

BETWEEN:

BENJAMIN KENZIK, BERT HEDGES }
and S. C. TOMLIN, LIMITED } SUPPLIANTS;

1953
Nov. 25 & 26
1954
Jan. 20

AND

HER MAJESTY THE QUEEN RESPONDENT.

Crown—Petition of Right—Claim for return of goods or money of the suppliants in possession of the Crown—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 17—The Customs Act, R.S.C. 1952, c. 58, s. 2(q), 18, 178(1), 181(1), 190(a)(c)—Minister not bound by reasons given in Notice of Seizure and Forfeiture—Burden of proof on suppliants to prove goods not forfeited under any section of Customs Act—Failure to prove goods not forfeited.

Held: That where suppliants seek the return of goods and money formerly their property but now in the possession of the Crown as forfeited under the provisions of the Customs Act, R.S.C. 1952, c. 58, the burden is on them and each of them to prove that such goods and money deposited in lieu of a bond on the release of a seized van and tractor were not forfeited under any provision of the Customs Act and in the present case this the suppliants have failed to do.

2. That the Crown is not bound by the reasons given by the Minister when he ordered the seizure and forfeiture of the goods and is not confined to the reasons given in the Notice of Seizure and Forfeiture.

PETITION OF RIGHT seeking return of goods and money of suppliants in possession of Crown.

The action was tried before the Honourable Mr. Justice Potter at Toronto.

E. A. Goodman for suppliants.

G. B. Bagwell, Q.C. for respondent.

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

POTTER J. now (January 20, 1954) delivered the following judgment:

This is a petition of right within the Petition of Right Act, chapter 158, R.S.C. 1927, as amended, now chapter 210, R.S.C. 1952, by which the suppliants pray the return of certain goods and money which are in the possession of the Crown as having been forfeited under the provisions of The Customs Act, chapter 42, R.S.C. 1927, as amended, now chapter 58, R.S.C. 1952.

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The suppliant, Benjamin Kenzik, prays the return of one 21" screen Motorola television set, of the console type, valued at \$315; the suppliant, Bert Hedges, prays the return of one 21" Motorola television set, valued at \$238 and one glass panel heater, valued at \$42.60; and the suppliant, S. C. Tomlin, Limited, prays the return of the sum of \$600, deposited in lieu of a bond, for the release of a tractor and trailer. The television sets, the glass panel heater and the tractor and trailer were seized by Canadian Customs Officers at the Peace Bridge at Fort Erie, in the province of Ontario, on December 1, 1952—Notice of Seizure of the Department of National Revenue No. 61709/4539, dated December 6, 1952.

Subsequently, the suppliant, Kenzik, in accordance with the provisions of section 172 of chapter 42, R.S.C. 1927, as amended, now section 159 of chapter 58, R.S.C. 1952, made representations or furnished evidence to the Deputy Minister of National Revenue, Customs & Excise, and on February 2, 1953, the Deputy Minister rendered his decision to the effect: "that the deposit be forfeited; that the goods be released on payment of a further sum of \$864.71, to be forfeited and in default of such further payment for thirty days that the goods be forfeited."

On February 7, 1952, the suppliant, Kenzik, served notice on the Minister of National Revenue, Customs & Excise, that he would not accept the said decision and requested the Minister to refer the matter to this Court, and on February 17, 1953, the Minister served notice upon the agents of the solicitors for the suppliants that he would not refer the matter to the Court. The suppliant, Kenzik, filed his petition herein, on March 24, 1953, which was amended on praecipe on June 5, 1953, by joining the suppliants, Hedges and S. C. Tomlin, Limited, as petitioners.

The statement of defence submits that the petition of right does not allege facts, giving rise to any liability for which Her Majesty is bound or may be adjudged to respond, or claim relief for which a petition of right will lie, but these objections were not urged at the trial.

The evidence established the following:—

The suppliant corporation, incorporated under the laws of Ontario, with Head Office at Toronto in that province, is the owner of a number of tractor-drawn horse trailers or

vans, and the suppliant, Kenzik, is the President and General Manager of the suppliant corporation. The principal business of the suppliant corporation is to operate horse-vans and transport race horses from the stables of their owners to the various race tracks in Canada and the United States.

