WHITFIELD COOK ..... CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1927

Sept. 28.
Dec. 31.

Revenue—Customs Act—Forfeiture—Sections 101, 237, 238, 186 and 196 of Customs Act.

Held, that the purpose of sections 101, 237 and 238 of the Customs Act, is to prevent fraudulent export entries from customs warehouses, and to ensure the performance of the obligation to export the goods to another country. That the forfeiture penalties attached only when there had been actual and fraudulent relanding of the goods into Canada, in violation of the Customs Law.

2. That where goods are transferred within the territorial Waters of Canada, without the intention of fraudulently re-landing or bringing the same back into Canada, no offence is committed under the Act.

3. That if Parliament intended to make such an act an offence, then it is not sufficiently or clearly stated to warrant the imposition of the penalty of forfeiture.

4. That sections 186 and 196 deal with two entirely different offences, and cannot be read together so as to make a ship liable to forfeiture, for entering any place in Canada other than a port of entry.

Reference by the Minister of Customs and Excise under Section 179 of the Customs Act.

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

G. L. Fraser and *W. C. Ross* for Claimant.

H. A. McLean, K.C., for Respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (December 31, 1927), delivered judgment.

This is a reference made by the Minister of Customs and Excise under sec. 179 of the Customs Act. The claimant contends that the motor vessel *Ououkinish* which he owned, was improperly seized by the Customs authorities, and that the decision of the Minister, that the ship be and remain forfeited should be set aside.

Briefly stated the facts are as follows: The ship *Ououkinish* cleared from Vancouver on January 21, 1925, for Banks Island, B.C., with 100 barrels of beer and 95 cases of liquor, which was excise and duty paid, and on the 16th of April following, reported inward at Vancouver from

1927
COOK
v.
THE KING.
Maclean J

Banks Island, without any cargo. The vessel in fact did not proceed to Banks Island, but proceeded to sea where she came into communication with the Nicaraguan schooner *Lirio de Agua,* on January 26, this schooner being laden with liquor received from a sufferance warehouse at Victoria, B.C. It was the intention there to transfer the cargo from the Nicaraguan schooner to the claimant's vessel, but it is alleged, that owing to weather conditions and other causes it was found impossible to effect the transfer, and so both vessels proceeded to Neuchatlitz Inlet in Canadian waters, not being a port of entry, where the cargo consisting of 1,005 cases of liquor, was transferred to the claimant's vessel. The claimant alleges that his vessel's cargo was disposed of, off the American coast, and it is not contended that the same was landed in Canada.

The claimant's ship was seized upon her return to Vancouver, charged by the seizing customs officer with

having been made use of in the unshipping and removal of goods liable to forfeiture,

under sections 196 and 222 of the Customs Act. In the report of the Commissioner of Customs and Excise, the seized vessel was charged with the commission of the following offences: making a false report outwards, from Vancouver; making a false report inward at Vancouver; entering a place in Canada other than a port of entry; adding to cargo after receiving a clearance; for all of which offences it was alleged she was liable to penalties aggregating $2,000. It was also claimed that the vessel was liable to forfeiture under sections 101 and 238 of the Customs Act for having brought back into Canada goods exported from a Customs warehouse, and also liable to forfeiture under sec. 196 of the Customs Act for having been made use of in the importation or unshipping or landing of goods liable to forfeiture. The Commissioner of Customs and Excise recommended that the vessel be and remain forfeited, and the decision of the Minister of Customs and Excise affirmed the recommendation of the Commissioner.

The case is somewhat complicated by the following facts. The seizing officer detained the vessel for violation of sections 196 and 222 of the Customs Act. The Commissioner of Customs and Excise in his report, states that

1927
COOK
v.
THE KING.
Maclean J.

the vessel had committed the four offences which I have just above stated, and was liable to the penalties there also mentioned. The Commissioner also reported that the vessel was subject to forfeiture for violation of sections 101 and 238, and also sec. 196 of the Customs Act, the violation of sections 101 and 238 not having been mentioned by the seizing officer. It was the recommendation of the Commissioner that the vessel be forfeited, that the Minister concurred in. It was apparently the major offences and penalties that the Commissioner and Minister acted upon, but it does not follow I assume, that the minor offences were to be considered as abandoned. Then the owner and master of the vessel were officially notified, according to the papers before me, that the offence committed was violation of sec. 196, and for which forfeiture was decreed. This notification, which was in writing, was dated June 2, 1925, and was the notification required by sec. 175, which requires the Commissioner of Customs to notify the owner or his agent of the thing seized, of the reasons for the seizure, detention, penalty or forfeiture. At the hearing of the reference, counsel for the Crown pressed only the offences for which forfeiture was the penalty. Under the provisions of the statute I am empowered to consider the subject matter of the reference, upon the papers and evidence referred, and upon any other evidence produced, and decide according to " the right of the matter." I think I am justified therefore in considering all the offences charged or mentioned in the report of the Commissioner of Customs, or any offence disclosed in the proceedings upon the reference, whether prior or subsequent to the Minister's decision, and thus decide according to " the right of the matter." If I should find the vessel was not liable to forfeiture, it yet may well be that the vessel is, and should be liable to other penalties for such or other offences, if committed. It would seem strange if that were not possible, particularly in cases of this kind. Pleadings were filed in these proceedings, and the statement of defence is sufficiently wide to cover all the offences mentioned in the Commissioner's Report and alleged to have been committed. The Minister's decision affirming the recommendations of the Commissioner only means

