CASE AND COMMENT.

CONSTITUTIONAL LAW—EXTRA-TERRITORIAL OPERATION OF DOMINION LEGISLATION—CUSTOMS LEGISLATION—PROHIBITION OF "HOVERING."—Unqualified in its terms is section 3 of the *Statute of Westminster, 1931,* conferring on Dominion Parliaments power to enact laws having extra-territorial operation: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

The wording of the section is that proposed in the Report of the Conference of 1929 on the "Operation of Dominion Legislation and Merchant Shipping Legislation." The inconvenience of the constitutional limitation which it was designed to remove is referred to in section 39 of that Report—an inconvenience which was all the greater because the subject was "full of obscurity," and there was "conflict in legal opinion as expressed in the Courts and in the writings of jurists, both as to the existence of the limitation itself and as to its extent." Differences in Dominion constitutions had to be taken into account. No certain test was applicable to all cases. The doctrine introduced a "general uncertainty" which could be illustrated by questions arising in connection with legislation relating to such matters as fisheries, taxation, shipping, air navigation, marriage, criminal law, deportation and smuggling. The Conference, after struggling for some time, it is said, with the question of what qualifications should be annexed to the exercise by Dominions of extra-territorial power, finally dealt with the whole problem in a manner reminiscent of the trenchant method of Alexander shearing the *nodus Gordius.* It recommended the enactment of the section in the unqualified terms set out above.

The recent decision of the Privy Council in *Croft* v. *Dunphy,*[1] applying as it did the law existing before the passing of the *Statute of Westminster,* throws some light on the nature and extent of the constitutional limitations formerly alleged to exist. Their Lordships supported the validity of the Canadian legislation there impugned, and in so doing dealt with the matter quite apart from any retrospective operation which the provision of the *Statute of Westminster* might possibly have. Although decided on law which is now obsolete, the importance of the case is scarcely to be estimated by that circumstance. The reasonable interpretation to be placed on the wide language of section 3 of the *Statute of Westminster* is likely to

[1] (1932), 48 T.L.R. 652.

furnish a problem for the consideration of the Courts, and in dealing with that problem the reasoning of their Lordships in the present case will probably be found to be of significance.

The Dominion legislation challenged in *Croft* v. *Dunphy* is to be found in sections 151 and 207 of the *Customs Act* of Canada.[2] This legislation authorizes, *inter alia,* the seizure of any vessel registered in Canada found hovering within 12 marine miles of the coast and having on board goods dutiable under the Act.

Before stating the facts of the present case it may be of interest to refer to an earlier case, occurring in 1927, in which a similar question arose and which probably led to the passing of the amendment.[3] In the summer of 1927 a schooner owned by Capt. Edward J. Dicks and having on board a cargo of liquor was seized by customs officers of Canada off the south-east coast of Prince Edward Island. The seizure took place at a point more than 3 miles, but less than 12 miles, from the coast. To test the validity of the seizure proceedings were taken in the Exchequer Court of Canada. The case did not, however, go to trial. It was settled by the Crown restoring to Capt. Dicks his schooner and cargo and paying him his costs and an agreed sum for damages. The Department of Justice, acting on the advice of Mr. Eugene Lafleur, K.C., took the view that before the seizure could be justified it was necessary that the Dominion Parliament should first authorize seizure out to the 12 mile limit, as the *Customs Act* then did not.[4] In the session of 1928, the amending Act referred to above was passed to extend the seaward limit for seizure, in the case of any vessel registered in Canada, to 12 marine miles.

Turning now to the facts of the present case, in June, 1929, the "Dorothy M. Smart," a schooner registered in Nova Scotia, sailed from the French island of St. Pierre for "the high seas" with a cargo of rum and other liquors. Three days later she was seized at a distance of 11½ miles from the Nova Scotia coast, under the provisions of the customs legislation referred to above. In order to test the validity of the seizure and the legislation under which it was made, the owner, Dunphy, brought an action against Croft, the customs officer making the seizure.

