

CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE

AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

BETWEEN:

THE SHEARWATER COMPANY, LIM- } CLAIMANT;
 ITED }

1933
 Apr. 28,
 May 9,
 July 20.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Seizure—Customs enactments—Coasting regulations—The Merchant Shipping (Colonial) Act 1869

Claimant's ship was seized in August, 1930, by an officer of the Customs Excise Preventive Service of Canada for alleged violations of the Customs Act and coasting regulations. To maintain the seizure the Crown relied upon certain sections of the Customs Act, R.S.C., 1927, c. 42, and certain coasting regulations made thereunder, or under corresponding sections of earlier Customs Acts. In 1883 certain regulations were enacted by Order in Council, pursuant to the provisions of the Customs Act, 1877, and they became effective upon publication in the *Canada Gazette*. In May, 1901, no. 12 of such regulations was rescinded by Order in Council, and the following substituted therefor: "No goods shall be taken into or put out of any coasting vessel or boat, while on her voyage by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," and it was for an alleged infraction of this regulation that claimant's ship was seized. The regulation never became effective, because of failure to publish it in the *Canada Gazette*.

The Crown contends that regulation no. 12 as originally enacted continued in force and effect, because the repeal of the same intended by the later regulation no. 12 never became effective, and that the seizure should be maintained under it, and also under regulation no. 4, which provides *inter alia* that if any officer finds that "any goods" had been unladen from a vessel before the master had reported to a customs officer, the goods and vessel shall be forfeited.

Held, that the coasting regulations and the statutory provisions under which they were made, never became effective since they were not enacted in the form required by *The Merchant Shipping (Colonial) Act 1869*.

2. That enactments in regulation of the coasting trade of Canada involve more than a mere determination of the nationality of ships which may engage in that trade.

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REFERENCE by the Minister of National Revenue. The reference came before the Court upon an agreed statement of facts and upon the papers and documents referred by the Minister.

The case was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Ainslee Greene, K.C., and *L. A. Ryan* for Claimant.

C. P. Smith, K.C., and *F. P. Varcoe, K.C.*, for Respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (July 20, 1933), delivered the following judgment:

This is a reference made by the Minister of National Revenue, pursuant to the power vested in him under section 174 of the Customs Act, and was heard upon the papers and documents referred, and upon an agreed statement of facts.

The facts of the case may be briefly stated. On or about August 16, 1930, the British steamship *Vedas*, registered at the Port of Halifax, N.S., in the name of the Shearwater Company Ltd., the claimant herein, and licenced under certain regulations to engage in the coasting trade of Canada, reported outwards coastwise from Windsor, Ont., for Montreal, P.Q., with a cargo of approximately 12,900 cases of beer. At the material time, the *Vedas*, it is agreed, was under verbal charter to one Harry Low, but that is not, I think, of importance. The *Vedas* apparently did not proceed diligently on her voyage to Montreal, but it is charged, loitered in Lake Erie and there transhipped a portion of her cargo, approximately 9,000 cases of beer without permit of any proper officer of Canadian Customs, and contrary to the requirements of the Customs Act and the coasting regulations. The beer comprising the whole of the original cargo was manufactured in the City of London, Ontario, by Carling Breweries Limited. It is conceded that any excise or customs duties or other revenue imposts, exigible upon the cargo, were paid before the same was laden aboard the *Vedas* at Windsor. It is not suggested that the beer discharged from the *Vedas* was relanded in

Canada, and it was not shown whether the transshipment took place in Canadian or in American waters. The *Vedas*, together with the balance of her cargo, was on August 30, 1930, seized by an officer of the Customs-Excise Preventive Service of Canada, and is still under detention. The reference concerns only the *Vedas*, which was valued at the time of her detention, by Customs Officers, at \$50,000. The notice of seizure served upon the master of the *Vedas*, by the Commissioner of Customs, as required by the Customs Act, was in accordance with Departmental Form K. 30, and is in part as follows:—

That contrary to the requirements of the Customs Act and Coasting regulations, the said vessel after report outward 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.

