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HOW FAR PRIVATIVE OR RESTRICTIVE ENACTMENT BINDS THE CROWN

In these war times no one grudges the Crown new powers that might cause apprehension at another time. And if we cannot approve the tendency of Canadian legislatures, even before the war, to give the Crown new advantages over the subject, still such advantages are usually particular not general in their scope, and in an Anglo-Saxon community it seems unlikely that innovations requiring express enactment will assume threatening proportions. Here tradition plays its part. Moreover, what mischief the legislature may do, it can largely undo. But in recent years officials have shown a disposition to claim new advantages for the Crown over the subject, not by virtue of Parliament's bounty but as a matter of inherent right, by giving a new turn to the common law. This is a more serious matter than the undue complaisance of legislatures; for if a distorted view of the common law once gains acceptance, the effect may be permanent; then respect for tradition, which ought to safeguard the subject, will be made to fight on the wrong side.

The encroachment of prerogative complained of is to be seen in attempts by Crown officials, which become increasingly frequent, to distort to the Crown's advantage the common law rules for construing enactments that touch the Crown. These attempts present the more danger because they deal with aspects of the law in part familiar and in part peculiarly obscure; so that developments of legal doctrine in this half-light can easily take a wrong turn that will not become obvious until perversion of principle has gone beyond cure.

In making these attempts, officials invoke principles that up to a point are both old and well settled; the real objection is that they try to stretch these principles beyond that point, to apply them to matters in truth beyond their scope. This

unwarranted extension of these principles may well escape prompt detection because their exact limit, however well-defined in some directions, has in other directions remained singularly obscure.

To be more specific, our complaint is against the claim by Crown officials that enactments which restrict or cut down rights by language of general application are *always* ineffective against the Crown, whatever the origin of those rights. As proof, these officials invoke decisions that have refused to apply particular restrictive or privative provisions to the Crown, and have perhaps used general language as to the Crown's exemption; but we shall see that all rights which these provisions purported to cut down have been pure common law rights; so that rulings thereon are not authorities on rights of statutory origin. These rulings leave open the questions whether derogation from common law and statutory rights is governed by uniform principles, and whether it is justifiable to extend the old decisions on the Crown's common law rights to its statutory rights. We shall see that this extension, far from being one to be made as of course, is against legal principle.

It will even be found that the extension is against authority. Though, as has been said, the point is obscure, this obscurity has been largely due to text-writers having ignored decisions in point. These decisions, though not numerous, prove sufficient, when unearthed, to discredit most of the novel claims that Crown officials have been raising. Those claims not directly within the scope of these decisions fall within the principles therein laid down.

In considering the Crown's statutory rights, we need examine only those rights conferred by general language, that is, language that only applies to the Crown in common with all others. For a statute that purports to cut down rights that an earlier statute specifically gives to the Crown must affect the Crown or fail to operate at all. However, those benefits that in practice Crown officials have claimed to retain in the face of derogatory provisions have been benefits conferred on the Crown not by naming it, but by conferring them at large.

At the outset it is well to remind ourselves exactly how the law stands on the matters not in doubt. Where those rights that a privative or restrictive enactment purports to cut down or take away are pure common law rights, it is settled that to bring Crown rights within such enactment it must

indicate application to the Crown expressly or by *necessary* intendment. We have next to consider what is involved in extending this principle to cases where the rights are of statutory origin.

Such statutory rights may be based either entirely or only in part on statute. For rights that are perfectly well known to the common law may yet be extended in their scope by statute and, so to speak, enter a new field. We shall see examples of this process later. In dealing with various rights that statute may affect, the distinction of real significance for our purpose is between: (1) rights that the Crown can found entirely on the common law; and (2) rights that require the Crown to invoke a statute as an essential link, however small, in asserting its title thereto. When the Crown must invoke a statute to any extent, then both principle and authority require that it be bound by statutory restrictions, just like a subject, and equally whether the restrictions are created by the same statute or another.

The convenient approach to the question of derogation from the Crown's statutory rights is by first considering the situation where the Crown, in order to establish the rights which it claims to retain undiminished (*i.e.* untouched by words that diminish the subject's rights), must invoke the very statute by whose derogations the Crown denies it is bound. For on this point at least there is a reasonable amount of authority, even though the point is one neglected by the textbooks. Nor is this authority all recent by any means.