The trial judge upheld the validity of the legislation and seizure, and his decision was unanimously affirmed by the Supreme Court of Nova Scotia *en banco.* On appeal to the Supreme Court of Canada

[2] R.S.C., 1927, c. 42, as amended by 18 & 19 Geo. V, c. 16, ss. 1 and 3.
[3] See 18 & 19 Geo. V, c. 16.
[4] For the facts of this earlier case I am indebted to His Honour Judge Inman of Prince Edward Island, who was of Counsel for the Crown and acted for the Crown in connection with certain collateral proceedings (replevin, etc.) taken in the Island Courts. D.A.M.R.

this decision was reversed by a majority of three to two.[5] Mr. Justice Duff, delivering the majority judgment, started with the proposition that "*prima facie* the jurisdiction of subordinate legislatures is territorially limited," this as "an accepted principle." "Broadly," he said, "it may be laid down, as a rule of construction, that subordinate legislatures do not possess such extra-territorial jurisdiction unless it has been granted in express terms or by necessary implication." And he did not find in the powers granted to the Dominion by the *British North America Act* to legislate in relation to the "Peace, Order and Good Government of Canada," or in relation to "Navigation and Shipping," "Trade and Commerce," and "Taxation" any necessary implication of the power to detain and arrest ships extra-territorially. On appeal to the Privy Council the decision of the Supreme Court of Canada was reversed and that of the Nova Scotia Courts was restored.

Speaking generally, the effect of their Lordships' judgment, delivered by Lord Macmillan, may be said to be to substitute for the presumption with which Mr. Justice Duff appears to have started, viz., a presumption that the jurisdiction of the Dominion Parliament was "territorially limited," a presumption of an appreciably different character, viz., that the Imperial Parliament in enacting the *British North America Act* did not intend to confer on the Dominion Parliament power to legislate contrary to the principles of international law. "It may be," their Lordships said, "that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the *British North America Act* has not conferred power on the Dominion Parliament to legislate contrary to these principles."

That being the true nature of the presumption, there was no occasion for applying it in the present case. The legislation impugned was not contrary to the principles of international law. International law conceded to every State the degree of extra-territorial control sought to be exercised by the Dominion, at all events where such control had no application to foreign ships. Every State has, according to international law, the right to exercise jurisdiction outside the ordinary limits of its territorial waters for certain particular purposes. One such purpose is the enforcement of its revenue laws, in order effectually to prevent infractions of such laws upon its own territory.

[5] [1931] S.C.R. 531.

Presumption being thus out of the way, the sole question was one arising upon the interpretation of the *British North America Act* apart from presumption. As to that question, the legislative practice of the Imperial Parliament itself—a matter legitimately to be considered in determining the scope of any legislative power granted by it—showed that it had long been the practice of that Parliament, before 1867, to include in its customs legislation "anti-smuggling provisions authorizing the seizure of vessels having dutiable goods on board when found 'hovering' off the coast within distances substantially in excess of the ordinary territorial limits." The inference to be drawn from this legislative practice was in favour of the existence of the jurisdiction sought to be exercised by the Dominion. "It will thus be seen," they said, "that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against 'hovering' were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy.[6] The *British North America Act* imposed no such restriction in terms and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not *in pari materia.*"

They conclude with a reference to a suggestion made on the argument that section 3 of the *Statute of Westminster,* had retrospective operation, as follows: "In the view which their Lordships have taken of the present case it is not necessary to say anything on this point beyond observing that the question of the validity of extra-territorial legislation by the Dominion cannot arise in the future."

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[6] Cf. *Attorney-General for Canada* v. *Cain,* [1906] A.C. 542.

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EQUITY—TULK V. MOXHAY AND THE NEGATIVE EASEMENT, ANALOGY.—The wedding arranged by Jessel, M.R., in *London and South-Western Railway Co.* v. *Gomm*[1] between the doctrine of *Tulk* v. *Moxhay*[2] and the common law doctrine of negative easements has brought forth some eccentric progeny. Among these is a judgment delivered not long ago in Ontario. In *Cities Service Oil Co. Ltd.* v. *Pauley*,[3] A, the owner of a service station granted an exclusive licence for five years to the plaintiff company to instal oil and gasoline dispensing equipment in the service station, and as security for a loan, the company took a mortgage of the service station property. The licensor agreed that for the period mentioned she would purchase from the plaintiff "exclusively, all supplies of gasoline, oils, soaps," etc., at certain prices. Later, A conveyed the land on which the service station stood to the defendant, Pauley, who was then aware of the existence of the above agreement. The Court held that the covenants in the agreement, though affirmative in form, were restrictive in substance, and granted an injunction restraining the defendant from purchasing the supplies or erecting the equipment named in the agreement from anyone other than the plaintiff.