To maintain the seizure, the respondent, at the hearing, relied upon section 298 of the Customs Act, Chap. 42, R.S.C., 1927, which purports to empower the Governor in Council to make regulations in respect of the coasting trade of Canada, certain coasting regulations made thereunder or under corresponding sections of earlier Customs Acts, and section 245 (2) of the Customs Act (1927) which provides a penalty of \$400 against the master of any vessel for non-compliance with any regulations made by the Governor in Council, and in default of the payment of such penalty it is provided that the vessel may be detained, and if the default continues for a certain period the vessel may be sold to pay such penalty and the expenses of keeping her while under detention. The case was put to me on that footing only. No breach of any requirements of the Customs Act, other than section 245 (2), was suggested. It was not contended at the hearing that the goods "were carried contrary to the Customs Act and Regulations made by the Governor in Council," as is alleged in the notice of the seizure of the *Vedas* served upon her master. As the validity of the provisions of the Customs Act purporting to authorize the enactment of coasting regulations by the Governor in Council, are here challenged, and the coasting regulations made thereunder as well, upon grounds which

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I shall later mention, it would seem both desirable and convenient at this stage to refer to such provisions of the Customs Act, and the coasting regulations made thereunder.

Section 13 of Chap. 10 of the Statutes of Canada for 1877, entitled "An Act to amend and consolidate the Act respecting the Customs," provided as follows:—

The Governor in Council may, by regulation, declare any trade or voyage on the seas, rivers, lakes or waters, within or adjacent to Canada, whether to or from any place within or without Canada, to be a coasting trade or a coasting voyage within the meaning of this Act,—whether such seas, rivers, lakes or waters are or are not geographically or for the purposes of other Acts or laws, inland waters; and all carrying by water which is not a carrying by sea or coastwise, shall be deemed to be a carrying by inland navigation; and the Governor in Council may from time to time, with regard to any such coasting trade dispense with such of the requirements of the four next preceding sections as he deems it inexpedient to enforce in any case or class of cases, or make such further regulations as he may think expedient; and any goods carried coastwise, or laden, water borne or unladen, contrary to such regulations or to any provision of this Act not dispensed with by such regulations shall be forfeited.

In April, 1883, pursuant to this provision of that Act and section 124 (3) of the same Act which empowered the Governor in Council to make regulations respecting various matters including the coasting trade of Canada, certain coasting trade regulations were enacted by Order of the Governor in Council. The Order in Council recites that the

Board submit for the approval of the Honourable The Privy Council the following amended regulations governing the Coasting Trade of Canada submitted by the Honourable the Minister of Customs and concurred in by the Honourable the Minister of Justice, and it further recites that

His Excellency in Council has been pleased to order and it is hereby ordered, that the following regulations respecting the Coasting Trade of the Dominion be and the same are hereby adopted and established.

Then follow the regulations fourteen in number, under the caption, "Coasting Regulations in respect of British Registered Vessels."

The first regulation defines what is coasting trade, and enacts that vessels engaged in that trade "shall be subject to the regulations governing the same"; the second regulation is to the effect that only British registered vessels, and vessels owned by subjects of countries included in any treaty with Great Britain by which the coasting trade is mutually conceded, may engage in the coasting

trade of Canada; in substance this was merely declaratory of the law as it then stood. Regulation 3 provides that a coasting vessel may carry goods the produce of Canada, or goods duty free, or goods duty paid, from one Canadian port to another, provided always that the owner or master of such vessel shall take out a licence for the year or part of the year always terminable on the 30th day of June, for that purpose, and that the owner or master in taking out the said licence shall enter into a bond of \$500 conditioned that such vessel shall not be employed in the foreign trade, and provided also that the master of every such vessel shall report inwards and outwards on entering or leaving a port, on the form prescribed. Regulation 4 requires the master of any licensed coasting vessel to produce his licence to any officer of Customs upon demand, and to answer all questions put to him, and it provides that any such officer may board such vessel when he may deem proper, and if he should find any dutiable, or prohibited or smuggled goods, or if "any goods" had been unladen from the vessel before the master had reported to a Customs officer, the goods and vessel shall be forfeited. I think that "any goods" must relate to dutiable, or prohibited or smuggled goods. It is improbable that the penalty of forfeiture of both goods and vessel was intended to be imposed if "any goods" related to goods which were the produce of Canada and upon which all revenue imposts had been paid. Regulation 5 provides that before a coasting vessel shall depart from any port of lading, a report, in the form prescribed by that regulation, shall be delivered to the collector or some officer of Customs, and such report shall be the clearance of the vessel (in lieu of the requirements of the Customs Act), for the voyage, except for goods under bond, or goods liable to excise or internal revenue duty, and with this exception the report apparently does not require any information as to the contents of the cargo. The report requires, in the case of a report outwards, a declaration by the master in the following terms:

