1958
May 5, 6 & 7
1959
Oct. 21

BETWEEN:

JAVEX COMPANY LIMITED, CONSUMERS GLASS COMPANY, LTD., DOMINION GLASS COMPANY, LTD. .... APPELLANTS;

AND

MRS. AMY OPPENHEIMER, MISS RUTH OPPENHEIMER, MRS. EDITH KRIEGER, DAVID OPPENHEIMER, ERNEST KRIEGER AND LESLIE McDONALD, carrying on business together in partnership at Vancouver, British Columbia, under the style of OPPENHEIMER BROS. & COMPANY,

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ...... RESPONDENTS.

Revenue—Appeal from decision of Tariff Board—The Customs Act R.S.C. 1952, c. 58, s. 46(1)(2)—Tariff Item 219a—Essential requirements to support plea of estoppel per res judicatam lacking—"Clorox"—Imported product used as a bleach and as a disinfectant—Appeal dismissed.

The Tariff Board found that Clorox, a product consisting of sodium hypochlorite in solution and imported into Canada by the respondents, Oppenheimer Brothers & Company, was properly classifiable under Tariff Item 219*a*. Leave to appeal from this decision was granted by this Court on the question of law whether the Tariff Board erred in holding that the product known under the trade name of Clorox imported into Canada is properly classifiable for tariff purposes under Tariff Item No. 219*a*.

Appellants contend that the Tariff Board was estopped from so finding on the ground that the matter was *res judicata* under a former decision of the Board in Appeal No. 363, by which the Board stated its opinion that Clorox was not properly classifiable under Tariff Item 219*a*.

Held: That the plea of estoppel cannot be supported and that the "Opinion" of the Board in Appeal No. 363 was not a judicial decision *in rem*; that everything that is in controversy in this Appeal No. 398 was not in controversy in the former Appeal No. 363 and in order to support the plea of estoppel *per rem judicatam* it is essential that there be identity of question or issue in both cases; this appeal raises the question as to whether the Deputy Minister was right in classifying the entries under Tariff Item 711, which was not before the Board in the earlier matter, the finding there being merely that "Clorox" was not properly classifiable under Tariff Item 219*a*.

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2. That the earlier finding of the Board did not operate upon the thing known by the trade-mark "Clorox" but merely upon the personal rights, liabilities or interests of the parties thereto in relation to "Clorox", namely the determination of the tariff item properly applicable thereto, and, as a result, the determination of the Customs duty thus payable.
3. That Tariff Item 219*a* means if a product named is "for disinfecting"—which the Board finds as a fact—the product is properly classified under that item; and in the absence of any limitations imposed by Parliament and in virtue of the Board's finding that "Clorox" is ordinarily and regularly used as a disinfectant, the conclusion of the Board that it is *inter alia* for disinfecting and therefore within Tariff Item 219*a* is confirmed.

APPEAL from a decision of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Ottawa.

André Forget, Q.C. and *Paul F. Renault* for appellants Javex Company Limited and Dominion Glass Company, Ltd.

A. S. Hyndman for appellant Consumers Glass Company, Ltd.

G. F. Henderson, Q.C. and *R. H. McKercher* for respondents Oppenheimer Bros. & Company.

R. W. McKimm for Deputy Minister of National Revenue for Customs and Excise.

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

CAMERON J. now (October 21, 1959) delivered the following judgment:

This is an appeal from a decision of the Tariff Board dated June 7, 1957 (Appeal No. 398). By a majority, the Tariff Board found that "Clorox", a product consisting of sodium hypochlorite in solution and imported into Canada by the respondents, Oppenheimer Brothers & Company, was properly classifiable under Tariff Item 219*a*. By Order of the President, leave to appeal was granted on July 9, 1957, upon the following question of law.

> Did the Tariff Board err, as a matter of law, in holding that the product known under the trade mark "Clorox", imported under Vancouver Entries Nos. 68405 of January 12th, 1956, 67200 of January 6th, 1956, 71357 and 71295 of January 26th, 1956, 70238, 70264 and 70292 of January 23rd, 1956, is properly classifiable for tariff purposes under Tariff Item No. 219*a*?