To appreciate accurately the effect of this case in its "restrictive covenant" aspect it is necessary to read the following portion of the judgment:

It is strenuously argued that the doctrine laid down in *Tulk* v. *Moxhay* cannot apply here, as the plaintiff company had not and has not any adjoining lands to the benefit of which it can reasonably be inferred the covenants in question were intended to enure.

The question under consideration is dealt with by Mr. Justice Middleton in *Bessinnett* v. *White* (1925), 58 O.L.R. 125.

In most of the decisions dealt with by the learned Judge the covenantee owned adjacent or adjoining properties, but in summarising his conclusions Mr. Justice Middleton expressed certain views which are particularly helpful in solving the problem now being considered, in the following language reported at pp. 128 and 129:

"From this I conclude that the question is in each case one of intention—was the covenant taken to protect or benefit land in which the covenantee had an interest, using this term in its widest sense, or was it merely personal and collateral to the conveyance? If the former, then so long as the interest intended to be protected remains, or is augmented as in the case in hand, there is no reason why the Court should not compel the covenantor, or those who claim under him with notice of the covenant, to regard the terms of the covenant. The question in each case is one of substance and reality and not of technicality."

Here the plaintiff company had a service station at a considerable distance from the land in question, and it would be of some benefit or advantage

[1] (1882), 20 Ch. D. 562; 51 L.J. Ch. 530.
[2] (1848), 2 Ph. 774; 41 E.R. 1143.
[3] [1931] O.R. 685.

that competition be limited, which would be effected to some extent by enforcing the agreement.

The plaintiff as mortgagee has the legal estate in the land in question and apparently the moneys were advanced to the mortgagor on the strength of the agreement that she would deal exclusively with the plaintiff. This would result in a direct benefit to the plaintiff as mortgagee of the land by increasing the revenue to be derived from the same. In either case the covenant enures to the benefit of the plaintiff's land and thus the principle of the decisions referred to applies here.

The decision in *London County Council* v. *Allen* is not applicable here, as in that case the covenantees did not possess, nor were they interested in, any neighbouring land for the benefit of which the covenant was imposed, while here the plaintiff company is, in addition to being interested in neighbouring land, interested in the identical land in respect of which the covenant is imposed.

It would occur to me that, if an agreement of the nature in question was entered into between two tenants in common of land, a situation analogous to that existing here would be created, and it could hardly be said that one of the tenants in common had not sufficient interest or estate to enforce such an agreement.

Surely a mortgagee has sufficient interest or estate in the land included in his mortgage to make a valid stipulation governing the use of the land to which the mortgagor or his successor in title might put it.

There can be no doubt that the early chancery authorities held that a restrictive covenant relating to land sold could be enforced although the object was not to benefit any land.[4] "It was not until some thirty years after the leading case, (*Tulk* v. *Moxhay*), that Jessel, M.R., . . . [5] raised the analogy—since accepted within limits in the case of land—to negative easements which require a dominant tenement."[6] From then on the idea became current that the burden of the covenant, in order to bind the assignee of the covenantor, must have been "imposed for the benefit of the land reserved"[7] by the vendor-covenantee. Further, in the year 1909 in *Reid* v. *Bickerstaff*,[8] a building-scheme case, Cozens-Hardy, M.R., used language which implied that the question is not merely "does the covenant benefit the land retained?" but also "was it intended by the parties to it to do so?" He said: "It is irrelevant to urge that the performance of the covenant would be greatly for the benefit of the adjoining land. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by deed containing the covenant or by some subsequent instrument executed by the covenantee, does

[4] See *Catt* v. *Tourle* (1869), L.R. 4 Ch. App. 654; *Luker* v. *Dennis* (1877), 7 Ch. D. 227; article: The Origin of the Doctrine in *Tulk* v. *Moxhay*, (1928), 166 L.T. at p. 208.

