

Supreme Court Judgements.

Excess of Power by Governor-in-Council-Fish Export Regulations Illegal.

In The Matter of The Application of Smith & Shipman, Co., Ltd., for a Writ of Mandamus Directed to The Honourable Henry J. Browne, Minister of Finance and Customs.

JUDGMENT OF THE CHIEF JUSTICE.

A preliminary objection has been taken that the applicant has failed to prove a demand upon and a refusal by the Minister. The affidavit proves that the demand was made on the Deputy Minister. The act, the performance of which was sought from the department, was purely ministerial. Whatever objection there might be to the demand having been made to the Deputy Minister instead of to the Minister, it is, in my opinion, answered by the Minister's affidavit. He stated that by the proclamation of His Excellency the Governor-in-Council it is proved that no codfish shall be exported without a permit therefor having been obtained from the Minister of Fisheries and that no permit for the exportation of codfish, the subject of this proceeding, was filed with the proper customs officer or any customs officer. This statement shows a distinct determination on his part not to do what the applicant required unless "permit" was filed. Where an officer shows a settled purpose not to perform a duty, he cannot be heard to object with respect to the sufficiency of the demand (in re Davidson 24 U. C. Q.B. 66). This objection must therefore be overruled.

As the other objections with respect to procedure were passed upon by me at the hearing it is not necessary for me to refer to them again.

The applicant Smith and Shipman Co., Ltd., is a local company which has ready for export to Naples, Italy, via New York, a quantity of codfish which it has purchased for J. Aron and Company of New York on whose behalf it desires to export same. On the 27th of December 1919 the Manager of the Company attended at the Customs House here and reported nine thousand five hundred quintals for export to Naples via New York and applied to have it entered outwards at the Customs and to have delivered to him on behalf of Smith and Shipman, Ltd., a certified copy of said export entry to be attached to the way bill. The Assistant Collector refused to enter the fish outwards unless and until the applicant could produce to him a permit to export said fish signed by the Minister of Marine and Fisheries which he alleged was necessary under and by virtue of the proclamation of His Excellency the Governor-in-Council of date the 20th day of November 1919. The present application to the Court is for a Writ of Mandamus to issue directed to the Minister of Finance and Customs commanding him to enter outwards at the Customs House, St. John's, for Smith & Shipman, Ltd., 9,500 quintals of codfish for export to Naples, Italy, via New York, U.S.A., and to deliver to this company a certified copy of said export entry. The statutory duty, the enforcement of which is here sought, arises from the Customs Management Act, Section 102 of that Act declares that "all goods or merchandise exported shall be reported and entered outwards at the nearest Customs House and a certified copy of the export entry shall be attached to and accompany the way bill of goods."

It is competent for the Minister, who is, by statute the Collector of Customs, to designate an official for this purpose. Unless the applicant can have the requirements of the Customs Act complied with he is prevented from exporting his fish. His right to the Writ of Mandamus now applied for by him must depend upon the validity of the Proclamation of His Excellency the Governor-in-Council of date the 20th of November, 1919. This Act enables the Governor-in-Council by proclamation to "prohibit the importation or exportation of goods of any class, description or origin specified, either generally or from or to any country or place named in the proclamation or subject to such exceptions as may be specified in the proclamation."

The words used in the proclamation issued by His Excellency the Governor-in-Council are, "prohibit the exportation of codfish, except upon the following conditions, namely:—

- (1) That a License to export Codfish shall have been obtained from the Minister of Marine and Fisheries.
- (2) That no codfish shall be exported without a permit therefor having been obtained from the Minister of Marine and Fisheries, and filed with the proper Customs Officer.
- (3) That the sale and price of the Codfish exported under such License shall have been confirmed by the Minister of Marine and Fisheries.

(4) That an Affidavit shall be made by the holder of such License, or his duly qualified agent, describing the quality of such Codfish to be exported, and such affidavit shall be filed with the Minister of Marine and Fisheries."

The sole authority for the proclamation is the foregoing section of the Import and Exports Restriction Act. Consequently if, and in so far as the proclamation exceeds what is there enacted it must be regarded as ultra vires.