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

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This regulation was apparently designed to apply to a licensed coasting vessel only and it is suggested, with some force, I think, that a licensed coasting vessel might discharge or take on goods during her voyage providing they were not goods under bond or goods liable to excise or internal revenue duty. Regulation 6 requires that vessels employed in the coasting trade that have not taken out a coasting licence shall report inwards and outwards at their port of arrival or destination, and clearances are required of them whenever they depart from any port within the Dominion of Canada, and in default of their so reporting the vessel and cargo, a penalty is provided. Regulation 7 is to the effect that goods under a removal bond from one Canadian port to another may be carried in any licensed British vessel trading coastwise, but only upon such goods being entered in the report outwards and clearance. Regulation 8 provides that no coasting vessel shall touch at any foreign port unless forced to do so by unavoidable circumstances. Regulation 9 provides how and when goods carried or to be carried coastwise shall be shipped or unshipped, and regulation 10 states that officers of Customs may board and search any coasting vessel at any port or place. Regulation 11 is applicable to boats under fifteen tons and states that such boats, except by special licence, shall not carry any goods from a foreign country, which are liable to duty. Regulation 12 is as follows:—

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.

Regulation 13 permits the reports inwards and outwards coastwise required by the regulations, in the case of any steam vessel, to be made by a purser if carrying one, and regulation 14 states that all these regulations shall apply to the coasting trade of British Columbia.

These regulations became effective by publication in the *Canada Gazette* shortly following their enactment. In May, 1901, regulation no. 12 was rescinded by an Order in Council which recites that

The Governor General in Council is pleased to order and it is hereby ordered that the Regulations made by Order in Council of 17th April, 1883, respecting the Coasting Trade of the Dominion of Canada shall be and the same are hereby amended by rescinding section 12 of the said Regulations and substituting the following in lieu thereof.

This I assume was done under the authority of section 245 (c) Chap. 32, R.S.C., 1886. The material part of the new regulation no. 12 runs thus:—

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.

This regulation in fact never became effective, because of the failure to publish it in the *Canada Gazette*, yet, it is quite apparent, I think, whatever be its importance, that it was for the supposed infraction of this abortive regulation that the *Vedas* was seized. The notice of seizure served upon the master, I think, makes that quite clear. This is confirmed by the fact that the Department of Customs had apparently long acted under the belief that the new regulation no. 12 had become effective, because on August 1, 1901, a printed memorandum—which was put in evidence—was issued by the Commissioner of Customs addressed “To Collectors of Customs and others concerned” and under the caption of “Summary of Customs Manifesting and Coasting Regulations,” and the memorandum contained this new regulation no. 12. In this printed memorandum all the coasting regulations enacted in May, 1883, appear in full except regulation no. 12; the number remains followed by the words “Amended 31st May, 1901.” Further on in the memorandum the new regulation no. 12 is set forth in full under the head “Amendment of Section 12 Coasting Regulations.” Then there is the further fact that it was under this regulation that the respondent sought to maintain the seizure at the hearing of the reference.

Upon the hearing of the reference it was not shown whether or not the new regulation no. 12 had ever been published in the *Canada Gazette* as required by section 301 of the Customs Act, 1927, or the corresponding provision of the Customs Act in force in 1901, and at a subsequent date I heard counsel upon the point. It transpired, as I have already stated, that the new regulation no. 12 had never been published in the *Canada Gazette* and consequently had never become effective, but the coasting regulations of 1883 had been so published and I allowed counsel for the respondent to give evidence of that fact. I thereupon gave leave to counsel to submit written arguments applicable to the new state of facts that had de-

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veloped by reason of the irrelevancy of the new regulation no. 12 to the issue. Counsel for the respondent now contends that the seizure in question should be maintained under the old regulation no. 12, which continued in force and effect, it is claimed, because the repeal of the same intended by the later regulation no. 12 had never become effective; and also it is contended that the seizure should be maintained under coasting regulation no. 4.