[5] In *London and South-Western Railway* v. *Gomm, supra.*

[6] 166 L.T. at p. 208.

[7] See *Rogers* v. *Hosegood,* [1900] 2 Ch. 388 at p. 408.

[8] [1909] 2 Ch. 305.

not pass as an incident of land on a subsequent conveyance."[9] The doctrine was brought to a focus in 1914 in the well-known decision of the Court of Appeal in *London County Council* v. *Allen*[10] where a public body was unable to enforce a restriction imposed for the public benefit because no land had been retained by such body.

Both before and since this ill-starred union, of an analogy to the ultra-technical negative easements doctrine and an equitable doctrine which was created for the purpose of avoiding common law limitations, was thus "regrettably"[11] consummated by the Court of Appeal, the ingenious contortions of the courts in their attempts to avoid its consequences have marked its offspring. Fourteen years before the *Allen* case, Kekewich, J., in an analogous situation—*John Bros. Abergarw Brewery* v. *Holmes*—to that in the *Pauley* case, held that "the covenant must be regarded as having been made for the benefit of the business" of the covenantee, and treated the business as a sufficient "dominant tenement."[12] Although Kekewich, J., seems to have gone rather far, his decision has never been overruled, and it is suggested that it was open to Wright, J., to have applied the *John Bros.* case in *Cities Service Oil Co. Ltd.* v. *Pauley*. He might thus at least have avoided stretching the imagination beyond the breaking point in order to find an intention on the part of the covenantee to benefit "neighbouring land" as such.[13] Perhaps, however, it would have been impossible to avoid engrafting the doubtful "mortgagee interest" mutation onto the "restrictive covenants' family tree." As indicated above, a tendency of the courts toward such variations appears to be inherent. It will be recalled that Middleton, J.A., whose language is quoted by Wright, J., in the present case, succumbed to such a tendency in 1925 in *Bessinnett* v. *White*.[14] In that case the covenantee conveyed land, Lot X, subject to a restrictive covenant for the benefit of Lot Y. At the time the covenantee had merely an unenforceable oral contract to have Lot Y conveyed to her. Later Lot Y was conveyed in accordance with that contract. In holding that the covenantee's insubstantial property interest was a sufficient dominant tenement to satisfy the negative easement analogy, Middleton, J.A., doubtless trod rather shaky ground, but he had at least two lots of land as a foundation. In the present case Wright, J., was forced to put both

[9] [1909] 2 Ch. at p. 320.
[10] [1914] 3 K.B. 642.
[11] See [1914] 3 K.B., Scrutton, J., at p. 673.
[12] [1900] 1 Ch. 188, especially at p. 196.
[13] See quotation from judgment of Wright, J., *supra*, seventh paragraph.
[14] 58 O.L.R. 125; [1926] 1 D.L.R. 95. See comment: (1926), 39 Harv. L. Rev. 775.

a dominant and servient tenement in one lot of land, in order to find them, something like the feat of a magician who draws a rabbit out of a cocked hat.[15]

Surely a doctrine which forces the courts to such ingenious lengths in order that they may do equity is badly in need of review. In view of the decision of the Judicial Committee of the Privy Council in the *Strathcona* case,[16] is it too much to hope that one or the other of the tribunals of last resort will soon be given an opportunity to divorce the doctrine of *Tulk* v. *Moxhay* from the shackles imposed upon it through the enthusiasm of Jessel, M.R., for common law analogies? The old case of *Tulk* v. *Moxhay* concerning land, like the recent *Strathcona* case concerning a ship, proceeded essentially on the ground of constructive trust, and that trust depended not on the covenant *per se*, but upon notice of it.