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On December 1, 1952, the suppliant, Kenzik, accompanied by his wife and a Mr. Watt, and travelling in his own automobile, was in charge of a convoy of three horse-vans which were on their way from Pawtucket, Rhode Island, to the Peace Bridge, connecting Buffalo in the United States of America with Fort Erie in the province of Ontario. Two of the vans accommodated six horses each and the third, nine horses.

In the middle sections of the six-horse vans, which were of considerable length, were the stalls in which the horses were carried, three on each side of a lateral passageway, about four or five feet in width, and facing the same. Bars were placed across the passageways, to prevent the horses crossing the same, and the grooms, accompanying the horses, rode in the passageways. At the forward ends of the vans were compartments about seven feet two inches in width, by ten feet eleven inches in extreme length and six feet two inches in height, from floor to roof, which had no connection with the stalls and which were fitted with doors opening through one side of the vans. There were also small compartments in the rear ends of the vans. The tractors, operating the vans were operated by drivers who were in the employ of the suppliant corporation, and acting under the orders of the suppliant, Kenzik.

On approaching Buffalo, the suppliant, Kenzik, ordered one Kenyon, who had been driving one of the six-horse vans, to get into his, Kenzik's, passenger automobile, which Watt was then to drive, and he, Kenzik, took Kenyon's position as driver of the tractor drawing a six-horse van. Kenzik stated that he had told Kenyon and Watt to leave his wife at a hotel in Buffalo and that Kenyon was then to meet him at the corner of Genesee and Ellicott streets in Buffalo, as he considered that a good approach to the bridge, and that he had told Kenyon and the drivers of the

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other vans, at breakfast that morning, not to cross the border between the United States and Canada until he arrived there.

After Kenzik had taken over the driving of the tractor from Kenyon, he, Kenzik, drove the same to Buffalo, arriving between 4:30 and 5:00 o'clock in the afternoon, and parked it, telling the grooms, who were accompanying the horses, that they could go and get something to eat.

Kenzik then drove about two blocks to what he called "Ellicott's Electric" where he purchased a 21" screen Motorola television set of the console type for \$315. He did not pay the full cash price for the same, but paid the difference between the price and what he said a Mr. Simon of the shop owed him for transporting his horses at some earlier date. He neither gave Simon a receipt for the amount owing by him, nor did Simon receipt the invoice for this television set, which invoice was produced and marked Exhibit "5".

He further stated that after purchasing the television set for himself Simon asked him if he would transport a 21" Motorola television set, invoiced at \$238, and a glass panel heater, invoiced at \$42.60, across the border to the suppliant, Bert Hedges, who was not called as a witness, and to whom Simon was selling the same. This, the suppliant, Kenzik, agreed to do without any authority from Hedges to transport or pay the duty on them.

The invoices for the glass panel heater and the television set, supposedly sold to the suppliant, Bert Hedges, were produced and marked Exhibits "6" and "7" respectively. No money was paid by Kenzik on these purchases.

After completing these arrangements, the suppliant, Kenzik, with the assistance of men employed by Simon, removed some of the equipment consisting of buckets, harnesses, saddles, blankets, tubs, trunks and bedding, which were in the front compartment of the horse van, to make room for the cartons containing the television sets and the glass panel heater, and placed them on the floor of the compartment against the forward end of the same. Equipment was then placed around the cartons and blankets placed over or between them in such a manner, according to the evidence of the Canadian Customs Officers who made the

search, hereinafter described, that the cartons could not be seen, and a large spare tyre used for either the tractor or the trailer was then placed in the compartment, as Kenzik stated, on top of the equipment, but according to the evidence of the Canadian Customs Officers, it was found jammed in the doorway of the compartment, some distance above the floor in such a manner that it took the strength of two men to remove it, and who only succeeded in doing so after some minutes work.

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After the goods in question and the equipment and the tyre had been stowed in the compartment, and the doors closed it is assumed, the grooms returned from their meal and took their places in the van with the horses.

