

JOHN P. HEARN.....CLAIMANT;
 AND
 HIS MAJESTY THE KING.....RESPONDENT.

1931
 June 8.
 July 18.

Revenue—Crown—Reference—Seizure—Customs Act, Section 244

A certain unregistered motor boat of less than 10 tons tonnage, was seized under section 244 of the Customs Act for departing from a port in Canada without a clearance. She had been moored at one pier in the Customs port of Sydney and left this pier to go to another point in the same port.

Held, that, inasmuch as the motor boat in question was not required to be registered, and was not eligible for clearance by Customs on a coasting voyage, she was not required to obtain a clearance under the provisions of the Customs Act before leaving her port or place of mooring and that, in consequence, she was not liable for penalty imposed by section 244 of the said Act, which Act does not apply to the facts of this case.

2. *Held* that, moreover, the boat in question did not depart from the port of Sydney within the meaning of said section and that the provisions of the Statute do not apply to a small boat which is unregistered and which is proceeding from one point in any port to another point in the same port without goods on board, and that she was not required to clear.

REFERENCE by the Minister of National Revenue to have the Court decide upon the claim made by the claimant herein.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Sydney.

J. W. Maddin, K.C., for claimant.

A. D. Gunn, K.C., for respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

THE PRESIDENT, now (July 18, 1931), delivered the following judgment.

This is a Reference made by the Minister of National Revenue under sec. 176 of the Customs Act, and involves the seizure and forfeiture of a small motor boat owned by the claimant, the alleged offence being that the boat had departed on the 1st, 2nd and 4th of September, 1928, from the port of Sydney, N.S., without clearing at Customs contrary to the requirements of sec. 244 of the Customs Act,

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which enacts that if any vessel departs from any port or place in Canada without a clearance, the master shall incur a penalty of \$400. For the alleged offence a penalty of \$400 was imposed upon the owner of the boat, and the boat was detained until the penalty, expenses of seizure and subsequent keep, should be paid. The penalty was not paid and the boat is still under detention.

At the conclusion of the hearing I decided that the seizure was improperly made, and that the motor boat should be released to the owner, the claimant herein. I reserved however the matter of costs. As the grounds upon which the motor boat in question was seized and detained involves quite an important and difficult point, I have thought it desirable to state the reasons for the conclusion which I reached at greater length than I did at the hearing of this matter.

There is no definite evidence as to the tonnage of the boat. The seizing officer estimated the boat to be about ten tons, while the owner, the claimant, estimated that the tonnage of the boat was less than ten tons; the person from whom the claimant purchased the boat, stated that the tonnage of the boat was about three or four tons gross, or perhaps a little more, and this person is a master mariner, and has also served in the capacity of engineer on steamers. The length of the boat he stated was about thirty-five feet over all, with a beam of about nine feet, and a depth of about four feet; the boat has a covered cabin. I think that these measurements would probably indicate more than four tons but less than ten tons; at any rate we may, I think, safely assume that the boat is below ten tons. Such a boat is exempt, by sec. 5 of the Canada Shipping Act, from the provisions of that Act relating to measurement and registration of ships.

As I have already stated, the infraction of the Customs Act charged against the master of the motor boat is that she departed from the port of Sydney, September 2, 3 and 4, 1928, without clearing at Customs as required by sec. 242 of the Customs Act, but it is only in respect of the offence alleged to be committed on September 4 with which we are really concerned. The incidents leading to the seizure may be briefly stated.