We have therefore to enquire what words are to be found in this section which can authorise the number of exporters of codfish being restricted to those who may be licensed for the purpose by the Minister of Marine and Fisheries, or to compel them to obtain a permit from him or to submit to him for his confirmation or approval the sale and prices of the codfish to be exported; or to make oath as to the quality of fish.

What the Act says is simply that the Governor-in-Council by proclamation may prohibit the importation or exportation of goods of any class "subject to such exceptions as may be specified in the proclamation." That is the extent of the power conferred by the statute.

The discretion vested by the Legislature in the Governor-in-Council is personal and incapable of being delegated; and the subject of any prohibition to be proclaimed and of any exception to such prohibition must alike be specified in the proclamation.

The Act imposes no conditions upon the exporters of fish nor does it enable the Governor-in-Council to impose any. The proclamation is in excess of the powers granted by the Legislature in that instead of specifying exceptions it proclaims a prohibition subject to certain conditions. These conditions are without statutory authority. As the proclamation does not assume to prohibit the exportation of codfish generally and is not directed against any country or place named in the proclamation, its purport must have been to prohibit subject to exceptions and the proclamation having failed to effectually do this has to be treated as nugatory. The applicant is therefore entitled to export codfish upon complying with the requirements of the Customs Act. A peremptory Mandamus should issue directed to the Minister of Finance and Customs for the performance of the duty required by the applicant herein.

St. John's, January 8th, 1920.

Higgins, K.C., L. E. Emerson, with him for the applicant.
The Attorney General, Gibbs, K. C., with him for the Minister of Finance and Customs.

In The Matter of The Application of Smith & Shipman, Co., Ltd., for a Writ of Mandamus Directed to The Honourable William F. Coaker, Minister of Marine and Fisheries.

JUDGMENT OF THE CHIEF JUSTICE.

The applicant in this proceeding asks for a Writ of Mandamus to issue directed to the Minister of Marine and Fisheries commanding him to issue to Smith and Shipman Co., Ltd., a permit to export from Newfoundland to Naples, Italy, via New York, fifteen hundred casks of Labrador codfish and five hundred casks of Shore codfish. The affidavit of Benjamin M. Shipman the Managing Director of this company shows that he applied to the Minister of Fisheries for a license to export codfish and was informed that such license were not being issued and that permits to export particular parcels of fish would be granted without such licenses being necessary, provided the other conditions called for in the Proclamation of the 20th day of November 1919 has been complied with. Later he applied for permit to export these casks of Labrador and Shore codfish via New York to Naples, Italy, and, at the request of the Minister of Marine and Fisheries, information was provided the Minister on the 15th day of December that this fish had been sold to Consorzio, Italy, and that the price at which the said fish was sold was not less than ninety shillings for Shore and eighty-five shillings for Labrador.

On the 16th day of December the applicant received a letter from the Ministry of Marine and Fisheries refusing to grant the permit "unless the fish is handled by Messrs. Hawes & Co., Ltd." The affidavit of Joseph H. Gridley, Manager for J. Aron and Co., of New York on account of whom Smith & Shipman Co., purchased this fish for export, proves that he attended at the office of Messrs. Hawes & Co., Ltd., for the purpose of ascertaining the terms and conditions upon which they would undertake the handling of said fish and was informed by

Mr. Hawes (Junior) that they were reluctant to handle said fish but that they would do so on certain terms and conditions, viz: (a) They would take complete control of said shipment; (b) said fish would be sold or otherwise disposed of by them in such market as they thought fit, but not necessarily to the parties to whom the fish had already been sold; (c) they would not guarantee that they would obtain any particular price for said fish; (d) a commission of three per cent. on the sale price would be charged for their services.

The position taken by the applicants here is that having complied with the conditions called for in the Proclamation they are entitled to a permit from the Minister of Marine and Fisheries to export this fish.

Preliminary objections have been made to this application, touching questions of procedure similar to those raised in the case against the Minister of Finance and Customs. These objections are overruled for the same reasons as therein stated.

