BETWEEN:

HIS MAJESTY THE KING .....PLAINTIFF;

AND

STEVE GOMORI .....DEFENDANT.

1949

Sept. 22
Nov. 17

Crown—Information—Seizure under provisions of Foreign Exchange Control Act—Forfeiture—When offence proved Court must declare forfeiture of whole property seized.

Defendant admittedly attempted to export from Canada a sum of money contrary to the Foreign Exchange Control Act, Statutes of Canada 1946, c. 53. The money was seized and detained by the representatives of the Foreign Exchange Control Board and the plaintiff in this action asks for an order declaring forfeiture to the plaintiff of the sum of money so seized.

Held: That when the Attorney General has claimed forfeiture and it is established that the defendant has, in fact, done or omitted to do any of those things enumerated in s. 60(1) of the Act the Court has no power to declare there shall be no forfeiture.

2. That s. 60(1) of the Act, unlike s. 59(1) of the Act, confers no discretion on the Court and the Court cannot declare anything forfeited less than the whole of the property seized and detained.

INFORMATION exhibited by the Attorney General of Canada to have declared forfeited to the Crown money seized and detained by virtue of the provisions of the Foreign Exchange Control Act.

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The action was tried before the Honourable Mr. Justice Cameron at Calgary.

E. C. Collier and *A. J. MacLeod* for plaintiff.

W. J. C. Kirby for defendant.

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

CAMERON J. now (November 17, 1949) delivered the following judgment:

This is an information exhibited by the Attorney General of Canada in which it is alleged that the defendant, until December 23, 1947, of Newcastle, Alberta, did on that date attempt to export from Canada at the port of Halifax the sum of $4,170 Canadian currency, contrary to the provisions of the Foreign Exchange Control Act, ch. 53, Statutes of Canada, 1946. That sum of money was seized and detained by the representatives of the Foreign Exchange Control Board. The plaintiff asks for an order declaring forfeiture of the said sum to the plaintiff, and for costs. The defendant did not appear in person at the trial but was represented by counsel. The only evidence adduced was that of Leonard F. Hayes, Customs Superintendent of the Port of Halifax, and Arthur J. Vaughan, Customs and Excise Officer at Halifax (whose evidence was taken on commission), and that of R. W. Thompson, a member of the staff of the Bank of Montreal at Drumheller, Alberta. No evidence was given on behalf of the defendant but at the conclusion of the plaintiff's case the defendant's counsel admitted that the defendant on December 23, 1947, at the port of Halifax, Nova Scotia, had attempted to export $4,170 in Canadian currency contrary to the Foreign Exchange Control Act and its regulations, and that he had no permit to export such funds.

Notwithstanding this admission I think it necessary to set out briefly the facts of the case as they are of importance in considering the question of forfeiture which will be dealt with later.

The defendant was born in Hungary in 1894, but for many years had resided in Canada where he was employed as a miner near Drumheller. He had a bank account at

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the Bank of Montreal in that town and the evidence of Mr. R. W. Thompson, an employee of that branch of the bank, is the only evidence before me except that of the Customs Officials who made the seizure at the port of Halifax. Mr. Thompson knew the defendant as a customer of the bank. About September 5, 1947, the defendant attended at the bank and had an interview with Mr. Thompson. He informed him that he intended to leave Canada to reside permanently in Hungary and asked for information as to the steps he would have to take to secure permission to export his funds to that country. He was supplied with Form 107 of the Foreign Exchange Control Board, entitled "Application for Change of Status from Resident to Non-resident for Foreign Exchange Control Purposes." This form he completed and the bank, at his request, forwarded it to the Board for approval. Exhibit 2 is an original copy of that form as completed by the defendant and on the reverse side it shows his assets at a total of $4,877.04.