The appellant Javex Company Limited, manufactures in Canada a similar product, namely "Javex". The appellants, Consumers Glass Co. Ltd. and Dominion Glass Co. Ltd., are manufacturers of glass bottles and their interest is affected because the Javex Company is allowed under the ruling (and pursuant to Tariff Item 791) to import free of Customs duty "materials of all kinds" for use in producing or manufacturing their products in Canada, including glass bottles.

Two grounds of appeal are raised. The first is that the Tariff Board was estopped from so finding on the ground that the matter was *res judicata* under a former decision of the Board in Appeal No. 363, by which the Board stated its opinion that "Clorox" was not properly classifiable under Tariff Item 219*a*. It becomes necessary, therefore, to set out the circumstances of Appeal No. 363, dated December 19, 1955.

Under the provisions of s. 46(1) of the *Customs Act*, R.S.C. 1952, c. 58, the Deputy Minister of National Revenue may refer to the Tariff Board for its opinion any question relating to the valuation or tariff classification of any goods or classes of goods. The section further states:

(2). For the purposes of s. 44 a reference pursuant to this section shall be deemed to be an appeal.

Pursuant to that section, the Deputy Minister by letter dated July 29, 1955, wrote the Board as follows:

The Department has had for consideration a number of materials sold under different trade marked names, consisting of Sodium Hypochlorite in Solution. These products are generally described as bleaches, deodorizers, disinfectants and stain removers. They all have had an available chlorine strength of over 5% and they have been uniformly classified as non-alcoholic disinfectants under tariff item 219*a*.

This practice enables the manufacturers of similar products in Canada to import free of Customs duty under tariff item 791 "materials of all kinds" for use in producing or manufacturing their products in Canada. In this connection, a ruling has been made allowing empty glass bottles for use as containers for "Javex", a product manufactured in Canada by Javex Company Limited, under this tariff item.

The Canadian manufacturers of glass bottles who are affected by these rulings are disturbed thereby . . .

I have reviewed the Department's rulings and I concur with them, but I am placing the issue before the Tariff Board as an appeal under Section 46 of the Customs Act.

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In accordance with the requirements of s. 44(2), the Board gave notice of the hearing of the "Appeal" in the *Canada Gazette*, but unfortunately the notice did not come to the attention of Oppenheimer Brothers and they were given no specific notice of the hearing of the "Appeal" by the Board and were not present or represented at the hearing. Section 44 relates to appeals to the Board by a person who deems himself aggrieved by a decision of the Deputy Minister in matters relating to tariff classification (*inter alia*), and by s-s. (3) the Board is empowered on any such "Appeal" to make such order or finding as the nature of the case may require and, "an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in s. 45". No appeal was taken from the Board's "Opinion" in Appeal No. 363, and, indeed, Oppenheimer Brothers could not have appealed to this Court since they were neither parties to the appeal to the Board, nor had they entered an appearance with the Secretary of the Board (see s. 45).

When the "Opinion" of the Board did come to the attention of Oppenheimer Brothers, their counsel wrote the Board requesting a re-hearing of the case in regard to "Clorox" (other materials had also been considered) on a number of grounds, including lack of notice of the hearing or notice that "Clorox" was to be considered by the Board and that there was material evidence available in regard to "Clorox" which had not been before the Board.

The Board apparently declined to re-open Appeal No. 363 but the Chairman, in a letter to Mr. Henderson on February 27, 1956, stated in part:

> The Tariff Board does not accept, in the ordinary sense of the word, any responsibility whatsoever regarding the notifying of all who may be interested in an Appeal for the simple reason that such responsibility, if accepted, could not possibly be discharged. We simply have no way of knowing who may or may not be concerned about or interested in any given appeal. In the case under consideration, the evidence was presented by witnesses who appeared voluntarily.
>
> Following our telephone conversation this morning, I understand that you are making an importation in respect of which you will, in due course, lodge with the Board a new Appeal on the ground of new information or new facts. This is quite in order so far as the Board is concerned.

In the majority decision in Appeal No. 398, it is stated:

> In the circumstances, the Board consented to a hearing in respect of the particular sodium-hypochlorite solution sold under the trade-mark clorox, provided an importation were made and the resulting decision of the Deputy Minister thereon were such as to lead Oppenheimer Brothers and Company to proceed to appeal.