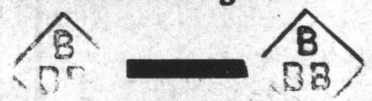
The real objection to this proceeding is that the applicant's position assumes the validity of the Proclamation, claims to have complied with the proclamation and asks for a permit from the Minister of Marine and Fisheries under its authority.

This Court has already held that said proclamation is ultra vires. The Minister of Marine and Fisheries cannot be commanded by the Court to issue permits to exporters as he has no legal authority to do so. This application must therefore be dismissed.

St. John's, January 8th, 1920.

Higgins, K.C., L. E. Emerson, with him for the applicant.
The Attorney General, Gibbs, K.C., with him for the Minister of Marine and Fisheries.

CASH'S Tobacco Store wishes to draw Smokers' attention to their recent shipment of the famous Old English



B.B.B. BRIAR PIPES. Also to again remind smokers that in connection with our Pipe Department we have a regular up-to-date

PIPE HOSPITAL where ordinary repairs can be done and stems fitted at the shortest notice.

JAMES P. CASH, Tobacconist.

Notice to Ex-Service Men

With the return of the dark evenings it has been arranged to open the Night School for the Winter months, beginning on Monday, October 6th.

The Night School will be in session from 8 o'clock to 9.30 every Monday, Tuesday, Thursday and Friday nights until further notice.

All ex-service men are entitled to free tuition in the Night School.

This affords a splendid opportunity to men who are at work during the day to fit themselves by education in their special line for promotion.

All applications for admission should be made to the Vocational Officer.

Hides & Furs Wanted.

50,000 Muskrat Skins; also Silver, Cross, White & Red Fox, Marten, Mink, Bear, Weasel and Lynx Skins.

Highest Market Prices. Special Prices for Raw Hides. North American Scrap and Metal Co.

Phone 367. Office: Clift's Cove. (Late G. C. Fearn & Son's Premises.) ST. JOHN'S.

It is almost necessary, considering the small cost, that you have your Suit and Overcoat Cleaned, Pressed and Repaired for New Year's Day, and have it done good by sending it to SPURRELL, 365 Water Street, or phone 574 and we will send for it.—dec3,6,1919

MINARD'S LINIMENT CURES COLDS, Etc.

To-day's Messages.

BOLSHEVIKS EXPANDING MOVEMENTS.

LONDON, Jan. 8. Bokhara, the capital of the important Khanate of Bokhara in Central Asia, and less than two hundred miles from the Afghanistan border, has been occupied by the Bolsheviks, according to reports reaching the War Office.

SPAIN CAN'T DO IT.

MADRID, Jan. 9. The newspaper A.B.C., discussing the League of Nations declares that "France is preparing for the next war. We think, like Carlist, to obtain peace in Europe it is necessary to reduce France to a third class power," says the newspaper.

ROYAL FAMILY MEWED UP.

GENEVA, Jan. 9. The revolutionary movement in Bulgaria is spreading among the Peasants and workmen, according to Belgrade advices received here. Another important railroad bridge has been blown up by the strikers, it is alleged. King Boris and the Royal Family are said to be secluded in their Palace which is under heavy guard.

PERSIA THREATENED.

LONDON, Jan. 8. The situation in Russia is about as bad as could be from an anti-Bolshevik point of view, according to British war office reports, and there are few signs indicating any likely improvement. There are two especially menacing developments. In the first place General Denekine's army has been cut in two through the Bolshevik push to the sea of Azov at Taganrog, and its flanks have been thrust back, leaving a large gap. In addition comes the claim from the Bolsheviks of the capture, further east, of the town of Krasnovodsk on the Caspian Sea, and while this is not confirmed, it is generally accepted as true. The capture of this important port, it is pointed out, creates a grave possibility that the Reds may overrun Northern Persia, and occupy Teheran, which would probably mean the establishment of Bolshevik rule in Persia.

SATURDAY, SURE.

PARIS, Jan. 8. The exchange of the ratification of the Peace Treaty with Germany will take place on the coming Saturday, tenth January, it now seems certain. The Supreme Council, to-day, fixed this date for the ceremony and decided that it should be held in the French foreign office.

MRS. LLOYD GEORGE, S.W.

