

THE COURTS AND THE RUM-RUNNING BUSINESS.*

Four times during the past year, the courts of Canada and of Great Britain have been called upon to consider the validity of contracts closely connected with the intended violation of the municipal law of a foreign country,—to be precise, with the importation of liquor into the United States in violation of the Eighteenth Amendment to the American Constitution, and of the Volstead Act.¹ The fact that the rum-running business has figured in so many cases in so short a time is some indication of the size of what has come to be a staple Canadian industry, and it is easy to believe that the difficulties of the American authorities in carrying into practice their much-debated "prohibition enforcement" must be increased by the existence of this industry immediately across the border.

Canadian export statistics for the year ending March 31, 1926, show an export of liquor to the United States of the value of twelve and a half million dollars, or well over two and a half million sterling. In the year ending March 31, 1928, the value of this export trade had increased by fifty per cent.² It is maintained by officials of the United States that their efforts to suppress smuggling from the sea have been generally successful; if this is a fair statement of the case, the liquor still plentifully available must be either the fruit of home enterprise, or have been imported from across the Canadian border. While the existence of this traffic is a matter of the gravest concern to the authorities of the United States, it is by no means the unmixed blessing to Canada that statistics might suggest. The hijacker follows the bootlegger as the night the day, and the areas of their combined activities approximate sooner or later to the pattern of Chicago. Hence it has sometimes happened that the courts of the Dominion have treated the smuggler into the Detroit regions not so much as an offender against the laws of the United States, but, potentially and by implication, against the laws of Canada herself.³

In this question, as in others, it is the geographical factor which complicates the relations between Canada and the United States. Around the sea-coast, beyond the three-mile limit, the United States has been conceded by treaty the right to visit and search suspicious

* EDITOR'S NOTE.—This article was in type before the proposals to prohibit the exportation of liquor from Canada to the United States were brought before the Canadian Parliament during the session of 1930.

¹ "National Prohibition Act," October 28, 1919; 41 U.S. Statutes 305.

² Report of the Conference on Commercial Smuggling, held at Ottawa on 8th, 9th, and 10th January, 1929 between representatives of Canada and of the United States. U.S. State Department, Press Release, May 15th, 1929.

³ As in *Harwood and Cooper v. Wilkinson*, 64 O.L.R. 392, considered later.

vessels up to one hour's steaming-distance from shore.⁴ In the case of vessels carrying liquor to be shipped ashore in fast motor-boats, this measure of time may extend the range of the American Customs Control over thirty miles out into the Atlantic or Pacific. On the Canadian border, the citizens of the United States are separated from the source of their supply in part only by a narrow river. The opposite bank of this river is in many places, and particularly around Detroit, devoted to wharves where liquor is stored. These wharves, or more strictly the right of shipping from them, represent valuable property, much like stall space in a market. The shipping is carried out sometimes by the lessee of the wharf; at other times liquor is simply stored there until it is called for by American citizens, who are themselves responsible for its importation.

In 1924 Canada and the United States entered into a convention for the suppression of smuggling.⁵ Later, at the urgent invitation of the United States, a conference of the two governments was held at Ottawa in January, 1929, in view of the undoubted growth in the traffic. Daylight shipments across the border at Niagara and Detroit were referred to in despairing tones, and the suggestion was made that Canada should refuse clearances to all ships bound for destinations in the United States with cargoes whose importation was forbidden by the municipal law of that country.⁶ The Canadian delegates felt themselves unable to accede to this proposal. In the first place, it does not touch the difficulty of clandestine transfers of liquor for which no papers are asked in any case. In the second place, and this is the important consideration from our point of view, the export of liquor from Canada is in itself perfectly lawful; any taint of illegality which can be attributed to this act must be so attributed solely in virtue of internal legislation in the United States. To ask Canadian authorities to take administrative action on account of such legislation would be not unlike inviting them to carry out the police duties of the United States.⁷ Thus, while both parties are fully agreed in principle upon the undesirability of smuggling and the smuggler, the consideration of the precise method by which their disappearance is to be assured opens up wider questions.