In January 1956, Oppenheimer Brothers had imported a quantity of "Clorox" from Clorox Chemical Co. of Seattle, Washington, and these importations were accepted by the parties as suitable for the purpose of launching a new appeal. Mr. Forget, counsel for Javex Company Limited, stated that Tariff Item 220(*a*) was applied to the goods at the port of entry, although the exhibits themselves seem to indicate that the classification was under Item 219*a*2—and free of Customs duty. In any event, the Deputy Minister under s. 43 ruled that the goods should have been classified under Tariff Item 711, presumably following the opinion of the Board in Appeal No. 363 that they were not properly classifiable under Item 219*a*. Then, under s. 44, Oppenheimer Brothers launched an appeal to the Board and it is from the Board's decision in Appeal No. 398 that this appeal is now taken.

Put briefly, the submission of the appellants on this point is that the finding or "Opinion" of the Board in Appeal No. 363, that "Clorox" is not properly classifiable under Tariff Item 219*a*, is a judicial decision *in rem* by a Court of Record (s. 5(6) of the *Tariff Board Act,* R.S.C. 1952, c. 261, states that the Board is a Court of Record) and that such judgment, from which no appeal was taken, is not only "final and conclusive" (s. 44(3)) between the parties thereto, but as a judgment *in rem,* is binding upon the whole world, including the respondents, Oppenheimer Brothers.

The distinction between judgments *in rem* and judgments *inter partes* is stated in Halsbury's *Laws of England,* 2nd Ed., Vol. 13, p. 420:

> 473. The most important distinction between judgments *in rem* and judgments *inter partes* is that whereas the latter are only binding as between the parties thereto and those who are privy to them, the judgment *in rem* of a Court of competent jurisdiction is, as regards persons domiciled and property situated within the jurisdiction of the Court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the persons or property, or as to the right or title to the latter, and as to whatever disposition it makes of the property itself, or of the

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proceeds of its sale. In other words, all persons, whether party to the proceedings or not, are estopped from averring that the status of persons or things, or the right or title to property, is other than the Court has by such a judgment declared or made it to be. But a judgment *in rem* can have no effect as such beyond the limits of the State within which the Court delivering the judgment exercises jurisdiction, unless the thing affected is situate, or the person affected is domiciled, within those limits.

In Spencer Bower on *The Doctrine of Res Judicata,* (1924 Ed.), a judicial decision *in rem* is defined at p. 132 as follows:

> 209. A judicial decision *in rem* is one which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and, therefore is conclusive for, or against, everybody, as distinct from those decisions which only purport to determine the jural relation of the parties to one another, and their personal rights and equities *inter se,* and which, therefore, are commonly termed decisions *in personam.*

After full consideration of the matter and having reviewed the cases cited as well as others, I have come to the conclusion that the plea of estoppel here raised cannot be supported and that the "Opinion" of the Board in Appeal No. 363 was not a judicial decision *in rem.* I do not find it necessary in this case to reach any conclusion on the submission of counsel for Oppenheimer Brothers that that "Opinion" was not a decision, but merely an opinion of the Board which could be accepted or rejected by the Deputy Minister who had made the reference.

One of the essential requirements to support the plea of estoppel *per rem judicatam* is that there must be identity of question or issue in both cases. The principle is stated in Spencer Bower's text at p. 119:

> 184. There is no estoppel *per rem judicatam,* unless the case put forward by the party sought to be estopped, not only relates to the same matter (in the physical sense) as that which was the subject of the judicial decision in the former proceedings, but also raises the identical question of law, or issue of fact, which either expressly, or by necessary implication, in accordance with canons of construction already expounded, was in substance determined by such decision.

And at p. 121 the author states:

> And, generally, there can be no *eadem quaestio,* and, therefore, no estoppel by *res judicata,* unless everything in controversy in the proceedings where the question of estoppel is raised was also in controversy in the litigation which resulted in the judicial decision relied upon as an estoppel. (See *Moss v. Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108 (per Lord Cranworth L.C., at pp. 114-116).

From the facts which I have set out above, it is apparent that everything which is in controversy in this appeal (No. 398) was not in controversy in the former Appeal No. 363. The present appeal raises the question as to whether the Deputy Minister was right in classifying the entries under Tariff Item 711. That question was not before the Board in the earlier matter and the finding there was merely that "Clorox" was *not* properly classifiable under Tariff Item 219*a*.

