

HIS MAJESTY THE KING.....PLAINTIFF;

AND

MAX KRAKOWEC, DAHLBERG AND EKLUND AND CONTINENTAL GUARANTY CORPORATION OF CANADA, LIMITED } DEFENDANTS.

1931
April 20.
May 20.

*Revenue—Customs Act—Section 181—“ Whether owner thereof or not ”—
Forfeiture—“ Removed ”—Interpretation of Statutes—Judicial obser-
vation.*

Held, that, inasmuch as by the first part of section 181 of the Customs Act, which deals with the penalty for having liquor in one’s possession illegally, it is provided that the offence exists “ whether (the party is) the owner thereof or not,” and in the second part, where provision is made for the forfeiture of the liquor or vehicle in which it is being transported, the words “ whether the owner thereof or not ”

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are omitted, if it is proved that the vehicle used is the property of an innocent party who claims it, the Crown has no power to forfeit the same.

2. That the word "removed" used in said section means, in the case of a manufacture, the removal from the distillery or factory, and in the case of importation, from the vessel or train.
3. That in statutes imposing penalties and forfeiture, the language must be clear to charge the alleged offender with liability, and if there is a reasonable interpretation which would avoid the penalty or forfeiture in any particular case, that construction must be adopted.

Judicial observation. In view of the dissimilarity of the American and our Constitution, cases there determined would have no bearing, because by the first Article of the American Constitution, it is forbidden to pass any law impairing the obligation of contracts.

INFORMATION by the Attorney-General of Canada to have it declared that a certain vehicle seized under the provisions of section 181 of the Excise Act, is forfeited to His Majesty.

The action was tried before the Honourable Mr. Justice Audette at Ottawa, upon an admission of facts, no oral evidence being adduced.

E. Miall for plaintiff.

Stanley Clark, K.C., for defendants Dahlberg, Eklund and Continental Guaranty Corporation of Canada, Limited.

No one appearing for Krakowec.

The statement of facts admitted are given at length in the Reasons for Judgment.

AUDETTE J., now (May 20, 1931), delivered the following judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to have "a declaration and judgment that a Fargo Express vehicle,—alleged to have been seized under the provisions of section 181 of the Excise Act, R.S.C., 1927, ch. 60,—has become and is forfeited to His Majesty."

The case comes on for trial upon the following admission and submission, signed by counsel for the respective parties, viz:—

Admissions of Facts

It is admitted by counsel for the plaintiff and the defendants that:—

(1) Action has been instituted herein on the information of the Attorney-General of Canada for the purpose of obtaining, should the facts

warrant it, a declaration and judgment that the vehicle in the information described has become and is forfeited to His Majesty.

(2) On December 5, 1929, S. A. Bovan, an Excise Officer carrying a Writ of Assistance, and C. E. Buck of the Prince Albert Town Station encountered at Albertville, Sask., one, Max Krakowec, then driving the truck described in paragraph 4 of the information.

(3) Bovan, under authority of the Writ, searching the truck found therein two bottles of spirits, one under the seat and one in the back, a third being found in Krakowec's pocket.

(4) Bovan seized the spirits and truck as forfeited under section 181 of the Excise Act, duly served notice of seizure on Max Krakowec and laid information before John Ashby, J.P., against Krakowec in respect of having in his possession spirits of unlawful manufacture contrary to section 181.

(5) At trial the same day before the said Ashby, J.P., and another, Rosser, Max Krakowec pleaded guilty and had sentence imposed.

(6) The truck remained in the custody of the non-commissioned officer in charge of R.C.M.P. Town Station, Prince Albert, Sask.

(7) On December 12th Messrs. Diefenbaker and Elder wired the Department of National Revenue as follows:—

"MAX KRAKOWEC ON DEC FIFTH PLEADED GUILTY TO OFFENCE UNDER SECTION 181 EXCISE ACT STOP FARGO TRUCK OWNED BY ACCUSED STILL HELD BY POLICE STOP PLEASE WIRE AUTHORIZATION TO PROPER OFFICIALS TO RELEASE SAID TRUCK TO THE ACCUSED."

