1932
Sept. 13.
1933
Feb. 28.

BETWEEN:

JOHN SANDNESS ..... CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Seizure—Forfeiture—Customs Act—Burden of proof—Innocence of owner

Held, there is no material dissimilarity in the essential provisions of the Excise Act (R.S.C., 1927, c. 60) and the Customs Act (R.S.C., 1927, c. 42) pertaining to seizure and forfeiture; claimant having failed to prove that his boat had been illegally seized and forfeited, the forfeiture was held good and valid, the Customs Act attaching to the vehicle unlawfully used the penalty of forfeiture, independently of the guilt or innocence of the owner. *The King* v. *Krakowec* (1932) S.C.R., 134 followed.

REFERENCE by the Crown under section 176 of the Customs Act.

The action was heard before the Honourable Mr. Justice Angers, at Vancouver.

J. W. DeB. Farris, K.C., for claimant.

Clarence O'Brian, K.C., for respondent.

The facts are stated in the reasons for judgment.

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ANGERS J., now (February 28, 1933), delivered the following judgment:

The plaintiff is a deep-sea fisherman of the city of Bellingham, in the State of Washington, one of the United States of America.

In April, 1932, plaintiff was the owner of a motor boat named the *Advance;* he had had this boat since 1929 and had always used it for fishing purposes. The *Advance* was registered in the name of plaintiff at the port of Seattle, in the State of Washington.

On the 7th day of April, 1932, plaintiff chartered his boat to one Jack Farley, also known as A. J. Harris, for two days in consideration of the sum of $100 cash. This sum included food, fuel and the services of plaintiff's son, Adolph, who was to attend to the engine. According to plaintiff's contention the boat was chartered for the purpose of transporting gasoline from the city of Seattle to San Juan Island.

Ninety cans, supposed to contain gasoline, were loaded on the boat on the evening of the 7th of April or the morning of the 8th.

The boat left Seattle between four and five o'clock on the morning of the 8th with on board Farley alias Harris, one Hardy and Adolph Sandness.

Late in the afternoon of the 8th of April the *Advance* was sighted by a Customs Patrol boat in Trincomali Channel near Victoria Rock, a short distance from Salt Spring Island.

The customs officers, after observing the *Advance* for a certain time, boarded her. They were met by Hardy and young Sandness, who both stated that they were the only persons on board and that there was nothing to report to customs. Apparently not satisfied with this answer, the customs officers searched the boat and found 90 five gallon tins of alcohol in the forward part of the hold, which was bulkheaded off with shifting boards. Continuing their search, they found Farley alias Harris covered up in blankets in the starboard forehead bunk.

The boat was seized, taken to Victoria and forfeited; the decision of the Minister of National Revenue, dated the 28th day of June, 1932, was to the effect " that the vessel be and remain forfeited and be dealt with accordingly."

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On the 4th day of July, 1932, plaintiff's solicitors gave notice that the above decision would not be accepted, and the Minister, acting under authority of section 176 of the Customs Act, referred the matter to this Court for adjudication.

[The learned Judge here referred to the allegations set forth in the Claimant's Statement of Claim, and in the Respondent's Statement of Defence.]

The plaintiff was examined on discovery. Counsel for the defendant, at the trial, declared that he intended to use in evidence a part of the examination for discovery, to wit questions and answers 1 to 5, 52 to 88, 100 to 104, 112 to 115, 119 to 128, 147 and 148, 178 to 192, 195 to 198, 207 to 209, 216, 218, 224, 225 and 228 to 233, all inclusive.

The plaintiff was examined anew at the trial. Counsel for plaintiff refrained from examining plaintiff's son, Adolph Sandness, but the latter was called by counsel for defendant for cross-examination. Neither Farley alias Harris nor Hardy were heard as witnesses. I may say that counsel for plaintiff stated that he had been informed that Farley had been drowned.

