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*Nov. 6.
*Nov. 10.

G. MARTINELLO AND COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

JOSEPH B. McCORMICK AND FRED. G. MUGGAH (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Constitutional law—"Nova Scotia Temperance Act," 1 Geo. V. c. 33—Seizure of liquor—Intercolonial Railway—Carrier—Statute—Application to Crown.

Sec. 36 of the "Nova Scotia Temperance Act" authorizes the seizure of liquor in transit or course of delivery upon the premises of any carrier etc.

Held, that neither expressly nor by necessary implication did this enactment apply to liquor in custody of the Crown in right of the Dominion as a carrier.

Held, also, Duff J. expressing no opinion, that if it did purport so to apply it would be *ultra vires*.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial in favour of the plaintiff.

Liquor shipped from Montreal and consigned to the plaintiff company at Sydney was seized there by an inspector, under the provisions of sec. 36 of the "Nova Scotia Temperance Act, 1911" on the premises of the Dominion Government Railway by which it had been carried from Montreal. The company issued a writ of replevin on the trial of which it was held that the transaction was *bonâ fide* and came within the saving clause, sec. 4, of the Act of 1910. His

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 D.L.R. 364.

judgment for the plaintiff was reversed by the full court and the action dismissed.

J. M. G. Stewart for the appellant referred to *Kelly & Glassey* v. *Scriven* (1); *Ex parte McGrath* (2).

Finlay Macdonald K.C. for the respondents. The liquor was imported for re-sale and the transaction was not *bonâ fide* within the meaning of sec. 4 of the Act of 1910. See *In re Nova Scotia Temperance Act, 1910* (3).

This is a proceeding *in rem*, and the judgment of the court below is final. *McNeil* v. *McGillivray* (4); *Sleeth* v. *Hurlbert* (5), at pages 630-1.

THE CHIEF JUSTICE.—The sole question raised and argued on this appeal was whether a seizure of certain liquor by an inspector under the Provincial Temperance Act of Nova Scotia in the freight sheds of the Intercolonial Railway where it had been carried by the railway and was awaiting delivery to the consignee, was a legal seizure or not. In other words, whether or not the Crown in right of the Dominion was a "carrier" within the meaning of the Provincial Temperance Act. I am of the opinion that the Crown in right of the Dominion was not such a carrier, that the Act in question did not pretend to extend its provisions to the Crown in right of the Dominion and that the legislature of the province had no power to so extend it even if it had tried to do so. I concur with Anglin J. in the reasons stated by him in allowing the appeal and restoring the judgment of the trial judge, and would refer to the case of

(1) 50 N.S. Rep. 96, at pages 106, 109-10; 28 D.L.R. 319 at pages 324, 325-327.
(2) 31 Can. Cr. C. 10.
(3) 51 N.S. Rep. 405; 36 D.L.R. 690.
(4) 42 N.S. Rep. 133.
(5) 25 Can. S.C.R. 620.

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The Queen v. *McLeod* (1), where it was held the Crown was not liable as a common carrier for the safety and security of passengers using its railway.

Idington J.

IDINGTON J.—Counsel for the appellant wisely abstained from pressing many points taken in the courts below and confined this appeal to the single neat point of whether or not by virtue of the Nova Scotia Act which, neither by express words nor by any legal implication in those used, pretended to so extend them as to include the Crown and its possessions when giving the powers of entry and seizure it conferred on inspectors named pursuant to the provisions of said Act, can be held to have given them such powers as asserted by invading in the way in question the premises of the Crown, commonly known as the "Intercolonial Railway" and taking therefrom the cases of liquor in question.

I am of opinion his point is well taken. We have repeatedly held that most beneficent legislation of local legislatures could not give a remedy for grevious wrongs suffered on, or in and by, operations carried on upon said railway, and other like public works vested in the Crown. The like holding has been adhered to in analogous cases.

There is a double difficulty in respondent's way herein, because the Act in question fails to use express language extending it to include the Crown property, and he is invoking it to assert a power to enter that property vested in the Crown on behalf of the Dominion.

The counsel for respondent urged that the point taken here was not taken below, but clearly he is in error for the amended pleadings distinctly raise the issue presented here by appellant.