The bank was advised by letter of the Board, dated September 17, 1947 (Ex. 3), that his application for change of status had been approved on the basis of the information supplied and that upon his departure from Canada the bank could issue Form H and provide up to $500 United States funds for in-transit expenses. Within a few days thereafter he was advised by the bank officials that Exhibit 3 had been received and that he could take out $500 in United States funds and the balance in the form of a Canadian dollar draft. On the evidence of Thompson I must find that he clearly understood these instructions.

Gomori stated to Mr. Thompson that as he was not leaving Canada for a few months he would let the matter stand.

His ledger account with the bank (Ex. 5) shows that he withdrew cash from the bank as follows:

November 1, 1947	$500 00
November 7, 1947	600 06
November 14, 1947	500 06
December 5, 1947	500 06

About December 11 he returned to the bank and intimated to Mr. Thompson that he was about to leave for Hungary and wished to complete the arrangements

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which he had discussed. At that time his bank balance was $1,817.72. Form H of the Foreign Exchange Control Board, called "Application for Travel Permit," was prepared by Thompson and signed by Gomori (Ex. 4). As so completed it was an application and authority to take with him out of Canada $500 in United States funds only and this amount was issued to him in travellers' cheques in United States funds. He was informed by Thompson that the balance of his account could only be taken out of Canada in the form of a Canadian dollar draft and that he could not take out Canadian currency. However, he requested that the balance be given to him in Canadian currency and that was done. He stated to Thompson that none of it would be taken out of Canada and that he intended to give a substantial part of it to a relative in Canada and that he would be spending the balance before he left Canada.

On December 23, 1947, when about to leave Canada at the port of Halifax, the defendant was asked by the witness Hayes (who was accompanied by the witness Vaughan) for his passport and Form H (Ex. 4), which he produced. He was asked to produce any funds that he was carrying and did produce $500 in United States currency which he was authorized to export. He was asked if he had any other funds in his possession to which he replied, "No." He was then taken to quarters provided for personal search and when his outer clothing had been removed it was found that he had a belt around his waist. Upon request this belt was removed and $4,170 in Canadian currency was found sewn into the belt. The belt was of flannel and it was apparently specially made so as to conceal the contents of its eight pockets. Most of the money in this belt was in bills of large denominations.

He was asked if he did not know it was illegal to take Canadian funds from Canada without a permit, but made no reply. He was then informed that his Canadian currency would be turned over to the Foreign Exchange Control Board and that any steps he wished to take to recover it should be addressed to that Board. He was then escorted to the ship, taking with him $500 in United States currency, and he proceeded to Hungary where he

apparently now resides. The witness Hayes states that while Gomori spoke English but poorly he seemed to understand all questions put to him.

The claim for forfeiture of the currency so seized is founded on the provisions of section 60 of the Foreign Exchange Control Act, the relevant part of which is as follows:

> 60(1). Any property of any kind which any person exports or attempts to export from Canada . . . contrary to this Act or the regulations . . . may, in addition to any other penalty which may have been imposed on any such person, or to which any person may be subject with relation to such unlawful act or omission, and whether any prosecution in relation thereto has been commenced or not, be seized and detained by any Inspector or Officer and shall be liable to forfeiture at the instance of the Attorney General of Canada upon proceedings in the Exchequer Court of Canada or in any Superior Court, subject, however, to a right of compensation on the part of any innocent person interested in such property . . .

In the Statement of Defence, in addition to asking that the claim be dismissed, the defendant asked in the alternative for an order of this Court that the moneys be returned to the defendant or such proportion thereof as to the Court might seem just. Counsel for the defendant in his argument urged upon me that notwithstanding the admission of a breach of the Act and regulations that the Court had power and a discretion to either (1) deny the claim for forfeiture in toto, or (2) alternatively, to declare a forfeiture of only a portion of the currency so seized and under the circumstances above disclosed should exercise its discretion in favour of the defendant in one or either of these ways. For the plaintiff it is contended that when the Attorney General of Canada has exercised the discretion conferred on him by section 60(1) to initiate proceedings for forfeiture and it has been established to the satisfaction of the Court that the defendant has committed any of the acts enumerated in section 60(1) that the whole of the property so seized and detained must be declared forfeited—subject only to the right of compensation to any innocent person interested in the property, as provided in the section; and, alternatively, that if there is any discretion in the Court to declare a forfeiture of a part only of such property, that such discretion should not here be exercised in favour of the defendant.