There is a further and perhaps a stronger reason for rejecting the appellants' submission. It is argued that the "Opinion" of the Board in the earlier case determined the status of "Clorox" and that, therefore, the "Opinion" or finding is conclusive *in rem.* It seems to me, however, that the earlier finding did not operate upon the thing known by the trade-mark "Clorox", but merely upon the personal rights, liabilities or interests of the parties thereto in relation to "Clorox", namely, the determination of the tariff item properly applicable thereto, and, as a result, the determination of the Customs duty thus payable. In Spencer Bower's text (*supra*), the principle is stated thus at p. 145:

> 237. Any English judicial decision which operates upon a thing (in the physical sense) by effecting a disposition of it, is said to determine the status of the thing, and such decision accordingly may be set up by, or against, any member of the English public, as conclusive *in rem,* whereas any decision which determines, not the disposition of the thing, but solely the personal rights, liabilities, equities, and interests of the parties *inter se* in relation to the thing, concludes those parties only, or their privies. It must be remembered, however, that, in order to establish that a decision operates *in rem,* whether it be one which determines the status of a person, or that of a thing, all other conditions of a valid estoppel *per rem judicatam* must be satisfied, no less than where the decision is *inter partes.*

For the reasons so stated, I find that the plea of estoppel raised by the appellants cannot be supported.

I find it unnecessary, therefore, to consider a further submission made on behalf of Oppenheimer Brothers that the provisions of ss. 43, 44 and 45 confer a statutory right upon an importer of goods to appeal from the tariff classification made at the time of entry, or by a Dominion Customs appraiser, and from a decision by the Deputy Minister in respect of each entry.

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I must now consider the second ground of appeal, namely, that the Board erred as a matter of law in holding that the product known under the trade-mark "Clorox", imported in the manner described, was properly classifiable under Tariff Item 219*a*. That item is as follows:

> 219*a*. Non-alcoholic preparations or chemicals for disinfecting, or for preventing, destroying, repelling, or mitigating fungi, weeds, insects, rodents, or other plant or animal pests, n.o.p.:—
>
> (i) When in packages not exceeding three pounds each, gross weight ....
>
> (ii) Otherwise ....

"Clorox" (like "Javex") is sodium hypochlorite in solution and it is agreed that it is a non-alcoholic preparation or chemical within the opening words of Tariff Item 219*a*. The dispute is upon the interpretation to be placed upon such a preparation "for disinfecting". The Board decided unanimously that Tariff Item 219*a* was a use-item, and I think that view of the matter was clearly correct. If the non-alcoholic preparations or chemicals imported were not "*for* disinfecting", or *for* the other uses named such as for destroying fungi, etc., such importations would not fall within Item 219*a*.

The Board found as a fact that "Clorox"—like many other solutions of sodium hypochlorite—possessed disinfecting properties and is, therefore, a disinfectant. If that were its only use, then undoubtedly it would be classifiable under Item 219*a*. It has other properties, however, the other major one being that of its capacity to bleach.

The classification problem before the Board is clearly set out in the two opinions rendered. In the majority decision rendered by the Chairman (Mr. McKinnon) and the Vice-Chairman (Mr. W. W. Buchanan), after referring to the conflicting evidence, it is stated:

> Both products, Clorox and Javex, are Sodium hypochlorite in solution. Both have disinfecting properties; both have bleaching properties. As to exactly what is in the mind of the housewife—who is by far the largest user of either—when she contemplates the purchase of Clorox, such evidence as was offered was not conclusive. As to what is attempted to be implanted in her mind by the Clorox advertising, by the labels on the containers, and by the numerous directions as to its use, the evidence of the witness Parks withstood cross-examination: that she is purchasing and using, consciously a product that is "for disinfecting", even when the use to which such product is to be put is in doing the family wash. The numerous physical exhibits entered by the appellant attested to that effect.

There is no room for doubt that Clorox—like so many solutions of sodium hypochlorite—is a disinfectant, in that it possesses disinfecting properties. Its efficiency as a disinfectant, or the extent or degree to which it so serves, in, for example, the family wash, is not material, provided that the housewife—in resorting to its application in respect of the family wash—is doing so in full knowledge and understanding of the directions as to use, is following the said directions, and, in consequence, is to be deemed as consciously using it "for disinfecting".