(1) 8 Can. S.C.R. 1.

It may well be, as so often happens in every court in too many cases, that the one issue upon which the case should turn, gets so befogged by raising irrelevant issues of law or fact, or both, that its import is apt to be overlooked; and possibly this is another of the same to be added to the long list of those which have preceded it.

I think this property now in question never got, except by an illegal act, where respondents had a legal right to deal with it, or by the appellant's own act when he might, if he had taken it there, presumably be held to have rendered it liable to such seizure as made.

The appeal should be allowed with costs and the judgment of the learned trial judge be restored.

DUFF J.—This appeal raises a question under section 59 of the "Nova Scotia Temperance Act," being ch. 8 of the Nova Scotia statutes of 1918. By sub-section 1 of that section:

> Where any inspector, constable or other peace officer finds liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, and reasonably believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same.

The section goes on to provide for proceedings before a magistrate for the purpose of hearing and determining the claim of the owner that the liquor is not intended to be sold or kept for sale in violation of the Act and authorizes the destruction of the liquor in the event of the disallowance of this claim by the magistrate or in the event of no person appearing to make such a claim.

Certain liquor in the freight sheds of the Intercolonial Railway and there awaiting delivery to a consignee after carriage on the railway was seized by an inspector professing to act under the authority

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of this enactment. Proceedings having been instituted before a magistrate under the Act, the consignee demanded delivery of the liquor, the property in which in the meantime had passed to him by payment of the vendor's draft attached to the bill of lading; the assignee's demand was refused and the liquor was destroyed.

The proceedings including the destruction of the liquor were taken professedly under the authority of sub-section 1 of section 59 and it is not suggested that the acts, of which the appellant complains as wrongful acts, could be justified under any other provision of the Act and the defence must fail unless the seizure was authorized under sub-section 1. It is contended on behalf of the appellant 1st, that this sub-section does not authorize the seizing and removing of such property from premises which are occupied by the Crown in connection with and for the purpose of the working of a Government railway, and 2nd, that if the scope of the sub-section is broad enough to give such authority it must be restricted in such a way as to exclude from its operation the premises of the Intercolonial Railway as being a railway owned and worked by the Government of Canada on the ground that if such were the effect of the enactment it would be *ultra vires* of the provincial legislature. I think the appeal should be allowed on the first mentioned ground and I desire to say as regards the second ground that questions touching the authority of a provincial legislature purporting to exercise the jurisdiction it possesses concerning civil rights or local and private matters within the province or the administration of justice to pass legislation incidentally giving rights of entry upon property connected with a Dominion railway or Dominion Crown property

for purposes not otherwise affecting any interest of the Crown in the right of the Dominion or in conflict with any Dominion enactment may have to be considered by reference to the Dominion authority respecting the public property of the Dominion or by reference to the Dominion authority in relation to Railways or Trade and Commerce. But such questions can more satisfactorily be considered (presenting as they frequently do difficult and important points) after full argument upon them, and on this second ground we virtually have had no argument. I therefore pass no opinion upon it as I find it unnecessary to do so.

It is quite clear, I think, that section 59 does authorize the taking of goods out of the possession of a carrier in derogation of any possessory lien or other right of possession the carrier may have in relation to them. It is therefore, if applicable to the Crown as carrier, an enactment in derogation of the rights of the Crown and upon settled principles for which it is unnecessary to cite authority it must not be given this application unless (there being no express words requiring it), the Crown is reached by necessary implication. The words of the section are general and there is nothing in it to indicate any intention on the part of the legislature that the authority conferred is to be exercisable in relation to goods in possession of officials of the Government in their capacity as such.

The appeal should be allowed and the judgment of the trial judge *restored.*

ANGLIN J.—The "Nova Scotia Temperance Act" (ch. 33 of the statutes of 1911) by section 36 authorized the seizure by an inspector of liquor in transit

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Anglin J.

or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, if reasonably believed by him to be intended or kept for sale. Liquor of the defendant, consigned to him from Montreal, was seized by an inspector under the Temperance Act in the freight sheds of the Intercolonial Railway at Halifax after property therein had passed to the defendant by the payment of the vendor's draft attached to the bill of lading.