Later, the suppliant, Kenzik, picked up the driver of the tractor, Kenyon, at the corner of Genesee and Ellicott streets, and he, Kenyon, took over the driving of the tractor again. Kenzik did not tell Kenyon that the television sets and the glass panel heater were in the van, nor did he give him the invoices of the same.

Notwithstanding that he had previously told his drivers to wait for him on the American side, Kenzik proceeded immediately to the Peace Bridge, and on talking to an American customs broker at that place, he was told by him, that Greenwood, the driver of another van, had telephoned that he had had motor trouble on coming into Buffalo, whereupon he, Kenzik, drove back with his car to find Greenwood, which he did, several miles back on the road, and found that he had trouble with the transmission of his tractor. Kenzik gave Greenwood orders to proceed as best he could and then returned to the Peace Bridge. Greenwood, in the meantime attempted to proceed with his truck, but finally had to stop in Buffalo for the night and have repairs made next morning.

William Kelly, the driver of the third van, stated that he had breakfast with the other drivers about 200 miles from Buffalo that morning, and was told by Kenzik to wait at the border until he arrived.

When Kelly arrived at the border with his van, he was told by some one there that Kenzik had already been there but had returned for some purpose. He waited awhile, but as one of the horses in the van seemed ill he filled out

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the necessary papers for export of the animals from the United States and went across to the Canadian side where the Canadian customs officers asked him the usual questions and made a partial search of the van.

While Kelly's van was being searched, the van, driven by Kenyon, which was the one containing the television sets and the glass panel heater arrived. When Kenyon arrived on the Canadian side, he, Kelly, asked him why he had not waited on the other side of the border, to which he replied that he also had a sick horse.

Kenyon was not called as a witness and the evidence in connection with the search and seizure adduced on behalf of the suppliants was given by the driver, Kelly.

According to Kelly's evidence, the trailer driven by Kenyon was stopped by the Canadian customs officers, the doors of the front compartment opened, when a spare tyre was found jammed in the doorway; that it was a heavy tyre and that it ordinarily took two men to lift it and that it took him and Kenyon some time to get the tyre out of the doorway, and further time to get the equipment out of the compartment, so that the cartons containing the television sets and the glass panel heater could be seen clearly.

Albert C. Simon, a Canadian customs officer, and not the Simon from whom the suppliant, Kenzik, had purchased the goods in question, testified that he had been a customs officer for a number of years, and on December 1, 1952, was stationed at the Peace Bridge and had gone on duty at 4:00 o'clock that afternoon. Shortly before 6:00 o'clock that afternoon, a horse-van of S. C. Tomlin, Limited, crossed the border and entered Canada, and shortly after 6:00 o'clock, another of the S. C. Tomlin, Limited horse-vans crossed, that he, Simon, gave instructions to another customs officer, A. W. Zanutto, to search the vans thoroughly.

The two drivers, Kelly and Kenyon, were asked the usual questions as to where they were born and where they lived and they were then asked if they had anything to declare and who was in charge of the tractors and vans. Kenyon replied that he was in charge of the tractor and van, which he was driving and that it contained horses and race track equipment. He did not declare the television sets and the glass panel heater.

Kenyon and his companion, were then required by the customs officers to open the forward compartment of the van driven by Kenyon, and upon their doing so, a large spare tyre was seen to be wedged in the doorway some distance from the floor of the compartment, some blankets, buckets, and other things could be seen, but not the cartons containing the goods in question. Kenyon and his companions were ordered to remove the tyre, which took them some time and still the cartons containing the goods in question could not be seen, and they were ordered to remove the race track equipment, and after they had taken out more blankets, burlap bags and a couple of club bags, the customs officer, Zanutto, got up and with his flashlight looked into the compartment, and asked the customs officer Simon to also look. The cartons containing the television sets and the glass panel heater were then seen by the customs officers, but Kenyon stated that he did not know what they were.

The cartons were then taken out and placed on the ground, the whole operation, from the time the doors of the compartment were opened until the cartons were found, taking about one half an hour.