Crooke's Case,[1] decided in 1691, is perhaps the earliest in point. That case turned on a statute of 1670 that united two parishes and provided that presentments to the united church should be made by the patrons of the former churches alternately, that patron whose church had had the more valuable living to have the first presentation. The King was patron of the church with the poorer living, and Crooke was presented by the patron of the other. The King claimed that he always had priority, by virtue of the prerogative, wherever his rights and a subject's competed, and that the statute did not bind him because it did not name him. The Court decided against the Crown; and though it gave no reasons, the reporter (Shower) was the successful counsel, and the Court apparently adopted his argument, which he gives in full. He argued :

[1] (1691), 1 Show. K.B. 208.

> Either the King is included in this Act or not; if he be, the words plainly give us the first presentation; if he be not included meant or concerned by this union, then there is no colour for this caveat . . . it seems very hard to say that the King is not bound because not included, because not bound, and yet he shall be included as to benefit. If they have any right, the King can only have it by this Act of Parliament, and then they must have it as this Act of Parliament gives it. . . . An Act of Parliament which gives a right to the King shall bind him as to the manner of enjoying or using that right, as well as the subject.[2]

In an Irish case, *R.* v. *Cruise*,[3] a petition was made on behalf of the Crown to have a receiver of rents appointed under the Judgments Act, 1835. An amendment to that Act in 1849 had provided that application for a receiver by a judgment creditor could not be made until the lapse of a year; but the application was made before that time had passed. The Master of the Rolls refused to appoint any receiver, saying that the applicant :

> . . . is not at liberty to contend that he or the Crown, in whose name he proceeds, is not bound by the provisions of the 12 & 13 Vict. c. 95, s. 10, amending the former Acts. It is laid down in Vin. Abr. Statutes E 10, Vol. 19, p. 534, Oct. ed. that "An Act of Parliament which gives a right to the King shall bind him as to the manner of enjoying and using that right, as well as a subject".[4]

In *Re Excelsior Electric Dairy Machinery Ltd.*,[5] the Crown attacked a sale as void under the Bulk Sales Act, but did not attack it within the sixty-day limitation prescribed by that Act. Orde J. held that the Crown came too late, saying :

> . . . the Crown could hardly claim the benefits of the Bulk Sales Act without also being subject to its limitations.[6]

Finally in *A. G. of B.C.* v. *Royal Bank of Canada and Island Amusement Co. Ltd.*,[7] the Crown made its most striking claim to approbate and reprobate a statute. The enactment in question was the Companies Act of British Columbia, and the relevant provisions were, first, that a company struck off the register of companies for failure to make returns should be deemed to have been dissolved, but, secondly, that upon certain steps being taken a company so struck off could be restored to the register by a judge's order, and then should be deemed to

[2] *Ibid.*, p. 210.
[3] (1852), 2 Ir. Ch. R. 65.
[4] *Ibid.*, p. 68. The reference in Viner is to *Crooke's Case*, *supra*.
[5] (1923), 52 O.L.R. 225.
[6] *Ibid.*, p. 228.
[7] (1936), 51 B.C.R. 241; *aff.* [1937] S.C.R. 459, on other grounds.

have continued in existence "as though it had never been struck off". The Island Amusement Co. Ltd. had been struck off the register for failure to make returns, but a judge's order under the above provision had been made for restoration. The Crown claimed that upon the striking-off the company's property had vested in the Crown as *bona vacantia*, and that the Crown's property had remained unprejudiced by the company's restoration because the Act did not mention the Crown. This case went through the Supreme Court and Appeal Court of British Columbia and finally to the Supreme Court of Canada, the decisions being uniformly against the Crown, though on differing grounds. The most elaborate judgment against the Crown's contention on this point was that of Macdonald J.A. who said:

> The Crown must invoke the Act . . . to obtain any colour of right to the fund. It cannot rely on that part of the Act by which the right is acquired and ignore that part which (if the true construction warrants it) puts an end to the right temporarily enjoyed. The nature and extent of the right depends on the wording of all relevant sections of the Act.[8]