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CROWN—CONTRACT OF SERVICE—CIVIL—MILITARY—DISMISSAL.—Servants of the Crown, in the absence of statutory provision to the contrary, hold their employment at the pleasure of the Crown. The Crown may put an end to the employment at its pleasure and without notice. The President of the Exchequer Court rightly said in *Reilly* v. *The King*[1] that this principle has a "somewhat ancient lineage." The suppliant, in the proceedings arising by petition of right, was by Order in Council appointed a member of the former pension tribunal, the Federal Appeal Board which was created by statute. Under subsequent legislation two new tribunals were formed and the suppliant's position was in consequence abolished. Reilly claimed that he was appointed for a period of five years and that he was entitled to recover from the Crown the balance of his salary for the unexpired period after the Federal Appeal Board ceased to exist. The learned President, in a review of British constitutional practice and the authorities, pointed out that "public office is a distinctive thing and is not contractual in nature." Later in his judgment he said: "The Crown has by law authority to dismiss at pleasure, either its civil or military officers, because a condition to that effect is an implied term of the contract of service . . ." If the former statement is true it would follow that the servant of the Crown

[15] Cf. however discussion in 166 L.T. at p. 208.
[16] *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A.C. 108.

[1] [1932] Ex. 14; affirmed, [1932] 3 D.L.R. 429.

would be at liberty to resign at any time, and furthermore he could not recover remuneration for the services which he had rendered; on the other hand, if there is a contract with an implied condition operating in favour of the Crown to the effect that the servant may be dismissed by the Crown at any time, the servant's obligation is absolute in the absence of an express term covering the matter and he would be liable if he commits an inexcusable breach of it. He might recover his salary or wages due, but unpaid, with respect to the time he had served.

As a matter of fact, in the *Reilly* case, it would appear that there was nothing to show that there was an agreement on the part of the Crown that the suppliant should be employed for the full period of five years or that he undertook to continue in office during that time.

The tone of the authorities is that it is possible for the servant to enter into a contract of service with the Crown to which there is attached a condition as to termination by the Crown implied in law. In *Dunn* v. *The Queen*[2] Lord Herschell said : "So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure." Sir Richard Couch speaking for the Judicial Committee of the Privy Council in *Gould* v. *Stuart*[3] contemplated a contract of service with a condition that the Crown has the power to dismiss.

On appeal in the *Reilly* case from the decision of the President to the Supreme Court of Canada[4] the judgment of the lower Court was affirmed. The late Mr. Justice Orde, sitting *ad hoc,* treated the engagement of servants of the Crown as resting on contract when he said: "There is, of course, in every appointment to public office a contractual element in that the Crown, in effect, promises to pay the salary or other emolument fixed by law for services performed. But this in no respect affects the Crown's prerogative right, unless restricted by statute, to dismiss the servant at any time without liability for damages or further compensation . . . Even if there be a contract of service, the Crown's absolute power of dismissal is deemed to be imported into it, and nothing short of a statute can restrict that power."

It should be observed that a person in military service can never successfully allege that his engagement rests on contract subject to any condition or otherwise. It is voluntary on the part of the

[2] [1896] 1 Q.B. 116.
[3] [1896] A.C. 575.
[4] [1932] 3 D.L.R. 429.

Crown and a petition of right will not lie for pay or gratuity.[5] Audette, J., in *Cooke* v. *The King*[6] gives the juristic basis for the obligations imposed upon the person in military service. He said: "Under the provisions of the Canadian *Militia Act*[7] all male inhabitants of Canada at the age of 18 years and upwards, and under 60, being British subjects, are liable to active service, that is to be enrolled, enlisted, drafted or warned for service. That is the supremacy of the law of the land under which every male Canadian must enlist when circumstances demand his services. The compliance with this law, whereby the subject is so enlisted, cannot be called a contract creating mutual rights and obligations between the parties. The enlistment is more in the formal transmutation of a citizen into a soldier for the time being and as required by the defense of the realm. . . . The enlistment of the soldier in its true substance and merit is absolutely unilateral . . . The enlistment is more in the nature of a series of compact . . . whereby the soldier is placed at the pleasure of the state." The obligations of the person in military service are to a large extent statutory or flow from a status recognized or established by statute.

S. E. S.

[5]See *Mitchell* v. *The Queen*, [1896] 1 Q.B. 121; *Hearson* v. *Churchill*, [1892] 2 Q.B. 144; *Hales* v. *The King* (1918), 34 T.L.R. 341, 589; *Leaman* v. *The King*, [1920] 3 K.B. 663.

[6][1929] Ex. 20.

[7]R.S.C. 1906, c. 41, s. 9(2), s. 10. See now R.S.C. 1927, c. 132, s. 8.