ROSS MASON ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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* May 22, 23.
* June 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Theft—Shipping—Customs Act, R.S.C. 1927, c. 42 (as amended), ss. 207, 151, 2 (o)—Vessel hovering within territorial waters of Canada with dutiable goods on board—Pursuit by police cruiser—Continuity of pursuit—Seizure of vessel on high seas—Forcible escape of vessel—Forfeiture of vessel—Time of forfeiture—Charge of theft against master—Form of charge.

The schooner *K.*, of Canadian registry, of which appellant was master, while "hovering within the territorial waters of Canada" off the

* PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ., and Dysart J. (*ad hoc*).

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shores of Cape Breton with a cargo of liquor on board (dutiable in Canada), was approached by a Canadian police cruiser, and proceeded towards the high seas. It was overhauled within the territorial waters and summoned to "heave to in the King's name," but before it could be boarded it resumed its course. The cruiser pursued for a short distance, then turned, picked up its boat which had been lowered for boarding, and hurried towards shore for about eight miles, then took bearings and received instructions by radio, and returned to the pursuit and overhauled and stopped the *K.* on the high seas about 35 miles from shore. Here its officers boarded the *K.*, asked appellant what cargo he had, were told in answer "a bit of liquor," asked to see and did see the manifest and shipping papers, and without further examination took the *K.* in charge and towed it back to a point within three miles of shore, where appellant, on some claim of navigation dangers to his vessel, forcibly took charge of the *K.'s* helm, turned it out of its course, thereby breaking the tow lines, and sailed away. The cruiser did not pursue. At trial appellant was convicted of theft of the schooner and theft of its cargo.

Held: The *K.*, at the time when appellant took it away from the officers, was lawfully under seizure and in control of the officers, and the convictions of theft must stand (Judgment of the Supreme Court of Nova Scotia *en banc*, 9 M.P.R. 97, affirmed). The effect of ss. 207, 151 and 2 (*o*) of the *Customs Act* (R.S.C. 1927, c. 42, as amended), when applied to the facts of this case, is that, by hovering in territorial waters of Canada with dutiable goods on board, the *K.* thereby became forfeited by operation of law. When the presence of liquor in its cargo was established as a fact, the forfeiture related back to the time of the hovering. The forfeiture was the legal unescapable consequence of the commission of the offence. The seizing on the high seas was part of the prolonged or continued act, which, begun within the territorial waters, and there temporarily frustrated by the *K.'s* flight, was consummated on the high seas; and the temporary abandonment of the pursuit was not such an abandonment as broke the continuity of the pursuit.

Objection on the ground that, according to the charge, the vessel taken by appellant was one which had "been seized and detained on suspicion by * * * as forfeited," was rejected. The words, "suspicion," etc., were unnecessary, and when deleted left the allegation as being "seized * * * as forfeited," which phrase falls within the definition "seized and forfeited" within s. 2 (*o*) of the Act.

APPEAL by the accused from the judgment of the Supreme Court of Nova Scotia *en banc* (1), affirming (Mellish and Carroll JJ. dissenting) his conviction, on trial before Doull J. with a jury, for theft of a schooner and theft of its cargo. (Accused was also convicted of obstructing a public officer in the execution of his duty, which conviction was affirmed by the said Court *en banc*. Accused appealed thereon to this Court with regard to the sentence). The accused was master of the vessel in question

(1) 9 M.P.R. 97; [1935] 2 D.L.R. 161.

and the alleged theft was in taking it away from the officers of a Royal Canadian Mounted Police cruiser when, it was alleged, it was lawfully under seizure and in the control of those officers. The questions in issue turned on the meaning and effect of certain provisions of the *Customs Act*. The material facts of the case and questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed.

W. P. Potter for the appellant.

G. McL. Daley K.C. for the respondent.

The judgment of the court was delivered by

DYSART J. (*ad hoc*)—This appeal from the Supreme Court of Nova Scotia affirming the conviction of the appellant on three charges—(1) theft of a schooner, (2) theft of the cargo of the vessel, and (3) obstructing a public officer in the discharge of his duty—turns on the meaning and effect of certain provisions of the *Customs Act*, R.S.C. 1927, ch. 42, and amendments. The dissent on which this appeal is based, opens up the whole case on the charges of theft.

In the early morning of December 6, 1933, the schooner *Kromhout*, of Canadian registry, of which the appellant was master, was "hovering within the territorial waters of Canada" off the shores of Cape Breton, with a cargo of liquor on board. When the Royal Canadian Mounted Police cruiser, No. 4, which had been lying in wait, approached her, the *Kromhout* started up her engines, and, with set sails, proceeded towards the high seas, but was overhauled before she got beyond the territorial waters and was summoned to "heave to in the King's name"—a summons she obeyed only after a few shots were fired across her bows. A boat was lowered from the cruiser, and officers thereof set out to row to the schooner, but, before the boat got well away, the *Kromhout* resumed her course towards the high seas. The cruiser pursued for a short distance, and then, turning about, picked up the boat and hurried towards shore for a distance of about eight miles, where, after taking bearings and receiving radio instructions, she returned to the pursuit, and about noon

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hour overhauled the *Kromhout* on the high seas, about thirty-five miles from shore. Here the schooner was stopped, boarded, and, after some discussion, was taken in charge by the cruiser's men, and towed back to a point within three miles of the shore. At this point the accused, on some pretence of navigation dangers to his vessel, forcibly took charge of the helm of the *Kromhout,* turned her out of her course, thereby breaking the tow lines, and sailed away. This time the cruiser did not pursue. By arrangement, the vessel and crew were later, near the French colony of St. Pierre, surrendered to Canadian officers without prejudice to their rights.