The evidence of Aldo Zanutto was to the effect that he went on duty at the Peace Bridge at 4:00 o'clock on the afternoon of December 1, and at about 6:00 o'clock went out to examine a truck which had entered the examination yard on the Canadian side, and while he was proceeding with such examination, a second van, known by him to be a van of S. C. Tomlin, Limited, arrived, which was driven by one Hugh Kenyon. He, Simon, questioned Kenyon as to his immigration status, that is with reference to his place of birth and where he lived, and then questioned him as to what he had to declare other than personal effects, horses and personal effects of the men in the vehicle, to which he replied, "Nothing!" and he was then asked a second time what he had to declare and he replied as in the first instance. The other men, that is the grooms accompanying the horses, were also questioned. He, Zanutto, then opened the doors to the horse compartment, where he found five horses and a pony, and then proceeded to examine the front compartment of the van.

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As the door was opened, he could see a spare tyre practically at the top of the doorway and jammed in the same, and below it were pails, trunks, feed, etc. He described the tyre as being flat up against the doors when they were closed, and wedged across the doorway. On requesting Kenyon to take the tyre out, he was reluctant to do so, but with the help of the other men, it was removed after about ten minutes effort.

Zanutto then attempted to enter the compartment but the goods described as above, were piled up so high, that he could not stay up in the doorway, and Kenyon and his companions were required to remove the same. They took out pails, and ropes to about halfway down the door, when he, Zanutto, climbed up again and, although using his flashlight, could still see nothing in the compartment other than race track tackle and he instructed Kenyon and the others to remove more goods, which they did. On this occasion, they took out two trunks and everything directly in front of the door and he got up again and saw part of a carton, but there was still considerable material, viz.—a suitcase burlap bag and ropes, piled on top of the cartons.

Zanutto drew the attention of Simon to the carton and required Kenyon and his companions to remove the remainder of the goods, when he, Zanutto, then removed two large cartons and a smaller carton, which were leaning up against the forward wall of the compartment. About this time, customs officer Simon had called his superintendent, Arthur L. Armstrong, by telephone, and when he appeared, the cartons were examined.

About fifteen minutes later, the suppliant, Kenzik, appeared, the cartons being at that time on the ground beside the truck, and he said that he owned the goods and wished to declare them. He was referred by Zanutto to customs officer Simon, and they all, with superintendent Armstrong, went into his office.

Kenzik was then questioned as to who owned the television sets and the glass panel heater and he produced the invoices, marked Exhibits "5", "6" and "7", and said that he and the suppliant, Hedges, owned the goods.

Kenzik then wanted to pay the duty and was asked how much money he had, to which he replied—"Between \$40 and \$50." He also produced his wallet with his identifications. When he was told the amount of the duty, or that the money he had with him was not sufficient to pay the same, he, according to the evidence of all the customs officers, said he had more money at the hotel in Buffalo.

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At this point, it appeared that Kelly had *not* declared the horses in his van or that there was some irregularity in that connection, and he had to go back across the border for that purpose.

The television sets and glass panel heater were subsequently appraised for duty, which was calculated as follows:—

Duty and tax on glass panel heater	\$ 14.43
Duty on 21" television console	153.55
Duty on 21" television table model	116.03
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Total	\$ 284.01
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The evidence of Arthur L. Armstrong, superintendent of customs and excise for the Port of Fort Erie, was to the effect that between 6:00 and 7:00 o'clock in the evening of December 1, he received a telephone call and as a consequence went to the Peace Bridge where he arrived shortly before 7:00 o'clock and saw an S. C. Tomlin, Limited van, with goods on the ground beside it. He viewed the goods and the inside of the van but could see nothing in the forward compartment of the same at that time. He then went to his office and later, customs officer Simon brought the suppliant, Kenzik, in, and they were followed by customs officer Zanutto.

Superintendent Armstrong asked the suppliant, Kenzik, who he was, and he said that he was the president of S. C. Tomlin, Limited, and produced the invoices for the two television sets and the glass panel heater, marked Exhibits "5", "6" and "7". Armstrong asked Kenzik who Hedges was, and he told him, and said that he, Kenzik, intended to pay the duty on the goods, but that his driver had disobeyed orders. He was then asked by superintendent Armstrong how much money he had, and he said \$40 or \$50, which he produced. When he was told that that

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would not be enough money to pay the duty, he said he had more money in Buffalo. The superintendent decided to seize the television sets, the glass panel heater and van, but was worried about the horses, and therefore, told Kenzik not to take his car out, but to take the van to Montana Farm, not far away, to which the horses belonged, in company with one of the customs officers. This was done, and the van got back about half past eight o'clock the next morning, when the suppliant, Kenzik, came to see the collector for the port.