⁴ Art. II. of the Treaty between Great Britain and the United States, dated January 23, 1924. Treaty Series (Gt. Britain) No. 22; Cmd. 2199. A similar provision occurs in the other treaties between the United States and other Powers. The steaming-time is that of the boat in which the liquor is actually shipped ashore.

⁵ Signed June 6, 1924; American Journal of International Law, Supplement, (1925) vol. XIX, 120.

⁶ *Op. Cit. sup.* Note 2, *passim*.

⁷ Admiral Billard, head of the American delegation to the Ottawa conference of 1929 recognised the existence of this feeling while he endeavoured to dissipate it.

In spite of her inability to accept the American proposals in this case, it seems that Canada has shown a willingness to co-operate with the United States to a degree transcending her strictly legal obligations. As an example, at the conference of Ottawa in 1929 Canada offered to permit officers of the United States to examine on Canadian soil cargoes bound for points in the United States, and transmit to their colleagues on the American side particulars of all such cargoes. The judgments of some of the Canadian courts indicate a possible willingness to go even farther than this. It is best to consider these cases in chronological order as they have an internal connection.

The first case to be discussed is that of *Walkerville Brewing Co. Ltd. v. Mayrand*.⁸ The defendant owned a dock on the Ontario side of the Detroit river. He made a contract with a brewing company, the plaintiff in the case, by which he undertook to ship no beer other than theirs from his dock. Subsequently, in breach of his contract, he shipped the beer of other companies. The plaintiff obtained an interim injunction to restrain the dock-owner from shipping this alien beer until the date of trial. Owing to various delays it was necessary for the plaintiff to obtain an extension of the injunction. The application was heard before Raney, J., in the Toronto Weekly Court; in refusing to grant an extension, the learned judge announced that he would take judicial notice of the existence of the rum-running business in the Detroit river, — possibly an unusual, but scarcely an unjustifiable use of judicial perspicacity. In addition, he presumed that the contract was designed to further this business, in the teeth of strenuous representations from the plaintiff's counsel that the Court should properly confine itself to the materials before it. In this respect, sympathy goes to the counsel. Although the facts of the particular case may have pointed very strongly to an evasion of the laws of the United States, there was no positive evidence of this before the court. The contract which had been broken related only to shipments in the future, which might have been to other points in Canada or in the world at large where the import of liquor is not prohibited. In case it may seem to advocates of prohibition that this view strains unnecessarily at a legal gnat, it may be pointed out that where it is possible for an obligation to be carried out in a legal manner, courts should be slow in the absence of contrary evidence, to assume that it will be carried out in an illegal manner. With this reservation in mind, we may fully concur in the further dicta of the learned judge, that the public policy of the courts should lead them to refuse help to a contract designed to frustrate

⁸ 63 O.L.R. 5. On appeal at p. 573.

the laws of a friendly nation; unfortunately the reservation is fatal to the particular case.

The judgment of the lower court was reversed in the Appellate Division, and the injunction extended.⁹ It was said that the export of liquor into the United States is lawful by Canadian law; if an appeal is to be made to the laws of the United States, these laws must be proved as a fact and cannot be judicially noticed.

Respecting the wider dicta of the learned judge as to the connection between the policy of the courts and international comity, it was said at p. 579, 581:

Courts may and should practise and encourage amity with our neighbours, but not to the extent of asserting that inhabitants of this Province are breaking the law of this country without first ascertaining by proper evidence what is the purpose and scope of the business which they are actually carrying on. If there is any common knowledge in this country of which the Court should take notice, and which indeed it should apprehend and apply continuously, it is the policy both of the Dominion and of the Province, as set out in their statute-law and regulations having the force of law.

