

1930
*Mar. 4, 6, 7.
*April 10.

THE CANADIAN SURETY COM-
PANY (DEFENDANT) } APPELLANT;

AND

HIS MAJESTY THE KING, REPRESENTED BY THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) } RESPONDENT;

AND

THE SCOTIA IMPORT AND EXPORT COMPANY, AND P. A. McDONNELL (THIRD PARTIES) } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Bond given, pursuant to s. 101 of Customs Act, R.S.C., 1906, c. 48, as amended by 12-13 Geo. V, c. 18, s. 6, in respect of export of liquors—Goods not exported to the place named—False landing certificate—Purported cancellation of bond—Crown's right to recover on the bond—Amount recoverable—Limitation period for action—Defect in form of bond—Interest.

Appellant gave a bond to the Crown, pursuant to s. 101 of the *Customs Act*, R.S.C., 1906, c. 48, as amended by 12-13 Geo. V, c. 18, s. 6, in respect of certain liquors entered at Halifax, N.S., by the S. Co., for export to Georgetown, Grand Cayman, by the steamer *G*. The required form of bond in such cases was expressed to secure actual exportation to the place provided for in the entry and production of proof thereof. The steamer reported outwards from Halifax on February 3, 1925, for Georgetown, via St. John, which she reached on February 5, where additional liquors were loaded for transport to

- (1) (1860) 13 Moo. P.C., 432. (3) Comb. 348.
(2) 1 Brownl. & G. 111. (4) (1873) L.R. 16 Eq., 275.
(5) (1790) 1 Ves. 160.

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

Havana, Cuba. On February 25 she cleared at St. John for Georgetown. On March 3 she reported inwards at Shelburne, N.S., in ballast, and, therefrom, she cleared for Halifax on March 10. At Shelburne the master made a sworn statement before a customs officer that the goods with which the *G.* was laden on departure from St. John had been disposed of on the high seas, 30 miles off the United States' coast, and transferred on board lighters. On February 27 there was deposited with the collector of customs at Halifax, purporting to proceed from the customs office at Georgetown, a certificate, dated February 16, that the goods described in the Halifax export entry had been delivered over to the customs at Georgetown. The goods had not been so delivered and the certificate was a concocted document. The collector acted on this fraudulent certificate (believing, as was found, in its genuineness) and, purporting to proceed under the authority given by s. 102 of the Act, cancelled the bond and surrendered it to appellant. In September, 1928, the Crown brought action in the Exchequer Court for the amount of the bond and interest. Maclean J. sustained the claim ([1929] Ex. C.R. 216). On appeal:

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- Held* (1) It could not be said that the conditions of the bond were in effect complied with, even assuming that the principal object of the statute and regulations was to provide special precautions against the clandestine re-importation of wines and liquors into Canada. Parliament, and the Minister, under its authority, had laid down rules which were deemed necessary in order to secure that object. The bond and the statute and regulations must be held to take effect according to their plain meaning.
- (2) Appellant could not rely upon the collector's act in delivering up the bond with the intention of cancelling it, even assuming such delivery to have misled it to its prejudice (*Mayor, etc., of Kingston-upon-Hull v. Harding*, [1892] 2 Q.B. 494). Even if the collector had (contrary to the finding) been a party to the fraud, a purported cancellation based upon it could not, as between the Crown and persons bound by the acts of parties implicated in the fraud, or civilly responsible for the non-observance of the law, have any effect as against the Crown.
- (3) The amount recoverable by the Crown was not limited to damages proved. Where a bond is given to secure the performance of the provisions of a revenue statute, it is forfeited if the condition is not performed, especially where the bond is required by statute (*The King v. Dixon*, 11 Price, 204, at p. 211; *The King v. Canadian Northern Ry. Co.*, [1923] A.C., 714, at p. 722).
- (4) It could not be said that the object of the proviso to s. 101 was to obtain a guarantee for the payment of the penalties exacted by s. 237 (now s. 235 of R.S.C., 1927, c. 42) and that the limitation period applicable thereto applied; the proviso created a substantive additional protection in the case of wines and liquors, and could not be fairly read as subsidiary to s. 237. The claim was not statute barred under s. 279 (now s. 277); s. 279 must be read with s. 272 (now s. 270), and s. 272 shews that the words "prosecutions or suits for the recovery" of "penalties or forfeitures imposed by this Act" do not embrace a proceeding upon a bond required by the statute; they apply to penalties, etc., imposed directly by the Act rather than to guarantee bonds.