But, since the particular product at issue, Clorox, is an imported one, the matter of its classification for customs purposes must be made at time of importation. How is the appraiser to determine whether or not in his opinion the product is in fact going to be used, by the ultimate consumer, "for disinfecting"?

In respect of an item such as 219*a* it is, we believe, virtually impossible to follow each individual importation to its ultimate consumer. This is particularly apparent when the tariff item is read as a whole. It is not contemplated that the appraiser should satisfy himself in each individual case that the use provision is precisely complied with, so long as it is evident that the imported product is one which is ordinarily and regularly used for the purposes indicated in the tariff item.

In the matter of the product "Clorox", which is at issue here, we believe the evidence establishes that it is ordinarily and regularly used in the family wash primarily as a bleach and, secondarily, as a disinfectant. Hence the appraiser must conclude that Clorox is, *inter alia,* "for disinfecting". Does the fact that it also bleaches have a bearing on its right to admissibility under tariff item 219*a*? There are no words in tariff item 219*a* which would warrant its exclusion on that ground. If it is a "non-alcoholic preparation for disinfecting", Clorox is admissible under tariff item 219*a* even though it may perform an additional function at the same time and—unless more specifically provided for elsewhere in the tariff—is classifiable under tariff item 219*a*. There being no more specific provision for the product Clorox than under tariff item 219*a,* it is properly classifiable thereunder.

Accordingly, the Appeal is allowed.

The opinion of the dissenting member (Mr. Leduc), Vice-Chairman, is found in the concluding paragraphs:

It is evident that this product Clorox is a multiple-property product and the weight of the evidence shows that disinfecting, although an important feature, is secondary to the main use of this product, which is laundering.

To sum up, the principle enunciated by counsel for the Crown—that one must look for the primary use to classify a multiple-purpose material—must remain the guiding principle for the appraiser at the border, who must classify the material imported. He has to draw from the common knowledge and such common knowledge among appraisers is more reliable than in the case of the ordinary man.

In the present appeal, the classification made should be maintained and the appeal should be dismissed.

After the most careful consideration, I have come to the conclusion that the appellants have not discharged the onus lying on them to establish that there is error in law

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in the decision under appeal. The majority of the Board have found as a fact that "Clorox" is ordinarily and regularly used in the family wash primarily as a bleach, and secondarily as a disinfectant, and that finding cannot be questioned in this appeal. I agree also with their conclusion that the appraiser must therefore conclude that "Clorox" is, *inter alia*, "for disinfecting".

In enacting Tariff Item 219*a*, Parliament made specific provisions for non-alcoholic preparations or chemicals "for disinfecting" and for the other uses set out in the item. Counsel for all parties agreed that there was no other item in the tariff relating to preparations "for bleaching". Had there been any such specific item, the Board might have had to consider whether "Clorox" being "primarily used as a bleach" should be classified under such an item or under Item 219*a*, but no such problem arises here. Tariff Item 711, in which "Clorox" was classified by the Deputy Minister, is a basket item which is in part as follows:

> All goods not enumerated in this schedule as subject to any other rate of duty, and not otherwise declared free of duty, and not being goods the importation whereof is by law prohibited . . . British Preferential Tariff 15 p.c. Most-Favoured-Nation Tariff 25 p.c. General Tariff 25 p.c.

It is patent, therefore, that as there is no tariff item for such products "for bleaching", and as Item 711 contains no reference whatever to "for disinfecting", the only tariff item referring specifically to such products "for disinfecting" is Tariff Item 219*a*.

The meaning to be placed on Item 219*a* is clear. If the product named is "for disinfecting"—and this has been found as a fact—the product is properly classified under that item. If Parliament had intended that such products should be classified under that item only if the sole or primary use were "for disinfecting", it would have been a simple matter to have so provided. In the absence of any such limitations and in view of the Board's finding that "Clorox" is ordinarily and regularly used as a disinfectant, the conclusion of the Board that it is *inter alia* for disinfecting, and therefore within Tariff Item 219*a*, should not be disturbed.

For these reasons, the appeal will be dismissed and the decision of the majority of the members of the Tariff Board affirmed.

The appellants will pay the costs of the respondents, Oppenheimer Brothers. In the circumstances, there will be no order as to the costs of the respondent, the Deputy Minister of National Revenue for Customs and Excise, his counsel having stated that his instructions were "to take no position before this Court".

Judgment accordingly.