Then, referring to the decision in *Re W.*,[9] a decision which held that the statutory legitimation of an illegitimate son, by the marriage of his parents after his birth, did not prevent the Crown's claiming his estate on his death intestate, as though the statute had not been passed, Macdonald J.A. continued:

> The distinction is that unlike the case at bar, the intestate's estate did not pass to the Crown by virtue of a statute or a step taken under a statute containing a provision that . . . the right to retain the estate might be terminated.[10]

Unfortunately, though the Supreme Court of Canada dismissed the Crown's further appeal in *A.G. of B.C.* v. *Royal Bank, supra*, its written judgment did not deal with the argument that the provision for restoration of a company could not derogate from Crown rights without expressly mentioning the Crown. But this point had been much elaborated in the Crown's factum filed in that Court, and when raised in the verbal argument had apparently been treated by the Court as quite untenable[11] though the eventual dismissal of the appeal went off on different grounds.

[8] 51 B.C.R. at p. 262.

[9] (1925), 56 O.L.R. 611. The soundness of this decision was shrewdly questioned by an anonymous commentator in 1 D.L.A. at p. 903. He pointed out that *Re W.* is inconsistent in principle with *Re Stone*, [1924] S.C.R. 682.

[10] 51 B.C.R. at p. 262.

[11] This is stated on the authority of counsel who took part.

The implications of the above rulings deserve some analysis. The reasoning in *R.* v. *Cruise, supra,* and *Re Excelsior Electric Dairy Machinery Ltd., supra,* indicates that the Crown cannot benefit under a statute and at the same time repudiate its restrictions because this is to approbate and reprobate the statute. This seems sound enough reasoning; but an even more convincing way of putting the matter can be found. Thus in *Crooke's Case, supra,* it was said :

> If they [the Crown] have any right, the King can only have it as this Act of Parliament gives it. . . .

Here we have the kernel of the matter. In that case the Crown was claiming what it could have no title to apart from statute, and claiming what the statute did *not* give, claiming what was not even consistent with the statute, which only gave rights that in terms denied the Crown's claim. The Crown then had to assert a right whose only possible basis was an Act that denied that right.

In *R.* v. *Cruise, supra,* the Crown claimed a receiver where none could be claimed except under a statute which gave no such right as was claimed, but another quite different and repugnant right. In other words, the Crown was trying to make out that the statute gave it an absolute right, where in fact the statute nowhere gave anything but a qualified right. Similarly in *Re Excelsior Electric Dairy Machinery Ltd., supra,* the Crown was trying to assert an unqualified right to upset a bulk sale, where no right in anyone existed apart from statute, and the only statute in point gave no one anything but a qualified right.

Again in *A.G. of B.C.* v. *Royal Bank, supra,* the Crown was claiming to treat a company as dissolved absolutely and irretrievably as against the Crown, though there was no basis for saying it was dissolved at all other that a statute which, read as a whole, purported to create not an absolute dissolution, but only a defeasible dissolution. The Crown in short claimed an absolute benefit where the Act gave no one more than a defeasible benefit. Here we may again quote Macdonald J.A. :

> There must be in fact a right before it can be invaded. In my view the right of His Majesty to this fund is not absolute; it is a right to retain it for the time being subject to termination by a step taken under the authority of the statute by which the Crown procured it, *viz.* by obtaining an order restoring the company to the register. It was solely because of a step taken under section 167 of the Companies Act that the fund reverted to the Crown. If on the

> proper construction of sections 199 and 200 of the same Act it provides, either expressly or by implication, that upon revival of a company the fund must be restored to its coffers, no rights are invaded at all. . . . The nature and extent of the right depends on the wording of all relevant sections of the Act.[12]

To sum up then, in all these cases the answer to the Crown was that it was making claims admittedly based on statute, yet claiming not those rights that the statute gave, but larger rights that the statute did not confer.

