1949
Oct. 11, 12
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Mar. 30

JOHN KOSCHUK ..... CLAIMANT;

AND

HIS MAJESTY THE KING..... DEFENDANT.

Revenue—Excise Act, Statutes of Canada, 1934, c. 52, ss. 112(1)(2), 169—Forfeiture—Res judicata—Burden of proof—Onus on claimant——Claimant entitled to succeed if on all the evidence he shows there is a preponderance of probability in that which he is called on to establish—Claim dismissed.

Held: That the quashing by the Manitoba Court of Appeal of a conviction by the city magistrate that the claimant had had liquor unlawfully in his possession is not *res judicata* in his favor of the fact that his automobile had not been unlawfully used for transportation of liquor contrary to the Excise Act.

2. That under s. 112 of the Excise Act the onus is on the claimant and he is entitled to succeed if upon all the evidence he has satisfied the Court that there is a preponderance of probability in that which he is called upon to establish; the claimant having failed to do so his claim must be dismissed.

INFORMATION by the Attorney General of Canada to have it declared that a certain vehicle seized under provisions of section 169 of the Excise Act is forfeited to His Majesty.

The action was tried before the Honourable Mr. Justice Cameron at Winnipeg.

A. R. Micay for claimant.

John L. Ross, K.C., and *A. J. MacLeod* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (March 30, 1950) delivered the following judgment:—

This is an Information exhibited by the Attorney General of Canada on behalf of His Majesty claiming to have the automobile above mentioned condemned as forfeited to the Crown. On December 11, 1948, at Winnipeg, it was seized as forfeited to the Crown under the provisions of section 169 of the Excise Act (ch. 52 of the Statutes of Canada, 1934, and amendments thereto) and it is alleged

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that at the time of such seizure it had been or was being used for the purpose of transporting a quantity of spirits unlawfully manufactured, in violation of the said Act. Following the filing of the Information and the posting of the notices required by section 115 (1) of the Act, John Koschuk of Winnipeg, the owner of the car, asserted his claim thereto alleging illegality of the seizure and other matters which will be referred to, and asking the Court for an order releasing the car with its tires and accessories to him, for compensation for loss of its use and his costs. Pleadings were delivered.

At the opening of the trial a question arose as to whether the burden of proof was on the Crown or the claimant. After hearing argument, I ruled that under section 112 of the Act (which will be later referred to) the burden was on the claimant. The witnesses for the claimant were then heard and counsel for the Crown then moved for a dismissal of the claim. I dismissed that motion and evidence was then given for the Crown.

The claimant pleaded and relied on the principle of *res judicata*. It was admitted that the Court of Appeal of the Province of Manitoba on April 29, 1949, unanimously allowed his appeal from and quashed his conviction under the judgment of Magistrate S. H. Garton, rendered in the City of Winnipeg Police Court on January 12, 1949, on the charge that he:—

> On the 11th day of December A.D. 1948, did unlawfully and without lawful authority have liquor in an automobile, Serial No. 9509105, bearing Manitoba License No. 90853, at the rear of 167 Gomez Street in the City of Winnipeg, which was not purchased from the Commission contrary to the Provisions of the Statutes in such cases made and provided.

Exhibit 1 is a certified copy of the judgment of the Court of Appeal. Prior to the trial it was agreed by counsel for both the claimant and the Crown that it would be filed by consent, that the parties therein referred to are the same parties that are now before this Court and "that the matter involved before the Court of Appeal arose out of the same circumstances as are now before the Exchequer Court."

For the claimant it is submitted that the judgment of the Court of Appeal must have been based on a finding

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of fact, namely, that Koschuk did not have the spirits in this automobile; that the parties there were the same as in the present case and that, therefore, the Crown is estopped by record from alleging that Koschuk did, in fact, have spirits in this car. I do not think it necessary to discuss fully the question as to whether in both cases the parties are the same. It may be noted merely that the proceedings in the Police Court were initiated by one Cafferty under the provisions of the Liquor Control Act of Manitoba.