The motor boat in question was taken from a certain wharf at Sydney, N.S., around 9 or 10 o'clock on the evening of September 4, by the owner Hearn, who stated in evidence that he afterwards proceeded to what is locally known as Whitney Pier, or International Pier, a shipping pier belonging to the Dominion Coal Company. Whitney Pier is within the limits of the city of Sydney, and within the Customs Port of Sydney, some two miles or less distant by water from the wharf from which the motor boat departed. The owner of the boat alleges that he purchased at Whitney Pier, from the "ships stores" of a steamer engaged in the river St. Lawrence coal trade, a quantity of wine and beer. It seems to be agreed that this wine and beer originated from the stores or stock of the Quebec Liquor Commission. It is not contended that these goods were unlawfully within Canada or were not duty paid, though they may have entered Nova Scotia contrary to the laws of that province. On his arrival back at Sydney, a few hours later, the motor boat was seized on the ground already stated; the wine and beer was seized and forfeited by the provincial authorities for violation of the Nova Scotia Temperance Act. There was some evidence suggesting that the boat proceeded far beyond Whitney Pier, and it was even suggested that she went beyond the limits of Sydney Harbour and out to sea, in the region known as Rum Row where vessels engaged in illicit liquor trade congregate, and that she there took on board the goods found in the boat when seized. There is not sufficient evidence to support these suggestions and they may be dismissed. The story of the owner of the boat is the more probable one, that is to say, that he procured the wines and beer at Whitney Pier from some steamer. The provincial authorities must have thought so, and in fact I must accept that evidence, because any evidence to the contrary is conjectural, and I cannot therefore entertain it. Such are the incidents leading to the seizure. The issue therefore is limited to the question as to whether or not this unregistered motor boat of less than ten tons, not employed as a common carrier containing no cargo or goods of any kind, destined for a place within the Customs Port of Sydney from which she sailed, was obliged under the law to clear at Customs.

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Mr. Campbell, Collector of Customs at the Port of Sydney testified that Whitney Pier was within the boundaries of the Customs Port of Sydney, and as I have already stated is within the limits of the city of Sydney. At Whitney Pier chiefly for the convenience of the clearance of coal carriers, a Customs clearing office of some kind is maintained by and directed from the Sydney Customs Office; it is not a separate Customs Office, nor a Sub-Customs Office, as I understand it. Mr. Campbell also testified that in practise all registered boats are required to clear, and also unregistered boats if bound for North Sydney, another Customs Port in Sydney Harbour, or if bound out of the harbour, but that boats unregistered, under ten tons, going around the harbour, do not in practise clear at Customs. The claimant stated in evidence that he did not know he was obliged to clear at Customs at the time in question here, and while I cannot find that evidence in the record, still I am sure this was stated by the claimant.

I do not think that sec. 244 of the Customs Act is applicable to the facts of this case. The section states that, "if any vessel *departs* from any port or place in Canada without a clearance," the master shall incur a penalty. In this case I find that the boat did not depart from the Port of Sydney. I do not think that this provision of the statute applies to a small boat, which is unregistered, and which proceeds from one point in any port or place to another point in the same port or place, without any goods on board, or that she is required to clear. Sec. 91 refers to vessels bound outwards from one port in Canada to a port or place out of Canada, or bound outwards from any port in Canada to any place within the limits of Canada, and the master is required to report outwards, and sec. 93 provides for the granting of a clearance. It is also to be pointed out that sec. 91 refers to a registered boat. Sec. 244 is really the penalty clause for violation of sections 91 to 93 inclusive, and also other provisions of the Act. It would appear somewhat strange if a person owning a sail boat or motor boat, under ten tons and unregistered, should proceed in such boat the distance of say one hundred yards or less, from one point to another point in any given port, to purchase non-dutiable goods for himself, that he must before so doing clear at Customs. That case would in no

respect be different from the case under discussion. I do not think that sec. 91 and sec. 244 provides that clearances should in such cases be made, and it was not suggested at the hearing that there was any regulation to that effect. If that is the law, then one can safely say that it is not generally enforced and the public are in ignorance of it. And the Collector of Customs at Sydney confirms this. The seizure, I think, was improperly made and cannot be sustained.

Assuming however that the motor boat was about to depart on a coasting voyage to Whitney Pier, and it could not have been anything else than a coasting voyage. Then other difficulties are to be encountered. None but British registered vessels can engage in Canadian coasting trade; this is subject to any treaty rights which the subjects of foreign countries may enjoy. The seized motor boat not being registered, could not lawfully engage in Canadian coasting trade, and therefore could not be lawfully cleared at Customs at Sydney to depart for Whitney Pier coastwise. If the master of the boat in question committed any offence, then it was in engaging in the coasting trade with an unregistered boat. That however, is not the offence charged against the boat and for which she was seized.

It is my opinion that the seizure cannot be sustained. After carefully considering the matter I have concluded that the claimant is entitled to his costs of the Reference.

Judgment accordingly.

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