect from the commencement of the statute.

S. 163 enacts a prohibition against the carriage of goods or passengers from one port of a British possession abroad to another port in the same possession except in British ships. This section (163) was repealed conditionally, that is to say, as appears from the text above set out, at the expiration of two years from the commencement of the Act, or at the date at which, within that period, an Act or ordinance “with respect to the coasting trade” shall come into operation.

We call attention to this proviso because it does not seem probable that repeal was to take effect upon the passing of some regulation with respect to some trivial customs matter, which would seem to be the logical consequence of the contention of the respondents. The main

purpose of the Act would appear to be to substitute the enactments of s. 4 for the enactments repealed by s. 5; and it seems probable that s. 4 was intended to authorize the regulation of the subject matters of the repealed enactments or cognate subject matters. Subss. 2 and 3 of s. 4, moreover, seem to indicate that the essential character of the legislation is not customs legislation but shipping legislation. It seems a not unreasonable application of *noscitur a sociis* to read the principal enactment of s. 4 “regulate the coasting trade” in the light of subss. 2 and 3 of that section and of s. 5 and the earlier legislation thereby affected.

But there are broader considerations derived from the circumstances in which the statute was enacted which seem to supply a conclusive answer to the argument addressed to us by the respondents.

The statute applies to all British possessions, enjoying, it is perhaps needless to say, self-government in varying measure and degree. It seems right to read it, in view of what has been said, as an enabling statute devolving upon local legislatures and legislative authorities powers which they did not previously possess. Observe that, by ss. 163 and 328 of the Act of 1853, which the Act of 1869 replaced by the provisions of s. 4, the legislative authority of a British possession was invested with no legislative power, but only with a status to initiate legislative proceedings by presenting a petition to Her Majesty.

The respondents have, as we have mentioned, rested their contention mainly upon legislation of the Imperial Parliament enacted from ten to twenty years before, dealing with customs, navigation and trade. In respect of the particular matter with which we are now concerned, it is of vastly greater importance to take into account the fact that the British North America Act had gone into effect only two years previously. It is true that after the passing of the B.N.A. Act the Imperial Parliament retained the legal authority to enact measures amending the constitutional statute, by limiting the powers thereby vested in the Dominion Parliament, or conditioning the exercise of those powers by imposing upon Parliament a procedure such as that set up by s. 4 (1) of the Act of 1869. We should not, however, be justified in construing Imperial legislation (applying to British possessions generally) enacted after the passing of the B.N.A. Act, as having any such effect unless the intention was not only unequivocally, but precisely, expressed.

The jurisdiction of the Parliament of Canada under the B.N.A. Act in relation to customs is not susceptible of debate.

The Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs.

(*Croft v. Dunphy*)[2]. This power is, indeed, explicitly recognized in s. 122 which is in these words,

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

It follows from *Croft v. Dunphy*[3], that the “customs laws” in respect of which the Parliament of Canada received full authority in 1867, are not limited to laws imposing customs duties. Nor is it easy to see how the application of the phrase in s. 122 could be limited so as to exclude laws proceeding from the enactments of the Imperial Parliament; although this latter observation does not strictly enter into our decision.

There is here a recognition of the plenary authority of the Canadian legislature “to legislate regarding customs”. Nor is there any distinction here or elsewhere in the B.N.A. Act between customs laws affecting overseas trade and those affecting the coasting trade.

The Act of 1869 ought, we repeat, for the reasons already explained, to be construed as an enabling statute creating legislative powers which did not previously exist, powers subject to prescribed conditions and exercisable according to a prescribed procedure. A statute of such a character, or even fairly capable of being so construed, ought not to be applied in such a way as to impose conditions upon the exercise of the plenary authority conferred by the B.N.A. Act upon the Dominion to legislate in respect of customs. We are not necessarily concerned with the scope that may properly be given to s. 4(1) in respect of the classes of Acts and ordinances of any British possession that may take effect under the authority of s. 4, and would be incompetent but for the authority conferred by that enactment. It seems clear that, whatever be the scope of that section in that respect, the enactment, being enabling, or capable of being so construed, ought not to be so applied as to prejudice the Dominion of Canada in the exercise of the unqualified powers indubitably committed to her by the constitutional enactment.

There are some further considerations in support of our conclusion which it may be worth while to mention. No purpose or object has been suggested, and we can think of none, which, in respect of customs matters, could afford a ground for distinguishing between overseas trade and coasting trade, by fettering the authority of Parliament in one case, and leaving it, as is not disputed, free and untrammelled in the other.

More important than this is a consideration which has already been suggested, viz., that it is extremely difficult to discover any purpose or object which could be served by subjecting, in a so-called self-governing country like Canada, customs regulations of the ordinary type to a procedure such as that prescribed in s. 4 (1). It seems incredible that anybody should have thought of requiring the Dominion Parliament to follow such a procedure when amending, in order the better to adapt it to local circumstances, some regulation touching bonded warehouses or reports inward or outward.

We have emphasized the argument founded upon the improbability that the British legislature in 1869 would have so qualified the powers of the Dominion Parliament under the B.N.A. Act as the respondents now contend. It should be mentioned, perhaps, that the force of this argument is not in the least weakened by the possibility that there may have been customs legislation (affecting the coasting trade) in force under Imperial enactments which (it might be contended), by virtue of the provisions of the Colonial Laws Validity Act, the Canadian Parliament would, notwithstanding the general provisions of the B.N.A. Act, and notwithstanding the explicit terms

of s. 122, have been incompetent to amend or repeal (*Nadan v. The King*[4].)