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(5) Notwithstanding the omission of certain words in the condition of the bond (as proved at trial by production of a copy) it should be read as of the form prescribed by the regulations. The recitals established clearly that the bond was given under the Act and regulations, and it was therefore necessary to look at these before deciding that a substantive clause in the condition, in which obviously the intention was not completely expressed, was entirely nugatory; the intention as to the form of the condition could be ascertained with certainty by reference to the Act and regulations, and it was one of the cases in which it is the court's duty to supply the missing words, to avoid the purpose of the document being defeated.

Judgment of the Exchequer Court (*supra*) affirmed, subject to a variation disallowing the claim for interest prior to date of judgment in that court.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff was entitled to recover from the defendant the amount of a certain bond. The bond was dated January 31, 1925, and was given pursuant to the provisions of s. 101 of the *Customs Act*, R.S.C., 1906, c. 48, as amended by 12-13 Geo. V, c. 18, s. 6, in respect of certain liquors entered at Halifax, N.S., by the Scotia Import and Export Company, Ltd., for export to Georgetown, Grand Cayman, by the steamer *Gemma*. The material facts of the case and questions in issue are sufficiently stated in the judgment below (1) and the judgment now reported. The Crown brought the action in September, 1928, claiming \$41,500 (the amount of the bond) with interest at 5% from February 28, 1925. The claim was allowed by the Exchequer Court (1). The defendant's appeal to this Court was dismissed with costs, subject to a variation disallowing the claim for interest prior to the date of the judgment in the Exchequer Court.

W. N. Tilley K.C. and *W. L. Scott K.C.* for the appellant.

N. W. Rowell K.C. and *G. Lindsay* for the (plaintiff) respondent.

The judgment of the court was delivered by

DUFF J.—This appeal arises out of proceedings by way of information in the Exchequer Court taken by His Majesty the King to recover the sum of \$41,500 under a

bond given pursuant to the provisions of section 101 of the *Customs Act* as amended by 12-13 Geo. V, c. 18, s. 6. We have had the advantage of an elaborate and rather protracted argument, but the decisive considerations can be stated in comparatively few pages.

Section 101, as so amended, is as follows:

101. Upon the entry outwards of any goods to be exported from a Customs warehouse, either by sea or by land or by inland navigation, as the case may be, the person entering the same for such purpose shall, by and upon the making of such entry, whether so expressed in such entry or not, become bound, when the entry aforesaid is for exportation by sea, to the actual exportation of the said goods, and, when the entry aforesaid is for exportation by land or inland navigation, to the actual landing or delivering of the goods at the place for which they are entered outwards, or, in either case, to otherwise account for the said goods to the satisfaction of the collector or other proper officer, and to produce, within a period to be named in such entry, such proof or certificate that such goods have been exported, landed or delivered or otherwise lawfully disposed of, as the case may be, as shall be required by any regulation of the Governor in Council, or by the collector or other proper officer.

Provided, however, that upon the entry outwards of wines and spirituous liquors to be exported from a Customs Warehouse either by sea or by land or inland navigation, as the case may be, the person entering the same for such purpose shall give security by bond of an incorporated guarantee company authorized to do business in Canada, and whose bonds are acceptable to the Dominion Government, such bond to be in form approved by the Minister, in double the duties of importation on such goods, that the same shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which they are entered outwards, unless in either case the said goods were after leaving Canada lost and destroyed, and that such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as shall be required by any regulation of the Minister, shall be produced to the Collector or other proper officer within a period to be appointed in such bond. * * *

The goods in respect of which the security was given were certain liquors entered at Halifax, by the Scotia Import and Export Company Limited, for export to Georgetown, Grand Cayman, by the steamer *Gemma*.