CARNARVON, Jan. 8. Mrs. David Lloyd George, wife of the Premier, took her seat to-day in the quarter sessions as the first Welsh woman magistrate.

KOLCHAK IN PERIL.

LONDON, Jan. 8. News has reached London from British sources in Irkutsk, that 9,000 anti-Kolchak insurgents are holding Irkutsk, Eastern Siberia. They are armed with machine guns, and have airplanes, and are constantly being reinforced.

OPEN SPLIT.

WASHINGTON, Jan. 8. William Jennings Bryan split openly with President Wilson at the Jackson Bay dinner here to-night on the question of whether the Democratic Party should make the League of Nations an issue at the next election. The former Secretary of State, three times a candidate for President and a power in his party, decided the Democrats could not go before the country at present. President Wilson in his message to the diners had declared that one clear and single way out was to submit the issue. Conceding the right of the Republican majority to dictate the Senate's course, Mr. Bryan declared, "Our plan has been rejected and we must face the situation as it is. We must either secure such compromises as may be possible or present the issue to the country. The latter course would mean a delay of at least 14 months, and then would succeed only in case of our securing a two-thirds majority. We cannot afford, either as citizens or members of a party, to share with the Republican Party the responsibility for further delay. We cannot go before the country on the issue that such an appeal would present. The majority of Congress can declare war. Shall we make it more difficult to conclude peace than to enter a war?"

TO CORRESPONDENTS!

Correspondents are requested to accompany contributions with their real names, not necessarily for publication but as a guarantee of good faith. In future no correspondence will be considered unless this rule is adhered to.

Fifty Crates Crockeryware

Per S. S. Digby, consisting of TOILET SETS, TEA SETS, CUPS and SAUCERS, TEAPOTS, PLATES, JUGS, TOILET BASINS, CHAMBERS, EWERS, MUGS, VEGETABLE DISHES, MOLASSES BOWLS, ETC.

Higher Prices for Earthenware, China & Glassware are predicted for the NEW YEAR.

Get on the inside track by placing your order EARLY

WITH

G. Knowling, Ltd.

CROCKERY DEPARTMENT.

Jan. 2, 3, 5, 7, 9, 10

Don't Blame the Stenographer

If you hesitate to sign and send out a letter because it's not well typed—do not blame the stenographer.

The type may be ragged. It may be out of alignment. The machine may skip or overprint. Or the margins may be uneven. All these faults must be blamed on the typewriting machine—not the stenographer. She is undoubtedly as appreciative of good work as you are. She may be even more anxious than you to have a clean printing, smooth running, speedy Oliver 9.

Clean pages of readable type, accurate and dignified, give distinction and prestige. Then why not be certain of first rank by using the Oliver 9?

Only the Oliver has the arch-shaped type-bar, with broad bearings. This insures perfect alignment. Oliver type cannot "run down at the heel," because it always strikes squarely.

Only the Oliver prints downward, just as one writes. No lifting is necessary to raise the type-bar. This means a lighter touch, greater speed, and a bigger day's output with a third less exertion.



Telephone, call or write to-day for fuller information and price to

Ayre & Sons, Ltd.

Agents for Newfoundland.

FLOUR has advanced. Ask our price for RAINBOW.

BRAN will surely advance. We want to move our stock and are selling

BRAN VERY CHEAP.

Colin Campbell, Ltd.

Police Court.

Two drunks were each fined \$2.

A girl, taken for safe-keeping, was released.

In a case of assault, between a man and wife, an agreement to separate was reached.

Minard's Liniment Cures Diphtheria.

Obituary.

THOMAS O'QUINN.

Thomas O'Quinn, 57, of Searstown, died at his home on the 3rd of this month. Death was due to paralysis of the brain. Besides many friends, two sons are left to mourn. To them the Telegram extends sympathy.

Minard's Liniment Cures Dandruff.

FASHIONS AND FADS.

Checked brims are fashionable on round satin crowned hats.

Velvet negligees are among the most luxurious of garments.

Dragon fly blue is a wonderful color for the evening wrap.

White Milanese silk jumpers are much worn instead of skirtwaists.

A very pretty serge skirt has a pearl front and a gathered back.