(8) On December 17, the department having been made aware of the circumstances, wrote in reply that "the truck is regarded as confiscated."

(9) Under letter of December 23 Messrs. Dahlberg and Eklund submitted the following document which they held out as a true copy of the sales contract covering the said truck.

Attached to the Admission is the contract for the sale of the Fargo Express,—whereby, among other things, it appears by clause (d) of the agreement or contract that:—

(d) It is mutually understood and agreed that the property in and title to the said goods does not pass to the Purchaser, but remains in the Seller until the entire purchase price and interest (and all costs) are fully paid in cash; this is to include the payment of any notes given and any judgments secured.

(10) The said Dahlberg and Eklund were informed in reply that the Act sets out no qualification as to ownership and that the truck was regarded as confiscated.

(11) On January 24, 1930, the Continental Guaranty Corporation of Canada, Limited, issued unsealed warrant to one, S. C. Anderson, its bailiff, to take possession of the said truck. The said bailiff on the 25th of January, in attempting to seize the truck, handed the warrant to a constable and received the same back forthwith.

(12) The said truck was not then, or at any time by or on behalf of any defendant herein, removed from the possession of the non-commissioned officer above mentioned.

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(13) The said solicitors under letter dated January 25, 1930, forwarded the said copy of warrant to, and made demand for immediate delivery over of the said truck of, the Minister of Excise.

(14) By virtue of the claim to the said truck so laid and the provisions of section 125 of the said Act the automatic condemnation of the said truck was avoided and the right of the claimant to have his claim adjudicated upon preserved.

(15) The defendant Krakowec lays no claim and stands subject to having judgment signed against him on the pleadings.

(16) The defendants Dahlberg and Eklund have assigned to the Continental Guaranty Corporation of Canada, Limited, all interest of them or either of them in the said truck or arising out of the said contract of sale.

(17) The defendant the Continental Guaranty Corporation of Canada, Limited, claims the right to have delivered over to it the said truck or the sum of \$672.55, the moneys still owing in respect thereof by the said Krakowec on the grounds that as assignee it stands in the shoes of Dahlberg and Eklund the vendors, is entitled to all the rights before assignment enjoyed by the said vendors, including title to and power to repossess the truck for cause.

(18) The following question submitted in the pending summons is calculated to decide the claim put forward by the said Corporation defendant:—

Is the vehicle referred to in paragraph numbered 4 of the information filed seized under section 181 of the Excise Act in the circumstances set forth in paragraphs numbered 4 and 5 of the said information liable to forfeiture notwithstanding that the legal owners of the vehicle in question had, prior to the said seizure, no notice or knowledge of the illegal use which was being made of the vehicle by the defendant Krakowec when the same was seized as alleged in said paragraph numbered 4?

Section 181 of the Excise Act, R.S.C., 1927, ch. 60, reads as follows, viz:—

181. Every person who sells or offers for sale, or who purchases, or has in his possession any spirits unlawfully manufactured or imported, whether the owner thereof or not, without lawful excuse, the proof of which shall be on the person accused, is guilty of an indictable offence, and shall, for a first offence be liable to a penalty not exceeding two thousand dollars and not less than two hundred dollars, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months, and for every subsequent offence to a penalty not exceeding two thousand dollars and not less than five hundred dollars, and to imprisonment, with hard labour, for a term not exceeding twelve months and not less than six months, and in default of payment of the penalty, to a further term of imprisonment equal to that already imposed by the court for such subsequent offence; and all spirits so unlawfully manufactured or imported wheresoever they are found, and all horses and vehicles, vessels, and other appliances which have been or are being used for the purpose of removing the same, shall be forfeited to the Crown, and shall be dealt with accordingly.

The information in this case appears to have been taken out under the provisions of section 124 of the Excise Act; but the proceedings required thereunder both by the Statute and Rules of Court 77, 78 and 79 of the Exchequer Court, have not been complied with. (Rules then in force). However, as all the parties are now before the Court, this failure to comply with any procedural requirements of the Statute and the Rules need not be taken into consideration.