In *A.G. of B.C.* v. *Royal Bank, supra,* the Crown sought to distinguish the other decisions referred to above on the ground that here it did not claim a purely statutory right; for the common law gave it *bona vacantia,* and the statute merely opened a new field for the common law to operate in, or, as it was put, the Crown "did not claim under the statute but as a consequence of it". Actually this attempted explanation explains nothing. In *Crooke's Case, supra,* the Crown's claim was not purely statutory either; a right of presentment to a living is a common law right. The appointment of a receiver is a remedy quite well known apart from statute, and one only given a new field by the statute ruled on in *R.* v. *Cruise, supra.* The Bulk Sales Act ruled on in *Re Excelsior Electric Dairy Machinery Ltd., supra,* did not create a statutory remedy entirely unknown to the common law; it authorized the bringing of an action at law by using the established machinery of the courts. It is saying very little to say that a right does not arise under a statute but in consequence of it; equally the Crown is forced to invoke a statute in order to make out an enforceable right, and must be content with the right as given. It must be immaterial whether a right claimed is purely statutory or partly statutory; so long as a statute must be invoked at all, it must be invoked as it stands, not as the Crown would like to have it.[13]

There seems to be only one decision clearly inconsistent with the principles laid down in *Crooke's Case, supra,* and the

[12] 51 B.C.R. at p. 262.

[13] The writer had to advise on this point many years ago, when consulted on a provision in the Land Registry Act of British Columbia, which required that all plans of a certain type must be certified by a qualified land surveyor before filing. Certain Dominion Government officials denied that this provision was binding on them. The writer had no hesitation in advising that as the Dominion could not require the Registry to file plans at all except under the statute, it must comply with the conditions of the statute, like everyone else.

others cited above, *viz.*, *R.* v. *Rutherford.*[14] And this decision seems to be clearly contrary to principle. It decided that the Crown is not bound by the statutory time limit on appeals, because *nullum tempus occurrit regi.* In other words, the court reasoned as though it were dealing with an ordinary statute of limitations. But the time limit on appeals is not analogous; for appeal is a purely statutory remedy and no statute gives an unlimited and unfettered right of appeal; it always gives a right fettered not only by time conditions, but by many other conditions too. What the court failed to see was that the Crown was claiming an absolute right where there was no right apart from statute, and the statute gave no one more than a limited right.

So far we have considered only provisions that restrict Crown rights conferred in whole or in part by the same statute. But provided the rights cut down are given by statute in whole or in part, does it really matter whether the provision that cuts them down is contained in the same statute or in another? Is there any real distinction?

Let us first take the case where the restriction is found in an amendment to the statute that confers the rights restricted. An amending statute cannot be regarded as a mere appendage to the statute amended; the amendment is passed with the same formalities as the original, it has its own separate chapter number. Can any distinction be drawn between an amending statute that amends in terms and one that amends by enactment repugnant to the prior Act? It is submitted not. Both operate by causing the prior enactment to cease to exist as legislation *pro tanto.* Crown officials would have us believe that legislation can exist for the Crown and at the same time cease to exist for everyone else. But this claim seems to reach absurdity where the legislation relied on is quite general in its terms and such that the Crown can only invoke *because it purports to benefit everyone alike.*

It would seem therefore that Crown rights, when based on statute, can only be justly claimed to remain untouched by later repugnant legislation where those rights are expressly given to the Crown and the subsequent legislation does not expressly take them from the Crown.

[14] (1927), 60 O.L.R. 654. The writer criticized this decision when it first appeared; 5 Can. Bar Rev. 34. There seems to be no doubt that the common assumption has always been that the Crown is bound by time restrictions on appeal, like all others. In *Koksilah* v. *R.* (1897), 5 B.C.R. 600, the Crown applied for an extension of time for appealing, and was refused it.

No doubt when the Crown has particular rights actually vested in it, then subsequent legislation that derogates generally from rights of that type will not be deemed to cut down those vested rights; but that is a principle of general operation, one that operates as much in favour of the subject as of the Crown. But it is entirely another matter where possible statutory benefits are cut down by later legislation before any concrete rights actually vest. Can one conceive that if the Wills Act were amended to require only one witness instead of two, the Crown could claim the property of a testator who died without relatives because his will only complied with the amendment and not with the original Wills Act, and the amendment did not expressly mention the Crown?[15]

In practice nothing is commoner than for the Crown tacitly to admit that it is bound by legislation that cuts down, without express mention of the Crown, earlier statutory provisions that it could invoke like others. For example, where a section of the Criminal Code specifies the penalty to be paid by those convicted of a named offence, and this is later amended so as to reduce the penalty, can one conceive of the Crown's claiming the larger penalty merely because the amendment did not mention the Crown? Yet when does an amendment to the Code ever expressly mention the Crown? The true situation is that when the Crown prosecutes after reduction of the penalty its only right to receive any penalty must be based on the Code; it can only claim the penalty authorized; there is no longer a basis for claiming the penalty as first specified, because the original section as legislation has ceased to exist and is gone for everyone alike.