I do not know what facts were determined by the judgment of the Court of Appeal. The judgment itself does not set out any findings of fact but merely allows the appeal, quashes the conviction and disposes of the costs of the proceedings. But even assuming that the judgment was based on a finding that Koschuk did not have spirits on that day in that car, that is not the issue before this Court. This is an action *in rem* in which the Crown asks for a declaration of forfeiture of the car. The penalty of forfeiture applies where the car had been or was being used for the purpose of transporting illicit spirits and whether used by Koschuk or anyone else, *The King* v. *Krakowec et al* (1). The issue now raised is quite a different one from that before the Provincial Courts of Manitoba and therefore there has been no valid and final adjudication upon the issue now raised. Under the charge as laid, neither the Winnipeg Police Court nor the Court of Appeal, sitting in appeal from that Court, had any jurisdiction to grant the relief now claimed; it could not have been determined in those proceedings. These facts are sufficient in my opinion to dispose of the plea of *res judicata*. I hold that the claimant is not entitled to rely thereon.

Reference may be made to *Bureau* v. *The King* (2), where the President of this Court in considering a claim for forfeiture of a motor car used in bringing cigarettes into Canada, held:—

That the acquittal of the claimant by the jury on the charge that he had been in possession of unlawfully imported goods was not *res judicata* in his favour of the fact that the goods had not been illegally imported and can have no effect in this action.

(1) (1932) S.C.R. 134. (2) (1948) Ex. C.R. 257.

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An appeal being taken on that case (1), Rinfret C.J., said at p. 374:—

It was correctly decided in the Exchequer Court, (1948) Ex C R. 257, that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Foncière Compagnie d'Assurance de France* v. *Perras et al and Daoust*, (1943) S.C.R. 165.

In *Kantyluk* v. *Graham and Kostick* (2), Williams, C.J.K.B., in a civil proceeding, declined to admit a certificate of conviction of the plaintiff under the *Highway Traffic Act*, following *Caine* v. *Palace Steam Shipping Co.* (3); *La Foncière Compagnie d'Ass'ce de France* v. *Perras* (4); *McLean* v. *Pettigrew* (5).

As I have said, the claim for a declaration of forfeiture of the motor car is founded on section 169 (2) of the Excise Act. It is as follows:—

169. (2) All spirits unlawfully manufactured or imported, or unlawfully or fraudulently removed from any distillery, bonded manufactory or from any bonded warehouse, wheresoever they are found, and all horses and vehicles, vessels and other appliances which have been or are being used for the purpose of transporting the spirits so manufactured, imported or removed or in or upon which the same are found, shall be forfeited to the Crown, and may be seized and detained by any officer and be dealt with accordingly. 1948, c. 49, s. 21, Am.

It is not disputed that on the 11th of December, 1948, a quantity of spirits unlawfully manufactured was found by police officers in a yard adjacent to (but separated by a fence from) the laneway of the property where Koschuk resided and in which laneway the car in question (and admittedly owned by Koschuk) was stationed. It is not suggested that the car had been used for the purpose of transporting any spirits other than those so found in the adjacent yard.

The evidence will be more readily understood if a description of the property is first given. Koschuk is the owner of the property and building shown on the photograph, Exhibit 2. It is on the east side of Gomez Street and consists of four apartments, in one of which Koschuk resides. On the north side of the property is a driveway leading from Gomez Street to a garage at the rear, as shown on Exhibit 3. At the north side of the driveway

(1) (1949) S C R. 367.
(2) (1948) 3 D.L.R. 464.
(3) (1907) 1 K.B. 670.
(4) (1943) S.C.R. 165.
(5) (1945) 2 D.L.R. 65; (1945) S.C.R. 62.

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is a board fence about 5 ft. high extending from the road to and beyond the garage and separating Koschuk's property from the store at 167 Gomez Street. In the rear of the store is a yard shown on Exhibit 7.

Koschuk's evidence is that his car had not been used at any time for the transportation of illicit spirits. He says that he was in his apartment on the afternoon of December 11 with a pensioner, Mike Horodinak, who shared the accommodation; that Nicholas Shinkarik called on Horodinak and, after spending some time with them stated that he felt ill and asked Koschuk to drive him home. Shinkarik got in the rear seat of the car and before his home was reached became ill and vomited on the rear seat. Koschuk says that he returned home directly, parked his car in the driveway at the place where it is shown on Exhibit 3, removed the rear seat from the car, dragged it to his apartment and proceeded there to clean it. He left the keys in the car as he was accustomed to do. At about 8:30 p.m., he went to the store at 167 Gomez Street to purchase cigarettes, remained there for some time, and upon returning home was advised by Horodinak that the car had been seized and removed by the police. He says that there were no spirits of any sort in the car when he left it in the driveway and that the car had not been used by anyone after that time, nor had it been moved until taken by the police. Upon being told that his car had been removed by the police Koschuk says, that without communicating with anyone, he immediately walked to the police station to find out what had happened. He was questioned there about the missing rear seat of the car and explained its removal as I have set out above. He suggested that Shinkarik could corroborate that part of his statement, and, as a result, he was driven by the police to the latter's home. Koschuk did not enter, but Shinkarik did tell the officer that, while being driven home by Koschuk, he had been sick and had vomited on the rear seat.