It was urged on behalf of the Crown that there were contradictions in the deposition of plaintiff for discovery and his testimony at trial and that there were discrepancies between plaintiff's version and that of his son. It was also urged that there are contradictions in the boy's testimony and an affidavit dated the 2nd of June, 1932, which forms part of file (No. 171999) of the Department of National Revenue in connection with the seizure of the *Advance*. A careful perusal of the father's two depositions, of the son's deposition and of the latter's said affidavit has convinced me that there are contradictions and discrepancies, some of which bear on material points. On the other hand I must say that four witnesses have been called to testify as to plaintiff's character, one being the mayor of the city of Bellingham and an ex-judge of the Superior Court of the State of Washington. All said that plaintiff enjoyed a very good reputation. However I do not think that the good or bad faith of the plaintiff has any bearing on the issues herein and, for this reason, I do not intend spending any more time analysing the evidence concerning this particular aspect of the case.

To justify the seizure and forfeiture of the boat, the defendant had to prove two things:

1. that the liquid contained in the 90 cans seized was alcohol;
2. that the seizure was made within territorial waters of Canada.

On the first point, viz., the nature of the liquid seized, Healey, the customs officer who made the seizure, filed as exhibit D a certificate of analysis. This certificate shows that the sample was analysed on the 18th day of April, 1932, and that the alcoholic content thereof was found to be 167·18 per cent of proof spirit. The certificate was accepted as evidence by counsel for plaintiff without the necessity of calling the analyst. The evidence on this point is peremptory.

On the second point, we have: (*a*) the Customs seizure report made by Sergeant John Healey on the 9th of April, 1932, which forms part of the file of the Department of National Revenue (No. 171,999) already referred to; (*b*) the evidence of Healey and Captain Gilmour; (*c*) the map filed as exhibit E showing the point (indicated by letter B) where the *Advance* was seized; (*d*) the map filed as exhibit 1 showing Trincomali Channel, between Salt Spring and Galiano Islands, in Canadian territory. These two islands form part of the province of British Columbia. The evidence satisfies me that the seizure was made in territorial waters of Canada.

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* (1); *The King* v. *Doull* (2).

It has been argued on behalf of plaintiff that the boat was used for transporting alcohol without the knowledge, consent or connivance of the plaintiff; this, in my opinion, is absolutely immaterial. The statute attaches to the vehicle unlawfully used the penalty of forfeiture, independently of the guilt or innocence of the owner; see *The King* v. *Krakowec* (3); *The King* v. *The Sunrise and Others* (4);

(1) (1928) Ex. C.R., 106.
(2) (1931) Ex. C.R., 159.
(3) (1932) S.C.R., 134.
(4) 43 B.C.R., 494, and (1931) S.C.R., 387.

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also the report of Sir Walter Cassels, J., on a reference, *in re Nichol* v. *The King* (unreported), in which the learned judge says:

On the night of the 2nd of April, 1910, the goods seized and in question, viz: one team of horses, one wagon and one set of double harness, being the claimant's property, were wrongfully taken out of the custody of his agent at Abbotsford, by one A. T. Mercer (since deceased) and without the knowledge or consent of the plaintiff were used by the said Mercer on the night and early morning of the 2nd and 3rd of April, 1910, in an unlawful manner in the importation of goods into Canada contrary to the provisions of Sections 22, 23, 187, 192 and 193 of the Customs Act, cap. 48, R.S.C., whereby it is admitted that if the said horses, wagon and harness had been the property of said Mercer they would have become liable to seizure and forfeiture. But it is contended that since the claimant was as I find entirely innocent of the illegal use made of his property by said Mercer, the said property should not be held answerable for the unauthorized acts of a stranger over whom the claimant had no control.

Sections 19, 22, 23, 108, 177, 187, ss. (*a*) 189, 192, 193, 273 and 275 of the said Customs Act were referred to and also the following authorities: *Blewitt* v. *Hill* (1810) 13 East 13; *Campbell* v. *Campbell* (1846) 7 C. & F. 165; *The Queen* v. *Woodrow* (1846) 16 L.J.M.C. 122; *Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207; *Bond* v. *Evans* (1888) 21 Q.B.D. 249; *Roberts* v. *Woodward* (1890) 25 Q.B.D. 412; *Gregory* v. *United States,* 17 Blatch, 325; Bowstead on Agency, 4th Ed. 461-4, and Holmes on Common Law, 25.