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No question arises as to the right of seizure and detention, authority for such being clearly conferred in section 60(1). The important words to be considered are "shall be liable to forfeiture at the instance of the Attorney General of Canada."

I have not been referred to any case in which there has been a judicial determination of the question as to whether the Court has or has not the discretion attributed to it by defendant's counsel. In *Rex* v. *Mahaffey* (1), a somewhat similar question was raised, but in reaching a conclusion therein I did not find it necessary to determine the point. I assumed—but without deciding—that if the Court had a discretion, the facts in that case did not warrant the exercise of such a discretion in favour of the defendant.

It is submitted that the words "shall be liable to forfeiture" confer upon the Court a discretion to say whether or not forfeiture should be declared. Counsel cites *Rex* v. *Fraser* (2), in which Campbell, C.J. was considering the provisions of s. 39 of The Fisheries Act, Statutes of Canada, 1932, ch. 42. He came to the conclusion that the phrase "liable . . . on summary conviction to a term not exceeding six months . . . or to a fine of $100" gave the Magistrate a discretion to impose a fine of less than $100.

Defendant's counsel cited *James* v. *Young* (3) which was also referred to in the *Fraser case* (supra). In that case it was found that a clause, "shall be liable to be forfeited", did not result in an immediate forfeiture upon breach of one of the conditions, but only upon the Crown claiming the forfeiture. That case, in my opinion, is not helpful to the defendant here as the plaintiff does not suggest that forfeiture took place upon the seizure of the currency and the Attorney General has, in fact, by proceedings in this Court, claimed the forfeiture.

The case of *re Loftus-Otway* (4) was also cited. The Court there was considering the interpretation of an expression in a will "whereby either directly or by

(1) (1948) 92 C.C.C. 269.
(2) (1944) 2 D.L.R. 461.
(3) (1884) 27 Ch. D. 652.
(4) (1895) 2 Ch. 235.

operation of law he would be deprived or be liable to be deprived of the beneficial enjoyment." In that case Stirling, J. said at p. 240:

> There is a contrast between being deprived and being liable to be deprived . . . I think that those earlier words, "whereby or in consequence whereof, either directly or by operation of law, he would be deprived," apply to acts . . . the necessary consequence of which is a deprivation of the beneficial enjoyment. It seems to me that the latter words must be read as including acts which . . . would leave it with a Court of justice to say whether or not he is to be deprived. In this sense the act of bankruptcy . . . was an act which rendered him liable (no doubt in the discretion of the Court) to be deprived of the beneficial enjoyment of the income. The liability existed, although the Court did not see fit to enforce it.

I have considered most carefully the submissions made by defendant's counsel and all the cases cited by him in support thereof. I have scrutinized the provisions of section 60(1) to ascertain whether its language would permit of the interpretation put forward. But somewhat to my regret I have reached the conclusion that his argument must be rejected.

Dealing with the first submission I think it is manifest that when the Attorney General has claimed forfeiture and it is established by evidence (or by admissions made by or on behalf of the defendant), that the defendant has, in fact, done or omitted to do any of those things enumerated in the section, that the Court has no power to declare that there shall be no forfeiture. In my opinion it is the duty of the Court when satisfied of a breach of the statute or regulation, and where the Act confers no authority to do otherwise, to apply the penalty, punishment or sanction provided for in the statute and in this case the only sanction provided under this section is that of forfeiture of the property seized and detained. There is, however, a discretion vested in the Attorney General of Canada inasmuch as the property seized and detained under this section does not become liable to forfeiture unless and until condemnation proceedings are taken by him in one of the Courts enumerated. In the instant case, therefore, the offence having been proven—and later admitted—I must apply the sanction provided for, namely, forfeiture.