I shall first consider the provisions of the Customs Act of 1877, pursuant to which the coasting regulations in question were made by the Governor in Council, and the coasting regulations themselves, the validity of which are wholly contested by counsel for the claimant, upon the ground that neither the statutory provisions nor the coasting regulations were enacted in conformity with the requirements of the Imperial Statute, "The Merchant Shipping (Colonial) Act of 1869." While this point is of importance in so far as the matter presently before me is concerned, it is likely hereafter to be of academic interest only because of the coming into force of the Statute of Westminster, 1931. The Statute of Westminster has not, in my opinion, a retroactive effect; the antecedent history of Imperial legislation in respect of shipping, and of the coasting trade, in British possessions, repels, I think, the suggestion of the Statute of Westminster being a declaratory enactment. And it was not contended by counsel for the respondent that the British North America Act conferred unlimited power upon the Parliament of Canada to legislate in respect of shipping or the coasting trade of Canada.

It is to be determined what meaning is to be given to "regulation" of the coasting trade of Canada. There is no difficulty as to what is meant by "coasting trade." On the one hand it is contended, as I understand it, that "regulation" of the coasting trade is limited to a determination of the nationality of ships that shall be permitted to engage in that particular trade; on the other hand it is contended that "regulation" of the coasting trade comprises all such and similar provisions as are to be found in the Canadian coasting trade regulations of 1883. The latter contention is that submitted by counsel on behalf of the claimant. As was suggested in Mr. Greene's argument, one method of ascertaining the meaning of what is a "regulation" of the

coasting trade of Canada, is to review the earlier Imperial legislation relative to the same subject matter, and if it is there found that the word "regulation," when employed with reference to the "coasting trade," had a definite meaning, then it is a fair deduction, it is claimed, that when the power to legislate in respect of the "regulation" of Canadian coasting trade was conferred upon the Parliament of Canada, "regulation" must be implied to mean and to include what it meant and included in the legislative practice of the Imperial Parliament which conferred upon Canada the power to legislate in regulation of its coasting trade. And Mr. Greene referred to the case of *Croft v. Dunphy* (1), in which Lord Macmillan propounded a rule for the interpretation of the statute that was there in question, and which it is urged is applicable here. He said:

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.

Turning now to Imperial legislation extending in part to the British North American Provinces, and in force at the date of Confederation. It will be sufficient, I think, to refer to Chap. 107 of 16 & 17 Vict. (1853) "An Act to amend and consolidate the laws relating to the Customs of the United Kingdom . . . and certain laws relating to trade and navigation and the British possessions"; this Act was preceded by Chap. 93 of 8 & 9 Vict. (1843), and was entitled "An Act to regulate the Trade of British possessions abroad." In the Customs Consolidation Act, 1853, the short title, and under the head "As to the coasting trade of the United Kingdom,"—which appears within the text of the Act and not as a marginal reference—and commencing with section 151, we find a definition of what constitutes coasting trade in the United Kingdom, and that is followed by provisions which state that the coasting trade of the United Kingdom shall be carried on only in British ships, that coasting ships are confined to coasting voyages, that vessels engaged in the coasting trade must report at

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Customs within twenty-four hours after arrival and before goods are unloaded, that the landing or shipping of goods shall be at the times and places fixed by officers of Customs, that the master of a coasting vessel must keep a cargo book, and other provisions of the same general character. It is argued, as I have already stated, that if "regulation" of the coasting trade of the United Kingdom, at that time, included such provisions as I have mentioned, then the word "regulation" when used in Canadian statutes in respect of coasting trade, must be implied to include such or similar provisions as applied to the coasting trade of the United Kingdom, that is to say, the word "regulation" should be interpreted to mean and include what it did in Imperial legislative practice because the authority for the Parliament of Canada to legislate in respect of the coasting trade of Canada was conferred by an Imperial Act, which I shall at once mention. Passing then to the Imperial Act of 1869, enacted subsequent to the date of Confederation. This is the Act which I have already mentioned as conferring upon the legislatures of British possessions, the power to legislate in respect of their coasting trade, and "legislature," according to the interpretation clause of that Act, included the Parliament of Canada. This Act, being Chap. 11 of 32 Vict. and entitled "An Act for amending the Law relating to the Coasting Trade and Merchant Shipping in British possessions," its short title being "The Merchant Shipping (Colonial Act) 1869," for the first time conferred upon Canada the power, subject to certain conditions, to regulate by legislation the coasting trade of Canada. Sections 4 and 5 of that Act are as follows:

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.