The steamer reported outwards from Halifax, February 3, 1925, for Georgetown *via* St. John, which she reached on February 5, where additional liquors were taken on board for transport to Havana, Cuba. On the 25th February, she cleared at St. John for Georgetown; on the 3rd of March, she reported inwards at Shelburne in ballast, and, therefrom, she cleared for Halifax on the 10th of the same

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month. It is not contended that the liquors, or any part of them, entered for export at Halifax, reached Georgetown, or that the intended destination of the *Gemma* was in fact Georgetown. At Shelburne, on reporting inwards, the master made a sworn statement before a customs officer that the goods with which the *Gemma* was laden on departure from St. John had been disposed of on the high seas, thirty miles off the coast of the United States, and transferred on board lighters. On the 27th of February, two days after the ship had cleared from St. John for Georgetown, a written certificate was deposited with the Collector of Customs at Halifax, professing to be under the signature of L. A. R. Adams, and purporting to proceed from the office of Customs at the port of Georgetown, bearing date the 16th of February, certifying that the goods described in the Halifax export entry had been delivered over to the customs at Georgetown.

On this certificate the Collector at Halifax acted, believing it to be genuine (as the learned trial judge found), and, purporting to proceed under the authority given by section 102 of the Act, cancelled the bond, and surrendered it to the appellants.

The first question for consideration, is, whether the act of the Collector at Halifax in delivering up the bond with the intention of cancelling it, operated as a cancellation of that document. It is first necessary to notice a defect in the form of the bond as proved at the trial, by the production of a copy.

The form of bond approved by the Minister of Customs is as follows:

KNOW ALL MEN BY THESE PRESENTS, that we..... hereinafter called "the Guarantee Company," are held and firmly bound unto His Majesty the King, His Heirs and Successors in the sum of.....dollars, currency money of Canada, to be paid to His said Majesty the King, His Heirs and Successors, and for which payment well and truly to be made we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seal and dated this.....day of....., 192....

WHEREAS.....hath passed an entry,to export to.....by the..... whereof.....is Master.
.....

and which goods are now deposited in.....
 at....., in the Port of.....,
 under the provisions of the "Customs Act" and Regulations thereunder.

AND WHEREAS the Guarantee Company has agreed to guarantee that the said goods shall be duly exported, landed and delivered as required by the Customs Act and Regulations thereunder.

NOW THE CONDITION OF THE ABOVE WRITTEN OBLIGATION is such that if the said goods shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which they are entered outwards, unless in either case the said goods are after leaving Canada lost and destroyed, and if such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as required by Regulations of the Minister of Customs and Excise, be produced to the Collector or other proper officer of Customs and Excise at the Port of....., within..... days from the date hereof, then this obligation shall be void; but otherwise shall be and remain in full force and virtue.

IN WITNESS WHEREOF the Guarantee Company has hereunto affixed its Corporate Seal.

SEALED AND DELIVERED AND COUNTERSIGNED by.....
 of the Guarantee Company.

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The bond, as proved at the trial, omits the words (following "Minister of Customs and Excise") "be produced to the Collector or other proper officer of Customs and Excise." The point need not detain us. The recitals establish clearly that the bond was given under the *Customs Act* and Regulations, and it is therefore necessary to look at these before deciding that a substantive clause in the condition, in which, it is obvious, that the intention is not completely expressed, is entirely nugatory. The intention of the parties as to the form of the condition can be ascertained with certainty by reference to the Act and Regulations made under it, and this is one of those cases in which it is the duty of the court to supply the missing words, in order that the purpose of the document may not be defeated, and the document should therefore be read as of the form, prescribed by the Regulations, above set forth.

It is argued that the bond must be regarded as cancelled, because in effect the condition was in fact complied with, and because the appellants, being mere sureties, are en-

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titled to act, as they did act upon the apparent cancellation, the obligee is precluded from denying that this apparent cancellation was valid, and, in their favour, effective.

As to the first of these contentions, it is argued that the aim of the proviso in section 101, and the Regulations made thereunder, was to provide special precautions against the clandestine re-importation of wines and liquors into Canada, as to which there is (as is well known) a powerful inducement for smuggling, in the exceptionally high duties on such commodities. It is said, moreover, that it was quite well known to the Customs officers that the goods in question were destined for the United States, and that the venture of the exporters proceeded in the usual course, and in conformity with the expectations of those officers.