But, as I have intimated, it is further contended that the Court has power to declare but a partial forfeiture

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and should do so in this case. It is submitted that under the circumstances disclosed the whole of the property seized should not be condemned as forfeited, but only such part thereof as the Court might determine to be in the nature of a fair penalty considering the nature and circumstances of the offence. I may say at once that were I able to reach the conclusion that the Court had such a power I would not hesitate to use it for reasons which will appear later.

It is pointed out that under section 59(1) of the Act, which provides for *prosecutions* for offences relating to property, and provides for the penalties to be applied, that a wide discretion is given to the Court hearing those charges. Under that section, on summary conviction the Court may levy a fine not exceeding double the value of the property, or may impose imprisonment for a term not exceeding twelve months, or both fine and imprisonment. Where proceedings are taken by indictment the penalty may be a fine not exceeding double the value of the property, or imprisonment not exceeding five years, or both fine and imprisonment. Undoubtedly, under that section the Court has a wide discretion as to the fine or imprisonment to be imposed, the limits being carefully defined.

Section 60(1), on which this claim for forfeiture is based, contains no provision comparable to that in section 59(1). It provides merely that the property seized and detained shall be liable to forfeiture. I think it is proper to infer that when Parliament in passing this Act provided in very clear language in one section for a discretionary power as to the amount of the fine and the term of imprisonment to be imposed, and in the section immediately following used no words which even suggest a similar discretion as to what part of the property seized should be forfeited, that it did not intend to confer any discretion on the Court to declare anything forfeited less than the whole of the property so seized and detained.

Section 61 deals specifically with the offences involving currency and negotiable instruments of a value not over $100 and provides a summary procedure for seizure and forfeiture. Under that section the Board decides "whether the seized currency or negotiable instrument is forfeited"

(s. 60(4)), and under section 62(4), if the matter is referred by the Board to the Court, the Court is to "acquit or condemn the currency or negotiable instrument." I am unable to find anything in these two sections which gives either the Board or Court power to acquit or condemn part only of what has been seized and detained.

It must be kept in mind that section 60 has to do with "any property of any kind" and is not confined to currency. For example, the thing seized might be a large and valuable piece of machinery. In such a case it is obvious that the Court would have no power to declare a partial forfeiture of such property. In the absence of language which clearly confers upon the Court a power to declare a partial forfeiture, it must be found that no such power is given to the Court.

In enacting the Foreign Exchange Control Act, Parliament has provided for punishment of offences in two ways. The first is by prosecution where wide latitude is given to the Court in fixing the penalties. The second is directed specifically against the property involved in the offence rather than the person committing the offence. Proceedings may be taken under one or other of these two ways, or under both, but in my view "forfeiture" as used here means forfeiture of the whole of the property seized and detained. I have not been referred to any case in which it was found that the word "forfeiture" meant anything else than the forfeiture of the whole nor have I been able to find any such case.

I have therefore reached the conclusion that under the existing legislation I must find that the whole of the currency so seized and detained is forfeited to the plaintiff and I so declare. The plaintiff is also entitled to judgment against the defendant for his costs after taxation.

I cannot leave the matter, however, without indicating my opinion that this appears to be a case in which the Board might favourably consider an application for remission of a substantial portion of the amount so forfeited. As I have pointed out the defendant could have taken out all his declared assets by using a Canadian draft. No explanation is given as to why he deliberately chose to evade the Act and its regulations. He may have been badly advised by someone as to the value of the Canadian draft in

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Hungary and quite apparently he thought that the Canadian currency would be of greater value to him there than would a Canadian draft. If his declaration of assets is true, then by a single breach of the Act his entire Canadian savings may have been lost to him. That constitutes a very heavy penalty and in my view consideration might well be given to the matter of relieving him from a substantial part of such a drastic penalty.

Judgment accordingly.