The television sets and the heater were held for appraisal.

On being questioned by the Court, superintendent Armstrong stated that if the van had been permitted to proceed past the Canadian customs line without examination, there would have been nothing to prevent the television sets and the glass panel heater being unloaded at any point beyond, as no further inspections would have been made of the contents of the van.

The evidence of the suppliant, Kenzik, differs somewhat from that of the customs officers, and particularly, with regard to his statement as to where he had more money. He, Kenzik, swore that he told the customs officers that he had more money in his car, and explained to the Court that he frequently carried large sums of money in the pocket of a jacket which he had, on this occasion, left in his car, without locking the same.

In this connection, it is significant, that the suppliant Kenzik's evidence was to the effect that he had made arrangements to join his wife at a hotel in Buffalo, and to stay there all night and that the customs officers testified that he had stated Buffalo, instead of his car, as the place where he had more money. If he had said it was in his car, it is possible that he might have been asked to go to the car and obtain it.

Dr. A. S. Lawson and Mr. H. J. Addison were offered as witnesses as to the character of the suppliant, Kenzik, and their evidence was received, subject to objection. They were, however, confined to evidence of his character as affecting his credibility.

Thus, in criminal cases, to prove that the defendant committed the crime charged, evidence may not be given that he (1) bore a bad reputation in the community; or (2) had a disposition to commit crimes of that kind; or (3) had on other occasions committed particular acts of the same class evincing such a disposition. . . .

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The same rule prevails in civil cases. Thus, where a will was impeached for fraud, the defendant was not allowed to prove his good character in answer.

In all criminal cases involving punishment as distinguished from penalty the accused is allowed to prove his general good character (though not specific instances thereof) either by cross-examination of the witnesses for the prosecution, or in chief by his own testimony or that of independent witnesses. It has been held, however, that such evidence does not stand on precisely the same plane as that concerning the relevant facts going to prove or disprove the issue, but that the jury is only entitled to take into consideration the good character of the defendant when, weighing the other evidence, one view of that evidence would be favourable to the accused. There are some offences which no one but a person of good character should be in a position to commit. Phipson on Evidence, 9th Edition, pp. 188-9.

The knowledge of both witnesses as to the general reputation of the suppliant, insofar as it affected his credibility as a witness, was limited to their knowledge of him in connection with business carried on by him with them and their fellow sportsmen. Neither witness actually lived in the same community with the suppliant. The evidence of Dr. Lawson was that his general reputation in the community was "The very best and an honourable man", and that of Mr. Addison was, "I believe in the community Kenzik lives in he enjoys the reputation of having the highest and finest character, I have ever seen in any man."

In my opinion, such evidence was inadmissible and, in any event, it had no probative value relative to the issues before the Court.

Section 18 of the Exchequer Court Act, chapter 34 of R.S.C. 1927, as amended, and now section 17 of chapter 98 of R.S.C. 1952, is as follows:—

17. The Exchequer Court has exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into, by or on behalf of the Crown.

Section 262 of The Customs Act, chapter 42 of R.S.C. 1927, as amended, now section 248 of chapter 58 of R.S.C. 1952, is as follows:—

248 (1). In any proceedings instituted for any penalty, punishment or forfeiture or for the recovery of any duty under this Act, or any other law relating to the Customs or to trade and navigation, in case of any

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question of, or relating to the identity, origin, *importation*, landing or exportation of any goods or the payment of duties on any goods, or the compliance with the requirements of this Act with regard to the entry of any goods, or the doing or omission of anything by which such penalty, punishment, 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 Her Majesty or upon the person representing Her Majesty.

(2) Similarly, in any proceeding instituted against Her Majesty or any officer for the recovery of any goods seized or money deposited under this Act or any other law, if any such question arises the burden of proof shall lie upon the claimant of the goods seized or money deposited, and not upon Her Majesty or upon such person representing Her Majesty.