The learned trial judge has found that in fact the Collector at Halifax accepted the certificate produced as a genuine certificate, and acted in full belief in its genuineness. The document now proves to be, obviously, a concocted document, concocted for the purpose of defeating, and committing a fraud upon, the Customs law, and even if the Customs Collector had been a party to such a fraud, a purported cancellation based upon it could not, as between the Crown and persons implicated in the fraud, or persons bound by the acts of parties so implicated or civilly responsible for the non-observance of the law, have any effect as against the Crown. The authority and the duty of customs officials in respect of such matters is to be found in, or in instructions authorized by, the Statute or the Regulations; such officials possess no dispensing capacity unless a discretion is reposed in them by or under the authority of some enactment or regulation. Assuming that the principal object of the Statute and Regulations is that contended for, Parliament and the Minister under the authority of Parliament, have laid down rules which are deemed necessary in order to secure that object. A power is vested in the Governor-in-Council to deal with exceptional cases in which penalties have been incurred by remitting them in whole or in part. R.S.C. (1927) c. 178, s. 91. This would enable the Government to deal in a practical way with pen-

alties incurred under section 235 in the special cases suggested in the appellants' factum (*). The Act does not apply to bonds, but that is not a reason for holding that the bond and the regulations and the statute are not to take effect according to their plain meaning.

Now, as to the second contention, the appellants, dealing with Government officials, are presumed to know the statutes under which the officials act, and the limitations of their powers. But apart from this, assuming the delivery of the cancelled bond to the appellants to have misled them to their prejudice, there is a final answer to this contention, in the fact that it was a condition of the bond, as required by the proviso to section 101, that such proof or certificate of the export of the goods to the place named in the export entry should be furnished, as might be prescribed by the Regulations. It is not alleged that the certificate required by the Regulations was in fact produced, and it was, as the learned trial judge found, the production of the fraudulent certificate that led to the cancellation of the bond. The appellants can in these circumstances get no advantage from what the Collector did. The case, in principle, is covered by *Mayor, etc., of Kingston-upon-Hull v. Harding* (1).

Then, it is argued that the plaintiff can only recover such damages as have been proved. It is settled law, I think, that where a bond is given to secure the performance of the provisions of a revenue statute, the bond is forfeited if the condition is not performed, especially where the bond is required by the statute. *The King v. Dixon* (2); *The King v. Canadian Northern Ry. Co.* (3).

Two further contentions must be considered. It is argued that the object of the proviso to section 101 is to obtain a guarantee for the payment of the penalties exacted

(*) *Reporter's Note*: Cases suggested were, e.g., destination of cargo changed *en route*, possibly under compelling conditions; slight lateness of shipper in presenting landing certificate, owing to mishap; ship forced to take refuge short of destination and delayed pending repairs; or ship disabled.

Section 235 referred to would seem to be s. 235 of the *Customs Act*, c. 42 of R.S.C., 1927, which corresponds to s. 237 of c. 48 of R.S.C., 1906.

(1) [1892] 2 Q.B. 494.

(2) (1822) 11 Price, 204, at p. 211.

(3) [1923] A.C. 714, at p. 722.

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by section 235, and that the limitation clause of that section applies. I cannot agree. The proviso creates a substantive additional protection in the case of wines and liquors; it cannot be fairly read as subsidiary to section 235. Then the appellants rely on section 277, as showing that the claim is statute-barred. I think that section 277 must be read with section 270, and this latter section shows that the words "prosecutions or suits for the recovery of penalties or forfeitures imposed by this Act" do not embrace a proceeding upon a bond required by the statute. I think they apply to penalties, seizures and forfeitures imposed directly by the Act rather than to guarantee bonds (*).

The appellants cannot therefore succeed except in respect of interest, which admittedly was not exigible prior to judgment.

Subject to a variation of the judgment below, disallowing interest prior to judgment, the appeal is dismissed with costs.

Appeal dismissed with costs (subject to variation disallowing claim for interest prior to date of judgment in Exchequer Court).

Solicitors for the appellant: *Ewart, Scott, Kelley & Kelley.*

Solicitor for the respondent: *W. Stuart Edwards.*

(*) *Reporter's Note:* Sections 235, 277 and 270 referred to in this paragraph would seem to be sections of c. 42 of R.S.C., 1927. The corresponding sections in c. 48 of R.S.C., 1906, are ss. 237, 279 and 272.