In the interval between these two pronouncements, the English Court of Appeal had given judgment in the case of *Foster v. Driscoll*.¹⁰ The action arose out of a group of commercial transactions relating to the sale to purchasers in Scotland of a large quantity of whisky. Evidence was offered to show that the whole object of these transactions was the importation of the whisky into the United States in violation of the Eighteenth Amendment; on this ground the defendant contended that the agreements were not enforceable at law. Scrutton, L.J., was not prepared to accept this view, holding that since all the transactions upon which the action was brought took place in Great Britain, the law of the foreign jurisdiction was strictly irrelevant, and beyond the purview of the court.¹¹ The majority, however, declared the agreements unenforceable by reason of public policy. As was said by Lawrence, J., at p. 510:

The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause of complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of interna-

⁹ 63 O.L.R. 573. Appeal heard on March 18, 1929.

¹⁰ (1929) 1 K.B. 470.

¹¹ In 1920 in the case of *Ralli v. Compania Noviera* (1920) 2 K.B. 287 Scrutton, L.J. refused to enforce an agreement illegal by the law of the place of performance, saying: "This country should not assist or sanction the breach of the laws of other independent states." That case differs from the cases in hand in that performance was to be in the foreign country and that the parties had contracted bona fide. It is thus rather a case of supervening impossibility of legal performance than of public policy.

tional comity as now understood and recognized, and therefore would offend against our notions of public morality.

This dictum itself does not seem to be entirely free from the dangers of excessive width. Is every attempted import contrary to the rules of a foreign country to offend against our notions of public morality? If the answer is in the affirmative, it seems to follow that any country by the unilateral machinery of her internal legislation may extend indefinitely the range of contracts to which our courts must refuse to lend support. Perhaps this is the case; or again perhaps the concept of international comity is itself two-edged and able to restrain unreasonable legislation in the foreign country. On one point the majority have expressed themselves without uncertainty. The State does not incur responsibility for the enterprise of its rum-running citizens so long as it remains passive towards them, but assistance from the courts in the regulation of their relations *inter se* may give a cause of complaint to the State injured by their activities. Nevertheless, this abstention, on the part of the State, while it puts a premium on hi-jacking, does not necessarily help the foreign State. The refusal of an injunction by the Toronto court, more or less on these grounds, had the effect of allowing the peccant dock-owner to ship not the beer of one company of brewers, but if he pleased, of seventy such companies.

The case next in date is that of *Westgate v. Harris*,¹² concerning the lease from plaintiffs to defendants of another wharf on the Detroit river. The defendants stored liquor on this wharf from which it was fetched by American citizens. The sale took place on Canadian soil and the defendants there abandoned all interests in the liquor. The defendants repudiated their lease, and the appellants succeeded, both below and in the Appellate Court, in claiming rent and specific performance, in spite of the contention of the defendants that the whole contract was illegal and unenforceable, as being made in contemplation of a violation of the laws of the United States. The contract before the court was that of a lease only, but the court did not hesitate to glance from the shore across the river. However, impressed with the passive character of the defendant's conduct, the court held him too little of a smuggler or conspirator to win his case. Hodgins, J.A., said at p. 361:

The suggested crime is only a crime within the United States, and whatever the plaintiff actually did in this country was legal and valid.

It may be noted in connection with this case that the Federal Courts have held in the case of *The Muriel E. Winters*,¹³ that the

¹² 64 O.L.R. 358.

¹³ (1925) 6 Fed. (2nd) 466.

laws of the United States are not violated by a completed sale of liquor more than twelve miles out at sea,¹⁴ even when this sale is in furtherance of an illegal importation which may itself form the subject of a prosecution.