Questions agitated in the provincial courts arising under section 4 of the Temperance Act were not pressed by counsel for the appellant, who rested his appeal solely on the ground that goods in the custody of the Crown (Dom.) as a carrier and awaiting delivery are not within the provisions of section 36, invoking the familiar rule of construction that

> The Crown is not reached (by the statute) except by express words or by necessary implication,

and also contending that it would be *ultra vires* of a provincial legislature to authorize such interference with the undertaking of a Dominion railway and that a construction involving such authorization should not be placed on the statute unless inevitable. I am inclined to think both points well taken. The Crown in right of the Dominion, although a carrier, was not within the purview of the Nova Scotia statute and the impeached seizure on its premises was unlawful.

Authorities on the first branch of the argument are collected in Maxwell on Statutes (5 ed.), at page 220, and Craies Hardcastle (2 ed.), at pages 376 and 386-92. On the second branch reference may be made to *Gauthier* v. *The King* (1).

The original caption of the liquor having been illegal the defendant cannot, in my opinion, success-

(1) 56 Can. S.C.R. 176; 40 D.L.R. 353.

fully set up in answer to the plaintiff's action for replevin that since he might have proceeded rightfully to take it as soon as the plaintiff had removed it from the railway premises, the case may be treated as if he had seized the goods after they had in fact been removed from the railway premises, whether rightfully or wrongly, and the detention of them were thus legal. The inspector in seizing was a mere trespasser *ab initio*. All the acts he did were trespasses. He was in the same position as a mere stranger without any legal authority whatever. The plaintiff is entitled to say:

> Let me be put in the position in which I stood before your illegal act.

Attack v. *Bramwell* (1).

I agree with the view expressed by the majority of the learned judges of the Supreme Court of Nova Scotia, in *Ex parte McGrath* (2).

The appeal should be allowed with costs here and in the court *en banc* and the judgment of the learned trial judge restored.

BRODEUR J.—This is an appeal from the Supreme Court of Nova Scotia *in banco* reversing the judgment of Mr. Justice Chisholm.

In the courts below the question which was mainly discussed was whether or not the sale of liquor was a *bonâ fide* one within the meaning of section 4 of the "Nova Scotia Temperance Act."

The trial judge held that the transaction was a *bonâ fide* one and that therefore the statute did not apply.

Upon appeal this decision was reversed and the court held that the transaction ended in Sydney,

(1) 3 B. & S. 520. (2) 31 Can. Cr. Cas. 10.

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when the draft was paid at the bank, and that section 4 of the "Nova Scotia Temperance Act" did not apply.

Before this court, the above question was not pressed and the only point which was raised by the appellant for our consideration was whether under the provisions of the "Nova Scotia Temperance Act" authorizing the seizure of liquor in the hands of a common carrier, that seizure can be legally made when the liquor is in the hands of the Crown as owner of the Canadian Government Railways.

It is an elementary principle of law that no legislation can affect the Crown without formal reference to it in the statute. Moveable property in the possession of the Crown cannot be seized or removed without its consent, or without some law being passed to that effect; and the Crown is not bound by statute, unless expressly, or by necessary implication. There is no power or authority in this Dominion capable of binding the Sovereign, save only the Sovereign himself in Parliament, and then only by express mention or clear implication. *Gorton Local Board* v. *Prison Commissioners* (1).

The "Nova Scotia Temperance Act" could very well authorize the seizure of liquor in the hands of an ordinary common carrier; but if the carrier is the Crown itself, I do not think the statute could apply.

In the present case, the officers charged with the carrying out of the "Nova Scotia Temperance Act" thought it advisable to go and seize in the hands of the Crown the liquor in question. That seizure was illegal and the action instituted by the appellant to claim the goods is well founded.

The appeal should be allowed with costs of this

(1) [1904] 2 K.B. 165, n.

court and of the courts below and the judgment of the trial judge restored.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

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Mignault J.

Solicitor for the appellants: *A. D. Gunn.*
Solicitor for the respondents: *Finlay Macdonald.*