1927

COOK v. THE KING.

Maclean J.

that forfeiture was the proper penalty for some of the offences alleged to have been committed, but if such penalty of forfeiture in such case is not maintainable, it does not I think follow that penalties may not be imposed for other offences alleged or disclosed, and which in fact have been committed. I shall therefore proceed to consider the several offences alleged to have been committed by the vessel in question.

In respect of the charge that the master of the claimant's vessel, contrary to the provisions of sec. 96 (1) made a false report outwards, that is to say gave a false destination in his entry outwards, I need say little. There is no doubt but that the master stated a false destination in his entry outwards. In the case of *Parker* v. *The King* (1), I held that the Customs Act provided no penalty for such an offence, and I see no reason for varying the opinion delivered in that case.

Now in regard to the charge that the vessel added to her cargo in Canadian waters after clearance without having mentioned the intention to do so in her reports outwards, it is to be observed that the penalty (sec. 246) is against the master, and the vessel may be detained until the penalty is paid, and unless payment is made within thirty days, the vessel may be sold to pay such penalty. I think the master became liable to the penalty as he cleared with the intention to add to his cargo, without having mentioned it in his report outwards. However, that is not a ground for forfeiture of the vessel. The vessel is still in the possession of the Crown in the form of a deposit, pending a final decision of all the issues in dispute, and the question as to whether or not a penalty may yet be exacted for the offence stated, still remains open for adjudication. I am of the opinion that the master of the *Ououkinish* was guilty of this charge, and it is one of the offences set forth in the report of the Commissioner of Customs and Excise. I am of the opinion therefore that the vessel is liable for the payment of the penalty prescribed for this offence, viz., $400, if the same is not paid by the master within thirty days from the date of the rendering of this judgment.

(1) (1928) Ex. C.R. 36.

In respect of the charge of making a false report inward, which charge I take to mean that the vessel reported she was from Banks Island whereas this was untrue, there is no doubt as to the commission of the offence and that the report inwards in this respect was deliberately false. I cannot, however, find anywhere in the Customs Act any penalty provided for such an offence, and my attention has not been directed to any such provision. This charge against the vessel cannot therefore be sustained.

Another charge is that the claimant's vessel is liable to forfeiture for having brought goods back into Canada, which had been entered outwards from a Customs warehouse for export, and sections 101, 237 and 238 of the Customs Act are relied upon by the Crown. The real question for determination then is, did the claimant's vessel re-land or bring into Canada the cargo transferred from the Nicaraguan vessel within Canadian waters in the circumstances already stated, and within the meaning of sec. 238. I am unable to reach the conclusion that sec. 238 was intended to cover the facts of the particular charge I am now dealing with. The purpose of the three mentioned sections of the Act is to prevent fraudulent export entries from customs warehouses, and to ensure performance of the obligation to export goods to another country. If there has been a non-performance of this obligation the person entering the same for exportation shall be liable to a penalty of double the duties of importation on such goods. Also, if such goods are re-landed or brought into Canada in violation of the Customs law or regulations, they are liable to seizure together with any vessel from or on which they have been so landed. I think this section was intended to mean that the forfeiture penalties attached only when there had been an actual and fraudulent re-landing of the goods into Canada from whence they were exported, in violation of the Customs Law, that is without payment of duty, or without proper entry, or something of that nature. I do not think this section was intended to cover the case where a transfer was made within the territorial waters of Canada as was done in this case, without the intention to fraudulently re-land or bring the goods back into Canada. There is no evidence that the goods were fraudulently

1927
COOK
v.
THE KING.
Maclean J.

re-landed in Canada and I am not asked to find that they were so landed. If this section of the Customs Act was intended to make the act complained of here an offence, which I very much doubt, then it is not sufficiently or clearly stated to warrant the imposition of the penalty of forfeiture. An offence may have been committed, but not I think the one contemplated by sec. 238. That section was intended to state as an offence, and to provide a penalty, the fraudulently landing back into Canada of goods taken out of Canada for export, without complying with the Customs law or regulations. I am not of the opinion that the goods in question were fraudulently landed or brought back into Canada in the sense contemplated by sec. 238. I am therefore of the opinion that the claimant's vessel is not subject to forfeiture upon this charge.