Section 2(o) of chapter 42 of R.S.C. 1927, as amended, now section 2(q) of chapter 58, R.S.C. 1952, is as follows:—

(c) 'Seized and forfeited', 'liable to forfeiture' or 'subject to forfeiture', or any other expression that might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed;

The statute contains no provision for a period of limitation within which goods or money may be forfeited to the Crown for some violation of the provisions of the same working a forfeiture, and in view of the provisions just quoted, if it were discovered that goods or money had become subject to forfeiture some years ago, but no proceeding taken, such proceedings could be taken at any time and the forfeiture would relate back to the time of the commission of the offence.

In *Wilkins and Others v. Despard* (1), the plaintiff brought an action in trespass against the Governor of Honduras, who had seized the plaintiff's ship as forfeited to the use of the King and himself for violation of the Navigation Act, 12 Car. 2. c. 18, and the Court held, according to the marginal note, that the owner could not maintain trespass against the parties seizing although the latter had not proceeded to condemnation; for by the forfeiture the property is divested out of the owner.

The Annandale (2), was a case of forfeiture under the 103rd section of the Merchant Shipping Act, 1854, instituted on behalf of a British officer of customs against a

(1) (1793) 5 T.R. 112.

(2) (1877) 2 P.D. 179.

vessel seized for an alleged infringement of the provisions of that section, in that one of her owners, being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners.

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Sir Robert Phillimore at p. 185 stated:—

The case principally and properly relied upon is the case of *Wilkins v. Despard*, 5 T.R. 112, which seems to have followed two former decisions referred to in it—*Robert v. Witherhead*, 12 Mod. 92 and *Hennell v. Perry*, 5 T.R. 117; and the principle laid down in those cases, and adopted in *Wilkins v. Despard* is, that the forfeiture accrued before seizure, and before the institution of any suit, at the time when the illegal and fraudulent act was done, and that it divested out of the owners the property which before they had in the ship, and that the seizure related back to the act which was the cause of the forfeiture.

I am of opinion that this position is a sound one in law, looking to the cases to which I have adverted and that the demurrer must be sustained on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure of the *Anmandale* related back to the time of the wrongful act committed by the then owners.

If the law laid down in these cases is sound, it may very well be, assuming the procedure to have been regular, that this is not a case in which goods or money of the subject are in the possession of the Crown, within section 17 of chapter 98, R.S.C. 1952, for the property in the television sets, the glass panel heater and the van and tractor, or the sum of \$600 deposited in lieu of a bond on the release of the van and tractor, is in the Crown and not in the suppliants, and the relief claimed by the suppliants is not one for which a petition of right will lie, but, as before stated, that question was not argued and this decision is based on other principles.

This is a proceeding by petition of right in which the suppliants claim the return of goods, and money deposited in lieu of a bond which should have been furnished at the time the tractor and trailer of the suppliant corporation were detained or seized. The burden is on the suppliants to prove that the Crown has no right, under any provision of The Customs Act working a forfeiture, to retain the goods and the money deposited as aforesaid. The Crown is, therefore, not confined to the reasons given by the Minister when he ordered the seizure and the forfeiture of the same. Even if, for the purpose of this proceeding, the Minister were confined to the reasons given in the Notice of Seizure and Forfeiture, and the goods and money were about to be

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released because such reasons had not been proved, they could be retained or seized again and forfeited as soon as knowledge was received that some other provision of the statute working a forfeiture had been contravened. The burden is, therefore, upon the suppliants to establish that the Crown has no right, under any provision of the statute, to retain the goods and the money so deposited in lieu of a bond.

Section 203(c) of chapter 42 of R.S.C. 1927, as amended, now section 190(1)(a) and (c) of R.S.C. 1952, c. 58, is as follows:—

190(1) If any person

- (a) smuggles or clandestinely introduces into Canada any goods subject to duty under the value for duty of two hundred dollars;
- (c) in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value;

such goods if found shall be seized and forfeited . . . such forfeiture to be without power of remission in cases of offences under paragraph (a).