Horodinak confirmed Koschuk's statement that when the police took the car Koschuk had gone to the store; that previously he had helped Koschuk clean the rear seat of the car in the apartment and that it was there when the

police entered the home. He also states that Koschuk drove Shinkarik home about 7:00 p.m. but that he does not know when Koschuk returned as he was asleep.

C. H. Clark and S. Fraser—both detectives in the Winnipeg Police Force—were in the vicinity of Koschuk's home about 8:45 p.m. on that day. Seeing Koschuk's car standing in the driveway they made an investigation. The rear right door was wide open, the rear seat of the car was missing and the keys were in the ignition lock. There had been a heavy fall of snow earlier in the day but it had stopped. The snow had been shovelled from the driveway but a light fall of snow had started about 8:30 p.m.; there was a light sprinkling of snow over the whole driveway and part of the exterior of the car, and snow had drifted into the car. They saw that the light snow on the floor and on the place from which the seat had been removed, had been "mussed" up as though something had been dragged along it. On the driveway, at the entrance to the rear right door, they found that the fresh snow had been scuffled as though by someone walking. Leading from there to the junction of the fence and the garage, they found marks in the snow which indicated to them that someone had walked with a heavy load, although there were no clear footprints. The light snow on the top of the fence post had been recently brushed; and looking over the fence they saw about 20 feet away what appeared to be two dark bags, and, leading from the fence to the bags, marks in the snow similar to what had been observed between the car and the fence. Adjacent and parallel to these marks were other marks in the snow which suggested that a heavy burden had been carried and had touched the snow at intervals. They returned to Gomez Street by way of the driveway, entered on the store property at 167 Gomez Street and proceeded to the rear yard where they found two bags in the snow, each containing 7 gallon tins of spirits, which, on later analysis, proved to be of illicit manufacture. From the point where the bags were found in the snow they observed footprints leading to Gomez Street where they could not be traced further.

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The sacks were examined at the police station. In each was found a very small quantity of oats, now contained in the envelopes, Exhibits D and E. Exhibit F is another envelope containing a further small quantity of oats found on the floor of the car between the front and rear seats and on the running-board at the rear right door. Exhibit G contains five pieces of ordinary binder twine found on the floor of the car between the front and rear seats, and Exhibit H contains twelve pieces of binder twine found on the front floor. Exhibit I contains four used screw caps and three used corks found in the glove compartment. Exhibit J consists of eighty-seven paper bags (found at the ledge at the rear window) such as are used ordinarily by grocers. Exhibit B is one of the fourteen tins found in the bags.

Detective Clark also says that when he saw Koschuk at the police station that evening, he observed a quantity of "list" from bagging, and oat beards on his shoe. Asked to explain the presence of these things, Koschuk merely stated that he had not seen anything like that before.

Koschuk was formerly a painter. He had sustained injuries to his back in a fall and underwent an operation in May, 1948, for the removal of a disc from his spine. He says that for some time thereafter he could walk only with the aid of two canes and at the time of the seizure still had to use one cane and went daily to hospital for treatment. He says that it would have been impossible for him to lift or carry bags containing seven gallon tins of spirits or lift them over a fence five feet high. Dr. V. Rosenfield, his physician, confirmed the nature of his injuries and his condition on December 11, 1948, and said he was then incapacitated from lifting weights over 10 to 15 lbs., that he had cautioned him to be careful and to avoid any strain on his back.

Because of his injuries Koschuk said that he was unable to work as a painter; that he therefore purchased chickens and eggs from farmers and resold them in order to gain a living. It was for that purpose, he said, that he had the paper bags and twine. He says also that the oats in his car may well have come from the boxes or bags of produce which he purchased from farmers. As to the bottle caps

and screws found in the clothing compartment, he says he had no knowledge, that he had never seen them before and that they may have been there when he purchased the second-hand car in 1948. He also says that Horodinak collected old bottles and that on occasions he had used the car to drive him and his bottles to the scrap yard. He suggests also that possibly the bottle tops and corks may have been put in the glove compartment by Horodinak.