Then it is charged that the ship is liable to a penalty for entering a place in Canada, other than a port of entry, in contravention of sec. 186. There can be no doubt I think but that the claimant's vessel violated this section. She entered a place in Canada other than a port of entry, first with the goods she had on board when she cleared from Vancouver, and which was supplemented by cargo transferred from the *Lirio de Agua*. In doing so the claimant's vessel became liable of seizure, the goods to seizure and forfeiture, and the master liable to a penalty of $800. The vessel was liable to detention only if the penalty against the master was not paid within thirty days. After that period of time the vessel might be sold to pay such penalty. The vessel's value is now in the hands of the court, and the only question for decision is whether the master is liable to a penalty upon this charge, and I think he is, and in the sum of $800. There is no evidence that any penalty was imposed upon the master in this connection, or that he was notified of the imposition of such penalty. Accordingly I find that the master is liable to the penalty of $800 and if the same is not paid within thirty days of the date of the rendering of the present judgment, the same shall be paid from the money value of the ship now in the hands of the Crown.

There remains for consideration the question as to whether the claimant's vessel is liable to forfeiture under

sec. 196. I think this section relates to the case where a vessel is made use of in unlawfully importing, unshipping or landing in Canada, goods liable to forfeiture under the Act. It is not claimed that the claimant's vessel landed any of her original or later acquired cargo in Canada, or imported the same into Canada. What she did was to receive a part of her cargo within Canadian territorial waters and at a place other than a port of entry. I do not think that was the offence contemplated by sec. 196. It is the actual importation, unshipping or landing into Canada, of goods in violation of the Customs Act that constitutes the offence for which this section provides the penalty of forfeiture. There is no warrant I think for reading more into the section than this. If there is no offence created by statute covering what was done by the two vessels concerned in the transfer of cargo as here related, other than that I have already dealt with, there possibly should be, but the failure clearly constitutes such additional offence and to provide the appropriate penalty, does not I think justify any attempt to read into section 196 something that is not clearly there. I cannot reach the conclusion that there was any importation, unshipping or landing as contemplated by sec. 196. The fact that sec. 238 seems to deal specifically with the facts of this charge, would indicate that sec. 196 was not intended also to meet the case. It would I think be a forced construction of sec. 196 to say that the *Ououkinish* was engaged in the importation or unshipping or landing or removal of goods liable to forfeiture. To so hold would appear like applying the provisions of this section to offences which I think was never contemplated. It is always difficult to interpret with confidence this provision of the Act, but in this case that provision does not in spirit appear to have been enacted to meet the offence presently under discussion, and I doubt very much if it was ever so intended. It is to be hoped that amending legislation is imminent to remove such doubts regarding this section of the Act, as well as many others.

Mr. McLean on behalf of the Crown urged upon me strongly that sec. 186 and sec. 196 should be read together, and that for the offence of entering a place in Canada other than a port of entry, the vessel was liable to forfeiture

1927

COOK
v.
THE KING.

Maclean J.

under sec. 196. I think there is no substance in this argument. These two sections deal with entirely two different offences, and to attempt to read them together would I think be unwarranted and obviously beyond the intention of the enactments themselves. This is made clear I think by the fact that under sec. 186 the vessel is liable to seizure, but the seizure does not make the vessel liable to forfeiture, except for non-payment of the penalty imposed against the master, whereas under sec. 196 the vessel is liable to seizure and forfeiture, for the offence therein mentioned. There is no principle justifying the extension of a statute imposing penalties, beyond its plain and unmistakable meaning and intention, and the courts must look only to the express language employed therein for the designation of the offence and the penalty.

In the result I find that the *Ououkinish* is liable to the penalties already stated and amounting to $1,200; that this sum be declared forfeited and be deducted from the total deposit made with the respondent by the claimant, if not paid by the master of this vessel within the period already mentioned, and that the balance or the whole of the deposit be refunded to the claimant as the case may be. There was I certify probable cause for the detention and seizure of the vessel. In all the circumstances I think each party should bear its own costs, particularly as no demand was made by the claimant, or the master of the *Ououkinish*, in respect of the penalties which I have found to be payable.

Judgment accordingly.