When the cruiser's officers boarded the schooner on the high seas, they asked the accused what cargo he had and were told, "a bit of liquor." They asked to see the manifest and shipping papers, and did see them, but these were in French and not fully understood. They made no further examination of the vessel or of the cargo or of the accused. The vessel, as a matter of fact, had on board seven hundred and fifty-one kegs of rum which were dutiable in Canada.

Upon these facts the accused was tried at Halifax, N.S., before Doull J. with a jury, and convicted on the three counts mentioned, and sentenced to three years' imprisonment on each count, the sentences to run concurrently. This conviction was upheld on appeal, Mellish and Carroll JJ. dissenting. The jurisdiction of the trial court in cases such as this to deal with offences committed on the high seas, is conferred by s. 656 of the *Criminal Code.*

On this appeal we have to determine whether or not the *Kromhout* when the accused took her away from the police officers, was lawfully under seizure and in the control of those officers. The language of the charge is that the accused committed the theft by unlawfully taking the *Kromhout* openly and with force

> without the permission of * * * the person who seized the same, or some competent authority and before the said vessel had been declared by competent authority to have been seized without due cause, the said vessel having been seized and detained on suspicion by the said Moyle A. Hyson, a member of the Royal Canadian Mounted Police, as forfeited under section 207 of the Customs Act.

The provisions of the *Customs Act* by which this case is governed are not confined to s. 207—they include other

provisions which may now be set out, so far as necessary. By section 151,

> 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 (Subs. 1).

Such vessel "shall proceed to come to a stop when required so to do in the King's name by any officer" (Subs. 2); and upon such vessel's "failing to proceed to come to a stop when required," the captain or master of the Government cruiser may, after first causing a gun to be fired as a signal, fire at or into such vessel (Subs. 3). Further particulars of the rights and powers of such revenue officers in dealing with such a vessel are set out in subs. 8.

Section 207 reads:—

> 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 term "hovering" is not defined by the Act, but is a term understood by mariners to mean something like fluttering about, neither coming nor going, in an undecided manner. The term "territorial waters of Canada," so far as applicable to this case, means the waters "within twelve marine miles" of the Dominion of Canada (s. 151 (7)). "Officer" means an officer of customs (s. 2 (*l*)). By s. 2 (*o*)

> "seized and forfeited," "liable to forfeiture" or "subject to forfeiture," or any other expression which might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed.

Section 143 was also referred to, but really adds nothing to sections 151 and 207. It seems to have been assumed that a cargo of rum was dutiable goods in Canada and that the Royal Canadian Mounted Police cruiser and men were acting in discharge of public duty.

The effect of the foregoing provisions, when applied to the facts of this case, is that by hovering in territorial waters of Canada with dutiable goods on board, the *Kromhout* thereby became forfeited by operation of law. *Proof* of the forfeiture itself was established *after* the offence had

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been committed, that is, when the officers stopped and boarded the *Kromhout* and ascertained from the captain (the master) that dutiable goods were on board. The fact of hovering was established beyond peradventure by the general finding of the jury under quite proper directions. The seizing of the *Kromhout* on the high seas was part of the prolonged or continued act, which, begun within the territorial waters, and there temporarily frustrated by the flight of the schooner, was consummated on the high seas; and the temporary abandonment of the pursuit of the schooner by the cruiser was not such an abandonment as broke the continuity of the pursuit. When the presence of liquor in the schooner's cargo was established as a fact, the forfeiture which followed as a matter of law related back to the time of the hovering in territorial waters. The authority given to officers to stop and board vessels and examine them and their cargoes is intended for no other purpose than to establish whether or not an offence has in fact been committed. The forfeiture itself is not brought about by any act of officers, but is the legal unescapable consequence of the commission of the offence. A failure to establish that liquor was on board a vessel so hovering, would not mean that the offence had not been committed, but that the commission had not been proved.

It is objected that the charge is defective in that it alleges that the accused took a vessel that had "been seized and detained *on suspicion* * * * as forfeited." This objection, however, seems to be rather technical, and not of the substance of the matter. The words "suspicion," etc., were really quite unnecessary and when deleted leave the allegation as being "seized * * * as forfeited," and this phrase, I think, falls within the definition "seized and forfeited" within s. 2 (*o*).

Some complaint has also been made that the charge of the trial judge was not correct, but I find nothing in it that can properly be objected to in substance.

On the charges of theft, therefore, conviction must stand.

On the remaining charge—obstructing officers—the conviction itself is not in dispute. As to the sentence, it is not perfectly clear that the dissenting judges held it to be illegal. Mr. Justice Mellish says, "I think it is exces-

sive." Unless they dissented on the ground that it was illegal, this court has no jurisdiction to deal with the matter. Our jurisdiction is strictly limited to controversies in relation to some question of law on which there has been dissent. Whatever may be the proper construction of the judgments of Mr. Justice Mellish and Mr. Justice Carroll on this point, we think, since the sentence under the conviction upon the charge of obstruction runs concurrently with that under the conviction on the charges of theft, no useful purpose could be served by modifying it, although we are disposed to agree that, even if not illegal, it is excessive.

The appeal should be dismissed and the conviction affirmed.

Appeal dismissed.

Solicitor for the appellant: *W. P. Potter.*

Solicitor for the respondent: *W. Stuart Edwards.*