None of the witnesses saw any illicit spirits in the car or being removed therefrom, or saw the car being used for the purpose of transporting illicit spirits. The case for the Crown rests on the marks made in the snow, as described above, and on the statement of the police officers that in the driveway in rear of the car they were still able to see in the snow the tracks of the tires leading from Gomez Street to the car itself, partly obscured by the recent fall of snow. They said, also, that there were no other marks in the snow except the ones I have referred to, and specifically that there were none between the car and the building where Koschuk resided, and none at the left side of the car. The engine was still warm and there was every indication that it had been recently used.

The evidence of the police officers is that there was but a light fall of snow on the bags of about the same depth as that covering the tire tracks in rear of the car and on the driveway. They infer from this fact that the bags had not been there during the heavy snowfall earlier in the day, but had been there but a short time.

As I have said, section 112 (1) places the burden of proof on the claimant in proceedings instituted by the Crown for forfeiture; subsection (2) thereof places the same burden on a claimant when he institutes similar proceedings against the Crown. It is of first importance, therefore, to give careful consideration to the words used in the statute and to endeavour to ascertain therefrom the nature and extent of that burden. Section 112 (1) is as follows:—

112. (1) In any proceedings instituted for any penalty, imprisonment or forfeiture or for the recovery of any duty under this Act, in case any question arises as to the identity, origin, manufacture, importation, exportation or entry for duty of any goods or the payment of duties on any goods or the compliance with the requirements of this Act or the doing

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or omission of anything by which such penalty, imprisonment, forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie upon the owner or claimant of the goods or the person whose duty it was to comply with this Act, or in whose possession the goods were found, and not upon His Majesty or upon any person representing His Majesty.

Now this is a case where proceedings have been instituted for forfeiture of the vehicle and the question that arises is whether "it is a vehicle that had been used for the purpose of transporting spirits unlawfully manufactured" (s. 169 (2)). It is the doing of that act by which such forfeiture would be incurred. There can be no doubt, I think, that the burden of proof cast on the claimant is in respect to the question that so arises and he must therefore, in this case, establish to the satisfaction of the Court that the vehicle he now claims had not been used in the transporting of spirits unlawfully manufactured.

Reference may be made to *Sandness* v. *The King* (1), in which Angers J., was considering s. 262 of the Customs Act, R.S.C. 1927, c. 42, which contains a somewhat similar provision. At p. 81 he said:—

> I may add that in virtue of section 262 of the Customs Act (R S C., 1927, chap. 42) the burden of proof lay on the plaintiff, and that the latter has failed to show that his boat had been illegally seized and forfeited. In this respect, see: *Weiss* v. *The King* (1928) Ex. C R., 106; *The King* v. *Doull* (1931) Ex. C R 159.

In my opinion, the claimant here is not bound to prove his case beyond a reasonable doubt. I think that he is entitled to succeed if on the whole of the evidence there is a preponderance of probability in his favour. The most recent case which I have been able to find is *Rex.* v. *Carr-Briant* (2). That was an appeal from conviction under s. 2 of the Prevention of Corruption Act, 1916, when, under certain circumstances, money received "should be deemed to have been paid or given and received corruptly *unless the contrary is proved.*" The trial Judge had directed the jury that the burden of proof resting on the accused to negative corruption was as heavy as that resting in a normal case on the prosecution. In allowing the appeal on the ground of misdirection, Humphreys, J., speaking

(1) (1933) Ex. C.R. 78.

(2) (1943) 1 K.B. 607.

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for the full Court, referred to *Sodeman* v. *Regem* (1), where Lord Hailsham, L.C., in the Privy Council, said:—

'The suggestion made by the petitioner was that the jury may have been misled by the judge's language into the impression that the burden of proof resting upon the accused to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there was no doubt that the burden of proof for the defence was not so onerous . . . It was certainly plain that the burden in cases in which an accused had to prove insanity might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceedings. That that was the law was not challenged.' In so holding the Lord Chancellor was in agreement with the decision of the majority of the Supreme Court of Canada in *Clark* v. *The King* (1921) 61 S.C.R. (Can.) 608, 617, where Duff J., in the course of his judgment, expressed the view that the necessity for excluding doubt contained in the rule as to the onus on the prosecution in criminal cases might be regarded as an exception founded on considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption.