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Counsel for the plaintiff at bar relied upon and cited American cases in support of his case. Canadian Courts, like the English Courts, are accustomed to treat the decisions of the American Courts with great respect, although they are in no manner bound by them. However, in view of the dissimilarity of the American and our Constitution, cases there determined would have no bearing, because by the very first Article of the American Constitution, it is forbidden to pass any law impairing the obligation of contracts. The contract in this case between the defendants could not have been interfered with. See *Principle of Constitutional Law—Cooley*, 3rd Ed. 328 and XL.

A number of English cases have also been cited by the learned Counsel, but the British Excise Act which has a similar section (202) as the Canadian 181, has also section 264, which is not to be found in the Canadian, whereby the owner of the thing seized may have it returned to him on a mere affidavit—even on an affidavit by a third party swearing to the best of his knowledge and belief—that he is the bona fide owner of the same. See *Highmore's Customs Law*, 3rd Ed., 240, 292.

The submission of the present controversy is as to the effect of section 181 of the Canadian Excise Act.

The first part of that section deals with penalty and the latter part with forfeiture. The penalty has been imposed in this case because of three bottles of liquor found “in the possession” of the defendant and the Act provides that the offence exists “whether the owner thereof or not.” The present case has nothing to do with the question of penalties which has already been disposed of; but it has to do

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only with the last clause of the section dealing with forfeiture, viz:—

and all spirits so unlawfully manufactured or imported wheresoever they are found,—and all horses and vehicles, vessels, and other appliances which have been or are being used for the purpose of removing the same, shall be forfeited to the Crown, and shall be dealt with accordingly.

It will be observed that when the Statute is dealing with forfeiture, it does not use the language “whether the owner thereof or not” as it is used when it deals with penalties. It, therefore, must follow that it does not vest with the Crown the power to forfeit such goods if they are not the property of offender.

Moreover, dealing again with the question of forfeiture, one must, before pronouncing, endeavour to ascertain the meaning of the word “removing,” as applied by the Statute to the vehicle sought to be forfeited. To properly understand that meaning, the whole section must be read together. The section deals with spirits unlawfully manufactured—or imported. The meaning of the word “removed” as applied to either case would seem to be in case of manufacture—to the removal from the distillery or factory, and in the case of importation—from the vessel or train. Neither case indeed would apply to the circumstances of the present controversy, where only three bottles are found on a truck or express with a capacity of carrying $1\frac{1}{2}$ ton, and there is no evidence in this respect upon the record where these goods were coming from or going to, how they were manufactured or imported. It must be found that these three bottles were not seized in the act of such removal as contemplated by the Statute. The forfeiture sought as a punishment for having three bottles in one’s possession seems to be out of all proportion, specially when dealing with innocent third parties.

Now, the facts and circumstances of the case do not clearly bring the controversy within that ambit of the Statute and in case of doubt, the doubt must be resolved in favour of the accused. Indeed, in Statutes imposing penalties and forfeitures, the language must be clear to charge the alleged offender with liability; the words must be clear and distinct. If there is a reasonable interpretation which will avoid the penalty or forfeiture in any particular case,

that construction must be adopted. *Craies, On Statute Law*, 3rd Ed. 441, 444; *Parker v. The King* (1); *The Queen v. The J. C. Ayer Company* (2). Innocent third parties should also be given the benefit of the doubt.

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The Courts in Canada have already had occasion to pronounce upon facts absolutely similar to those in question in this case and they have pronounced in favour of the release of the forfeiture in favour of innocent third parties, as in the present case. The cases are *Re Excise Act* (3); *Forget v. Forget* (4); *Le Roi v. Messervier* (5).

I have come to the conclusion to dismiss the action as against all defendants and to release the Fargo Express in question to be returned to its owners, to be dealt with under the contract between the vendors and purchaser of the same. *Smith v. Cropper* (6).

Coming to the question of costs, I must find that there was justification for the Excise Officers to interfere as they did and there will therefore be no costs to any of the parties herein.

Therefore, there will be judgment accordingly, dismissing the action as against all parties, each party paying his own costs.

Judgment accordingly.