No such legislation has been called to our attention; but assuming such legislation did exist, and that it constituted an obstacle in the way of the complete exercise by the Dominion of its powers of legislation under the constitutional statute, that circumstance could not explain an enactment by the Imperial Parliament virtually amending the B.N.A. Act by imposing on the Canadian Parliament the procedure of s. 4 (1) of the Act of 1869 in respect of all regulations of customs affecting the coasting trade.

In this view, there seems to be no ground upon which the regulation of the 17th of April, 1883, can successfully be impeached or the sections of the Customs Act of 1877 under which those regulations were made. Of the last mentioned sections (s. 13 and s. 125 (3) of the Customs Act of 1877), s. 13 empowers the Governor General in Council by regulation to

declare any trade or voyage on the seas, rivers, lakes or waters, within or adjacent to Canada, * * * to be a coasting trade or a coasting voyage within the meaning of this Act * * *

It is to be observed that the declaration is to be made for the purposes of the Customs Act. Then, the section goes on to authorize the Governor General in Council to dispense with any of the requirements of the next preceding four sections of the statute and to make further regulations as he may think expedient.

Now, these four sections of the Act are concerned with matters which are, in substance and, indeed, strictly, customs matters. As to the general power to make further regulations, that power should not be considered to authorize the passing of any regulation inconsistent with s. 1 of ch. 14 of the statutes of 1870 which prohibits goods or passengers being carried from one port of Canada to another except in British ships, or with subss. 2 or 3 of s. 4 of the Imperial Act of 1869.

As to s. 125 (3), that, in substance, does not in any pertinent sense differ from s. 13 and the same observations apply.

Turning to the regulations themselves, ss. 1 and 2 embody the substance of s. 1 of the Canadian statute of 1870 and recognize at the same time the enactments of subs. 3 of s. 4 of the Imperial Act of 1869. The remaining sections, dealing with subject matters within the scope of ordinary customs regulations, are entirely within the competence of the Canadian Parliament under the B.N.A. Act, and, on the view above expressed, are not affected by the Imperial Act of 1869.

The Customs Act of 1877 and the regulations made under it, were supported by Mr. Stewart in his argument on behalf of the Crown on another ground. He invokes s. 151 of ch. 36 of the statute of 1876, which was the first general customs consolidation in the United Kingdom after the passing of the B.N.A. Act. That section is in these words,

151. The Customs Acts shall extend to and be of full force and effect in the several British possessions abroad, except where otherwise expressly provided for by the said Acts, or limited by express reference to the United Kingdom or the Channel Islands, and except also

as to any such possession as shall by local Act or ordinance have provided, or may hereafter, with the sanction and approbation of Her Majesty and her successors, make entire provision for the management and regulation of the Customs of any such possession, or make in like manner express provisions in lieu or variation of any of the clauses of the said Act for the purposes of such possession.

His contention is that this section impliedly confers authority upon British possessions abroad, with the sanction and approbation of Her Majesty and her successors, to make “entire provision” for the management and regulation of customs; and it is argued that, whatever be the effect of the statute of 1869, the statute of 1876 authorizes the passing of the Customs Act of 1877. As to the condition requiring “the sanction and approbation of Her Majesty and her successors it is contended that, in Canada, such sanction and approbation was effectively given when the Governor General assented to the Act on behalf of the sovereign. We do not think it necessary to consider this argument, although we think it is by no means without force (*Attorney-General for Canada v. Cain*[5]; *Webb v. Outrim*[6]).

We have still to consider the question whether the present case falls within the regulation. As to that, two points arise. In order to discuss them it is necessary to have the regulations before us. They are in these terms:

4. The master of any such vessel or boat shall produce his licence to any officer of Customs, whenever the same shall be demanded, and answer all questions put to him, and such officers of Customs shall be at liberty to go on board any such coasting vessel when he may deem proper, and if he should find any dutiable goods therein which have not been entered at the Customs, or any prohibited or smuggled goods, or if any goods had been unladen therefrom before the master had reported to a Customs officer the goods and vessel shall be forfeited, and the master shall incur a penalty of \$100.
12. No goods can be carried in any Coasting Vessel or Boat, except such as are laden to be so carried at some port or place in Canada, and no goods shall be taken into or put out of any Coasting Vessel or Boat while on her voyage by River, Lake or Sea.

By regulation 4, there are two cases in which a forfeiture is declared: first, where there are dutiable goods not entered at the customs or prohibited or smuggled goods; and, second, where goods have been unladen from the ship before the master had reported to a customs officer. We cannot agree that goods in the second case can properly be limited to dutiable goods or goods prohibited or smuggled. Indeed, the absence of any expression indicating that goods within the second case are so limited seems to be conclusive on the point. We do not think that the forms can prevail against what appears to us to be the plain construction of the regulation.

Then it is argued that, by force of the Order in Council of May 31, 1901, regulation 12 and, incidentally, regulation 4, were rescinded and that the regulation which was intended to be substituted never came into force. We do not think that in the regulation of the 31st of May, 1901, it is possible to sever that part of the Order which rescinds the old regulation 12 from that part which enacts the new regulation. We think the Order in Council is, in substance, an amendment

of the existing regulations and, as such, falls within s. 301. If any part of the amendment did not take effect by reason of non-publication, then the whole was inoperative.

We think the case stands to be decided on sections 4 and 12 as they stood under the Order in Council of 1883. We, therefore, think the Crown is entitled to succeed on the appeal.

There will be judgment dismissing the respondents' claim with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: W. Stuart Edwards.

Solicitor for the respondent: L. A. Ryan.

[1] [1934] Ex. C.R. 1.

[2] [1933] A.C. 156, at 166.

[3] [1933] A.C. 156.

[4] [1926] A.C. 482.

[5] [1906] A.C. 542.

[6] [1907] A.C. 81, at 88.

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