On September 20th 1929, the case of *Harwood and Cooper v. Wilkinson*¹⁵ fell to be decided by Raney, J., after the decision in *Foster v. Driscoll* (*supra*), and also after the reversal of his own decision in the *Walkerville* case (*supra*). The action was brought upon covenants to repay in a mortgage executed by the defendant in favour of the plaintiff Cooper and his assignee Harwood. The mortgages were to secure large advances made to the defendant in consideration of his permitting a boat purchased by the plaintiffs, and to be employed in the rum-running business, to be registered in his name. The court found as a fact that the real consideration for the advances was not the mortgage, but the participation of the defendant in the business ventures of the plaintiffs, which involved both the defrauding of the Canadian Government's revenue laws, and also the smuggling of liquor into the United States. Formal proof was offered of the Eighteenth Amendment and of the Volstead Act. In the course of his examination upon discovery, the plaintiff refused to answer relevant questions, and upon this ground the action was dismissed. But the learned judge proceeded to develop his opinion upon the wider issues of the case.

He found himself in the unusual and happy position of one able to oppose to the Appellate Court of Ontario which had reversed his finding upon a similar case the contrary finding of the English Court of Appeal, and, strong in such support, he expressed his not unnatural preference for the English view. Had it been necessary, he declared, he would have been ready to dismiss the case upon the ground that it also arose out of a contract founded upon an illegal consideration.

Certain particular points arise for consideration from these dicta. In the first place, it is strictly unnecessary to consider the attempted violation of foreign law at all, since the finding of the court that the plaintiffs intended a violation of the Canadian revenue laws was sufficient to taint the contract with illegality under the principle of such cases as *Pearce v. Brooks*.¹⁶ or the recent Nova Scotia decision, *Ernest v. Christian*.¹⁷

¹⁴ Twelve miles out to sea is the distance fixed by the United States Tariff Act of 1922, (42 U.S. Statutes 858) as the distance within which federal authorities should exercise their duties of search and inspection.

¹⁵ 64 O.L.R. 392.

¹⁶ (1866) L.R. 1 Ex. 213; also *Collins v. Blantern* (1766), 1 Sm. L.C. 12th ed. 412; *McKinnel v. Robinson*, 3 M. & W. 434; *Upfil v. Wright* (1911), 1 K.B. 506.

¹⁷ 60 Nova Scotia Reports 447.

Secondly, it may be doubted whether this case and the *Walkerville* case are strictly on the same footing, for here the illegality had been found by the court to lie in the very consideration, whereas in the earlier case the learned judge had been driven to the much broader ground that the contract was merely connected with, and of a kind to further, an infraction of the foreign law.

But the most interesting point of all lies in the dictum that the Appellate judgment in the Canadian case and the majority judgment in *Foster v. Driscoll* (*supra*) are sharply opposed. Perhaps a distinction might be hazarded, nevertheless. The broad ground of the judgment in the English case was that the plaintiffs were for all practical purposes partners in an illegal venture, and it was this partnership which the court felt itself to be debarred by comity from recognizing. Whereas neither the lease nor the restrictive covenant which formed the subject-matter respectively of the claims in the *Westgate* and the *Walkerville* case related exclusively, or even necessarily, to the illegal purpose.

Certain tentative conclusions suggest themselves from this small body of case-law. In the first place no act done outside the territory of the United States in contemplated violation of her laws is from that alone illegal by English or Canadian law. *But* it seems that such acts may be so closely bound up with attempted violations of the laws of the United States within her territory that British courts may refuse to assist them as a matter of policy. Whether this connection is close enough to merit the negative penalty from our courts must be a question of fact to be solved in the light of the particular case. From the internal angle, it might seem that the effect of the judgment in *Foster v. Driscoll* was simply to extend the category of illegal or immoral agreements unenforceable under the *Pearce v. Brooks* rule to cases where foreign municipal law is infringed. From the international point of view, the enforcement of such an agreement was held by the English Court of Appeal to amount to such an assistance or sanction of the objectionable agreement as might give a just international cause of complaint to the foreign country. It is possible that in this matter we see a fluid current of comity which may later crystallize into an international rule. At present, in view of the Canadian decisions, it may be premature to say that any legal obligation exists.

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