Section 193(1) of chapter 42, R.S.C. 1927, now section 181(1) of chapter 58, R.S.C. 1952, is as follows:—

181(1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

Section 190(a) of R.S.C. 1927, now section 178(1), is in part as follows:—

178(1) The following articles namely:

- (a) any vehicle containing goods, other than a railway carriage, arriving by land at any place in Canada, whether any duty is payable on such goods or not;
 - (b) any such vehicle on arriving, if the vehicle or its fittings, furnishings or appurtenances, or the animals drawing the same, or their harness or tackle, is or are liable to duty; and
 - (c) any goods brought into Canada in the charge or custody of any person arriving in Canada on foot or otherwise;
- shall be forfeited and may be seized and dealt with accordingly, if before unloading or in any manner disposing of any such vehicle or goods, the person in charge thereof does not

- (i) come to the Custom-house nearest to the point at which he crossed the frontier line or to the station of the officer nearest to such point, if such station is nearer thereto than any Custom-house, and there make a report in writing to the collector or other proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same;

- (ii) then truly answer all such questions respecting such goods or packages, and the vehicles, fittings, furnishings and appurtenances appertaining thereto, as the collector or proper officer requires of him; and
- (iii) then and there make due entry of the same in accordance with the law in that behalf.

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Section 18 of chapter 42, R.S.C. 1927, now section 18, chapter 58, R.S.C. 1952, should evidently be read with section 190 and section 178 of those two statutes respectively. Section 18 of both Revisions imposes certain duties on persons in charge of vehicles and persons on foot or otherwise, arriving in Canada, and having with them or in their charge or custody, any goods, whether the same are dutiable or not, but such sections do not state the consequences of the failure of such persons to perform such duties. Section 190, chapter 42, R.S.C. 1927, and section 178, chapter 58, R.S.C. 1952, provide for the forfeiture of such vehicles and goods under the circumstances specified therein.

The movements of the suppliant, Kenzik, the instructions which he gave or omitted to give to the men under his control, and the manner in which he stowed the television sets and the glass panel heater in the forward compartment of the horse van at Buffalo, indicate an attempt to defraud the revenue by avoiding the payment of duty on them; the tractor and van containing the television sets and the glass panel heater, arrived by land in Canada, and Kenyon, the person in charge of the same and their contents, including the television sets and the glass panel heater, on coming to the Custom-house nearest to the point at which he crossed the frontier line, did not comply with the provisions of section 18 or section 178 of the Customs Act, chapter 58, R.S.C. 1952.

It may be suggested that these two sections, when strictly interpreted, only require compliance with their provisions before unloading or in any manner disposing of any such vehicles or goods, and that it is conceivable that Kenyon might still have complied with the same before unloading or disposing of them.

The evidence of Superintendent Armstrong was that had the vehicle passed through the Custom examination yard at Fort Erie without the goods in question having been found, there would have been nothing to prevent their being

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unloaded or disposed of at any point beyond that place. It follows, therefore, that the intention of the Act is that there should be complete compliance with the provisions of these sections at the Custom-house nearest to the point at which the frontier line is crossed, or at the station of the officer nearest to such point.

In *The King v. Bureau* (1), somewhat similar facts were considered and it was held by the majority of the Court that the respondent, Bureau, not only had not succeeded in proving that he had a lawful excuse to have in his possession goods which were dutiable, but had not discharged the onus upon him and that the seizure and forfeiture of dutiable cigarettes, and the automobile in which they were carried, should be confirmed.

In the case under consideration, the suppliants are praying for the return of goods and money formerly their property, but now in the possession of the Crown as forfeited under the provisions of the Customs Act. The burden is on them and each of them, to prove that such goods and money deposited in lieu of a bond on the release of the van and tractor, were not forfeited under any provision of the Customs Act, and they have not only failed to do so, but on the evidence of the witnesses produced on their behalf, have established their forfeiture to the Crown.

For the reasons given, the judgment of the Court must be that the suppliants are not entitled to any of the relief sought by them, or any of them, in their petition of right, and that the respondent is entitled to costs.

Judgment accordingly.

(1) [1949] S.C.R. 387.