After a consideration of the statutory provisions applicable to the case, in the light of the above authorities and others, I am clearly of the opinion that apart from all personal liabilities or penalties, the statute attaches to the *res,* unlawfully employed as here, the penalty of forfeiture, quite independent of the guilt or innocence of the owner as being "in any way connected with the unlawful importation" (secs. 192-3). The case of *Blewitt* v. *Hill* is an exact illustration of this principle wherein a ship was condemned for smuggling and became forfeited even though the act of smuggling was that of the captain and commander over whom the owner had no control because the ship had been chartered from him by the Lord Commissioners of the Admiralty who had placed their own officer in absolute command. The owner, nevertheless, after condemnation and forfeiture of his ship was obliged to pay a certain sum of money in order to procure the restoration of the same and thereupon brought and successfully maintained an action against the captain for £2,150 damages occasioned by his wrongful acts of smuggling. In the course of his judgment Lord Ellenborough C.J., said: "The thing itself is forfeited by whomsoever used."

There is nothing unusual in the legislation in question and similar provisions are, e.g., to be found in sec. 92 of the Fisheries Act, cap. 45, R.S.C. and sec. 10 of the Customs and Fisheries Protection Act, cap. 47, R.S.C. It would clearly be no answer to proceedings for condemnation and forfeiture under those acts that the boats and tackle which were unlawfully used had been employed in that manner without the owners' knowledge or consent. Even if they had been stolen from him the result would be the same and the proper recourse would be for the owner to appeal to the clemency of the Crown, for which application in prosecutions under the Customs Act special provision is made by sec. 273, or to

bring an action against the person who has caused the damage, as was done in *Blewitt* v. *Hill* and *Campbell* v. *Campbell, supra.*

See sections 193 and 207 of the Customs Act (R.S.C., 1927, ch. 42) and section 181 of the Excise Act (R.S.C., 1927, ch. 60).

I see no material dissimilarity in the essential provisions of the Excise Act and the Customs Act pertaining to seizure and forfeiture.

See also *Robertson* v. *Commission des Liqueurs de Québec* (1).

Counsel for plaintiff, at trial, argued that Farley alias Harris had obtained the boat by means of a larceny by trick and he cited in support of his contention the following cases: *Heap* v. *Motorists' Advisory Agency* (2) and *Cuff-Waldron Manufacturing Co.* v. *Heald* (3). He submitted that, in the circumstances, under Article III of the Convention between Canada and the United States for the suppression of smuggling, signed at Washington on June 6, 1924, plaintiff was entitled to the return of his boat. Article III reads as follows:

> Each of the high contracting parties agrees with the other that property of all kinds in its possession which, having been stolen and brought into the territory of the United States or of Canada, is seized by its customs authorities shall, when the owners are nationals of the other country, be returned to such owners, subject to satisfactory proof of such ownership and the absence of any collusion, and subject moreover to payment of the expenses of the seizure and detention and to the abandonment of any claims by the owners against the customs, or the customs officers, warehousemen or agents, for compensation or damages for the seizure, detention, warehousing or keeping of the property.

I regret to say that I cannot agree with the learned counsel's contention; I fail to see any theft or larceny by trick in the present case; an essential element, viz., the *animus furandi,* is missing. There is no doubt that Farley alias Harris never intended misappropriating and converting to his own use the boat and that, if he had succeeded in disposing of his alcohol, he would have returned the boat to the plaintiff in accordance with his agreement.

See 36 Corpus Juris, p. 761, No. 101, p. 767, No. 112, p. 770, No. 124; also p. 760, No. 93.

There will be judgment declaring the forfeiture of the boat good and valid and dismissing the action with costs against plaintiff.

Judgment accordingly.

(1) (1932) R.J.Q. 54 K.B. at 10. (2) (1923) 92 L.J. K.B. 553.
(3) (1930) 2 W.W.R. 135.