Lastly, we turn to the argument, more than once advanced for the Crown, that even where a privative provision in a statute would take away or cut down Crown rights according to the common law rules for interpreting statutes, still the Dominion and most of the provinces have changed all this by enacting special rules for construing their Acts. The Interpretation Act, R.S.C. 1927, c. 1, s. 16, declares :

> No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

[15] See *Re Stone*, [1924] S.C.R. 682, wherein it was held that changes in inheritance laws are binding on the Crown, even though they do not mention the Crown, and though they cut down the Crown's chances of obtaining lands by escheat.

The Interpretation Act of British Columbia, R.S.B.C. 1936, c. 1, s. 35, uses exactly the same language. The Interpretation Act of Ontario, R.S.O. 1937, c. 1, s. 11, provides :

> No Act shall affect the rights of His Majesty, His Heirs or Successors, unless it is expressly stated that His Majesty shall be bound thereby.

And most of the other provinces have passed similar enactments.

It should be recalled at this juncture that even by the common law rules for interpretation, *prima facie* a privative statute does not prejudice the Crown, except by express words, but the common law did make an exception where the statute must have meant to include the Crown by necessary inference. In *Re Silver Bros. Ltd.*[16] Lord Dunedin insisted that the Dominion interpretation section quoted above excluded *all* inferences; but, as has been pointed out by other judges, in practice it is not easy to draw the line between express statement and *necessary* implication. Yet assume that this line can be drawn; do the interpretation sections really enable the Crown to claim statutory benefits and at the same time to ignore statutory derogations therefrom?

This question was raised in *A.G.* for *B.C.* v. *Royal Bank and Island Amusement Co. Ltd., supra,* where it was pointed out that when a statute confers a statutory benefit unknown to the common law but also makes the fulfilment of certain conditions end such benefits, then the proviso does not "affect" any rights, because the statute never gave any but defeasible rights. The application to such a statute of the interpretation clauses cited has no effect whatever on its operation.[17]

Offhand it would seem as though the legislatures have attempted to give the Crown unfair and unjustifiable advantages by passing the interpretation clauses quoted above.[18] Consideration however raises strong doubt whether the true effect of such clauses has not been misconceived. The Crown assumes that such clauses operate entirely in its favour, and more specifically that the word "affect" means "prejudice", so that

[16] [1932] A.C. 514 at p. 523.

[17] See the judgment of Macdonald J.A., 51 B.C.R. at p. 262.

[18] The common law modified the rule that only express words could bind the Crown by conceding that it was enough if the words included the Crown by *necessary* implication. This concession was in effect imperative; for often the legislature proves incapable of expressing itself clearly, and this concession enabled the Courts to give effect to common sense and avoid stultifying the legislature where its meaning could not really be doubted. Can it be said that statutory interpretation clauses were enacted to exclude common sense?

the effect of the clause is simply to preserve Crown rights without in any way touching their acquisition. But can this assumption be justified?

Actually the dictionaries all show that the verb "affect" is not synonymous with "prejudice". All show that the real meaning of "affect" is "act upon", "have effect upon". As it is put in Stroud's Legal Dictionary (*sub. nom.* "affect") *prima facie* "affect" is a neutral word. It no more means "prejudice" than it means "benefit".

At common law, it should be remembered, not only could a statute prejudice the Crown by necessary implication without mention but equally it could confer a benefit on the Crown by general language without mention. It could "affect" the Crown either way. But the literal wording of these statutory interpretation clauses imports that by reason of these clauses general language in a statute shall neither prejudice or *benefit* the Crown unless the statute "expressly states that His Majesty shall be bound". Certainly such a construction would work far more equitably than one that makes the exemption from "affection" all one-sided.

If the above is sound, then obviously the Crown cannot claim the benefits of any statute whose burdens it repudiates; for its right to invoke the statute at all will depend on its being expressly declared to be bound by it. That means that these statutory interpretation clauses actually deprive the Crown of advantages conceded by the common law.

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