These provisions were re-enacted in the identical language in the Merchant Shipping Act, 1894, sec. 736. It was under the provisions of the Imperial Statute of 1869 that Chap. 14 of the Statutes of Canada, 1870, "An Act respecting the Coasting Trade of Canada," was enacted. That Act provided that no goods or passengers might be carried coastwise in Canada except in British ships; it contained a suspending clause as required by the Imperial Statute of 1869, and it only came into operation in Canada after Her Majesty's pleasure had been publicly signified by proclamation in Canada.

It is my opinion that enactments in regulation of the coasting trade of Canada involve more than a mere determination of the nationality of ships which may engage in that trade. Sec. 5 of the Imperial Act of 1869 repealed sec. 163 of The Customs Consolidation Act, 1853, which provided that goods and passengers could only be carried between any two ports in a British possession, in British ships, and the repeal of this section left the Parliament of Canada free to determine thereafter what ships might engage in Canadian coasting trade. The Act of 1869, however, does more than repeal sec. 163 of the Act of 1853; it conferred upon the Parliament of Canada the power "to regulate the coasting trade" of Canada from "time to time," subject to the conditions therein mentioned. The repeal of sec. 163 of the Act of 1853 was an incident of the policy expressed in the Act of 1869, namely, that British possessions might thereafter regulate their own coasting trade. If it was intended merely to permit the legislatures of British possessions to determine the nationality of ships which might engage in their coasting trade, then, as was suggested by claimant's counsel, a simple repeal of sec. 163 of the Act of 1853 would have sufficed. Furthermore, the

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Parliament of Canada could not have been of the opinion that "coasting regulations" was limited to a regulation of the nationality of ships that might engage in the coasting trade of Canada, otherwise it would not have continued to enact in the Customs Act of 1877, and later Customs Acts, the provision that the Governor in Council might make regulations respecting the coasting trade of Canada, because by its own Act of 1870 it had already determined what ships might engage in that coasting trade, and that Act was enacted and proclaimed in accordance with the conditions of the Imperial Act of 1869. I think "regulation" of the coasting trade includes, for example, the provisions contained in the Canadian coasting regulations of 1883, and the provisions of the Imperial Act of 1853 relating to the coasting trade of the United Kingdom, some of which I have mentioned. It is impossible to say that the regulations in question here are not in regulation of the coasting trade of Canada. That is just what they purport to do. They were designated by their makers as "coasting regulations" as will appear from the Orders in Council which I have mentioned, they were proclaimed as such in the *Canada Gazette*, the Department of Customs published the same as such in the printed memorandum I referred to, the charge preferred against the *Vedas* and the reason for her detention is that her master violated one or more of these "coasting regulations," and they were enacted avowedly pursuant to the terms of a statute which purported to authorize their enactment as "coasting regulations" by the Governor in Council. The regulations in question are therefore in my opinion "regulations" of the coasting trade of Canada within the meaning and intendment of The Merchant Shipping (Colonial) Act, 1869.

The next point for decision is whether the coasting regulations ever became effective. The regulations were not enacted in the form required by the Imperial Act of 1869, and neither were sections 13 and 125 of the Canadian Customs Act of 1877 under which the regulations were made. Neither the regulations nor the statutory provisions under which they were made contained the suspending clause required by sec. 4 (1) of the Imperial Act of 1869, and they were never approved of and proclaimed as required by that Act, which omissions are, I think, fatal. For these reasons

I am of the opinion that the coasting regulations in question, and the statutory provisions authorizing the same, never became effective.

In the result, it is my opinion, that the seizure of the *Vedas* cannot be maintained and that she should be released to her owners. It is not therefore necessary that I should pronounce upon any other aspect of the case. I referred to the coasting regulations at some length in order to show their character and purpose, and also because I thought the same would be convenient if this judgment came to be reviewed by another court. I know of no reason why I should refuse the claimant its costs of the reference and I therefore allow the same.

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Judgment accordingly.