At p. 611 Humphreys, J. said:—

What is the burden resting on a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement on the subject by Willes J. in *Cooper* v. *Slade*, 6 H.L. Cas. 772. That learned judge referred to an ancient authority in support of what he termed 'the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict.' The authority in question was the judgment of Dyer C.J and a majority of the justices of the Common Pleas in *Newis* v. *Lark* (1571) Plowd. 403, decided in the reign of Queen Elizabeth. The report contains this passage, Ibid 412: 'Where the matter is so far gone that the parties are at issue . . . so that the jury is to give a verdict one way or other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable and by the same reason that which is most probable shall be good evidence'

In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person 'unless the contrary is proved,' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish

In *Clark* v. *The King* (2), Duff, J. (as he then was) said at p. 616:—

Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has

(1) (1936) W.N. 190, 191. (2) (1921) 61 S.C.R 608.

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produced such a preponderance of evidence as to shew that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts.

Keeping in mind, therefore, that the onus is on the claimant and that he is entitled to succeed if, upon all the evidence, he has satisfied the Court that there is a preponderance of probability in that which he is called upon to establish, I now turn to consider the evidence.

It may be noted first that even if I were to accept all of the claimant's own statement, it contains no evidence as to the manner in which the car was used between 7:30 p.m. when he says he returned home and 8:45 p.m. when he says he went to the neighbouring store; or between that time (when he says it was still in the driveway) and the time of seizure. During those periods the keys were in the ignition lock and the car was available to anyone wishing to use it. To that extent the claimant has failed to establish his case.

The observations made by the police officers as to the condition of the car, the articles found therein, the marks in the snow from the street to the car, from the car to the fence, from the fence to the place where the bags were found, and from there to Gomez Street; and their evidence as to the "list" found on Koschuk's shoe, have not been seriously challenged in any way. I accept their statements as being accurate throughout. Now, while none of the Crown witnesses saw the illicit spirits in the car or saw the car used in the transportation of illicit spirits, the inference from what they observed is sufficiently clear and strong as to indicate that the car had been so used. The tire marks leading from Gomez Street to the car were clearly visible and no one denies that they were made by the car in question. Had Koschuk last returned home at about 7:30 p.m., as he alleges, there would have been no such tire marks in the snow for the driveway had been cleaned and the new fall of snow had not yet commenced; moreover, there were no marks in the snow leading from the car to the claimant's home. The only foot marks led from the car to the fence and from there directly to the

place where the bags were found, and, on the evidence, had been recently placed. From this evidence, I infer that the spirits found had been in the car in the driveway, and that they had been brought there in the car.

How, then, does Koschuk endeavour to discharge the onus put upon him? He says, of course, that the spirits were never in his car. He states that it was his custom to leave the keys in the car and that he had given no one permission to use it. But he made no investigation of any sort to ascertain whether, in fact, it had been used or to explain the marks in the snow leading from his own car to the place in the neighbouring yard but a short distance away where the spirits were found. The only matter on which it might be said that his evidence was corroborated on any point was in regard to the missing rear seat. That evidence was no doubt tendered in order to explain its absence and to meet the inference that it had been removed in order to make room for the bags. But that matter, in my opinion, is not material—the spirits could have been in the car whether the seat was there or not. One of the most significant facts in evidence is the finding of oats and oat beards in the car and on the bags as indicating a common origin. In explanation of this fact Koschuk states that he purchased eggs and chickens from farmers and the oats and beards may have been on those boxes or bags. This suggestion is not corroborated by any one, Horodinak merely stating that he knew Koschuk had purchased eggs. The bottle tops and caps are not satisfactorily accounted for. Koschuk suggested that Horodinak might have placed them there but the latter gave no evidence on that point.

Weighing the evidence as a whole, I am of the opinion that the claimant has not produced such a preponderance of evidence as to show that the conclusion he seeks to establish (namely, that the vehicle was not used in the transportation of illicit spirits) is substantially the most probable of the possible views that may be taken of the established facts. He has failed to relieve himself of the onus cast on him and his claim must therefore fail.

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In the result Koschuk's claim will be dismissed with costs. There will be an order declaring that the vehicle in question be condemned as forfeited to the Crown. The Informant is entitled to be paid his costs after taxation.

Judgment accordingly.