1931
June 1.
June 25.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

CARL DOULL .....DEFENDANT.

Revenue—Customs Act—Discovery—Penal action

The present action was one to recover a penalty to the amount of the duty paid value of goods harboured by D. unlawfully imported, and incurred under the provisions of the Customs Act. Plaintiff proved the finding of the goods in the premises of D. and the duty paid value thereof. D. offered no evidence at all.

Held that, by section 217 of the Customs Act, the burden of proving that the goods harboured were lawfully imported is upon the person in whose possession the goods are found, and section 262 provides that in case of any question relating to identity, *origin*, importation or payment of duty, the burden is on the owner or possessor of the goods, and that D. having failed to discharge the burden put upon him by law, plaintiff was entitled to judgment for the duty paid value of the goods so found on his premises.

2. The question of the right of the plaintiff in a penal action to examine the defendant on discovery, discussed.

INFORMATION by the Attorney-General of Canada to recover from the defendant a penalty incurred under the Customs Act for harbouring goods unlawfully imported.

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

G. H. V. Belyea, K.C., and *G. A. Hutchinson* for plaintiff.

R. M. Palmer for defendant.

The points of law raised and the facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (June 25, 1931), delivered the following judgment.

At the trial of this cause an objection was taken by Mr. Palmer, counsel for the defendant, to the reception, as part of the trial record, of the evidence on discovery of the defendant taken under order in that behalf granted by my brother Audette. Mr. Palmer contended that as the purpose of this action was to recover a statutory penalty, it was not permissible, under the English authorities, to order discovery of the defendant. Mr. Palmer relied on the cases

1931

THE KING v. DOULL.

Maclean J.

of *Mexborough* v. *Whitwood* (1), and *Seddon* v. *Commercial Salt Co.* (2), as establishing his contention, and I think they confirm his point as to the practice in England.

The question then arises, does the English rule apply to actions in the Exchequer Court of Canada, and I mention it although it is not necessary for me to decide the point in reaching my judgment in this case. The object of the English rule when formulated was to protect parties to actions from being compelled to answer questions which may either incriminate them or render them liable to actions for penalties (Bray on Discovery, p. 309 *et seq*). Now the Canada Evidence Act (section 5, R.S., 1927, c. 59), provides that no witness is excused from answering a question because the answer " may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person." But while this enactment provides immunity to the witness from any criminal proceedings which may be based upon his evidence, there is no immunity afforded him in respect of penal actions of a civil nature. Whether the word *witness* is to be construed so as to include a party giving evidence on discovery may be open to doubt; and it is also to be noted that section 5 of the Act, while expressly providing immunity from criminal proceedings, does not do so for civil actions which may be based upon the answer of the witness. But the matter does not rest there.

The provisions of section 35 of the Canada Evidence Act are in effect that " In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken shall, subject to the provisions of the Canada Evidence Act and other Acts of the Parliament of Canada, apply to such proceedings." This provision indicates the necessity of ascertaining the law of evidence as it obtains under the statutes of New Brunswick where this proceeding was taken; and by turning to the Revised Statutes of New Brunswick, 1927, c. 131, we find it provided by section 4 that:

> On the trial of any issue or of any matter or question, or any enquiry arising in any suit, action or proceeding in any court, the *parties thereto* and the persons in whose behalf the action, matter or proceeding is

(1) (1897) 2 Q.B. 111.

(2) (1925) 94 L.J. Ch. Div. 225.

brought or instituted, or opposed or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter excepted, be competent and compellable to give evidence either *viva voce*, or by disposition according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding.

Furthermore under Order 31 (*a*) of the New Brunswick Judicature Rules a party may be examined on discovery, and his examination used at the trial.

But further considerations arise which may displace the applicability of the New Brunswick law.

The Exchequer Court Act (R.S., 1927, c. 34, s. 87, as amended by Chapter 23 of the Acts of 1928) empowers the Judges of the Court to make general rules and orders for regulating the practice and procedure of and in the court, and by Rule 129 of the practice and procedure now in force it is provided that after a defence is filed, any party (other than the Crown or the Attorney-General) may be examined for the purposes of discovery. Rule 138 provides that such examinations may be used at the trial. But there is nothing in the Rules touching the privilege of a witness to refuse to answer questions that may incriminate him or make him liable to a penalty. The question under discussion is further embarrassed by the provisions of sec. 36 of the Exchequer Court Act which invokes the practice and procedure of the High Court of Justice in England, as of the year 1897, in cases where the Act itself or the Rules made thereunder do not provide for any particular matter. So that in the last result of a critical enquiry into the question raised, it may be proper to hold that the law of this court is that prevailing in England in 1897 and that it is not allowable to order discovery in penal actions.

I have given some attention to the point raised by Mr. Palmer because the condition of the law in that behalf would seem to demand some clarifying by the legislature.

As I have said before, it is not necessary for me to rely upon the discovery evidence in reaching my judgment, but if I deemed such evidence of controlling weight on the issues involved, I would be inclined to admit it on the ground that no objection was taken by the defendant in giving his evidence on discovery before the examiner, and I think it too late to take the objection at the trial. The privilege is that of the party as a witness and not of his counsel (*Taylor on Evidence*, 11th ed., p. 1007).

1931

THE KING v. DOULL.

Maclean J.

The plaintiff's counsel did not however rely upon the discovery evidence to sustain this action, which is one for the recovery of a penalty in the sum of the duty paid value of certain liquors found in the possession of the defendant in January, 1929, at Moncton, N.B., and seized by Customs Officers. The nature and quantity of the liquors so seized are set forth in the Information. It was proven, regardless of the discovery evidence, that these goods were found on the premises of the defendant, and the duty paid value of the goods was also established by evidence to be $12,090.25. The Information alleges that the defendant without lawful excuse harboured the goods in question, and which goods were unlawfully imported into Canada, that is to say, without the duties provided by the Customs Act, chapter 42, R.S.C., 1927, having been paid thereon.

Sec. 217 of the Customs Act provides that if any person, without lawful excuse, harbours or conceals any goods unlawfully imported, or whereon the duties lawfully payable have not been paid, the same shall be seized and forfeited without power of remission; the same section of the statute also provides that the proof shall be on the person accused to show that he did not harbour or conceal goods unlawfully imported into Canada or whereon the duties lawfully payable have not been paid. Sec. 262 of the Customs Act provides that in any proceedings instituted for any penalty under the Act, that in case of any question relating to the identity, origin or importation of any goods, or the payment of duties on any goods, the burden of proof shall lie upon the owner of the goods or the person in whose possession the goods were found, and not upon His Majesty or upon the person representing His Majesty.

The goods in question were found in the possession of the defendant, and he has failed to discharge the burden of proving that the goods were lawfully imported into Canada and that any duties lawfully payable thereon had been paid. The plaintiff must therefore succeed. There will be judgment for the plaintiff in the amount claimed in the Information, and costs will follow the event.

Judgment accordingly.