1950
June 12
July 8

BETWEEN:

HERBERT FREDERICK MAYBERRY,..CLAIMANT;

AND

HIS MAJESTY THE KING,.....RESPONDENT.

Crown—Information—The Excise Act, S. of C. 1934, c. 52, ss. 112(1), 124, 169(2), 169(A)—Seizure—Forfeiture—Vehicle which "had been or was being used for the purpose of transporting spirits unlawfully manufactured"—Court vested with no discretion when offence proved even when owner of vehicle had no knowledge it carried such spirits—Partial relief under s. 169(A) of the Act not available to claimant in whose possession vehicle was seized—Intention or purpose of owner or driver of vehicle in transporting illicit spirits need not be established by Crown officers—Powers to relieve from forfeiture reserved to Governor in Council under the Consolidated Revenue and Audit Act, S. of C. 1931, c. 27, s. 33—Claim dismissed.

One M. and one S. while motoring towards Charlottetown observed a man standing on the side of the road and signalling for a lift. M. stopped his car. He had never seen the man before but S. recognized him as one L. Upon being invited into the car, L. took a parcel from the ground, placed it in the rear seat and got into the front seat with M. and S. who paid no attention to the parcel. After proceeding but a very short distance they were ordered by R.C.M.P. constables to stop. The car was searched and the officers upon examining the parcel found it to be a potato sack in which there were two one-quart tins which contained spirits commonly called "moonshine". The spirits and car were then seized as forfeited. Subsequently both M. and S. were charged under s 169 of the Excise Tax Act with having in their possession spirits unlawfully manufactured or imported and were acquitted by the magistrate. L., also charged, pleaded guilty.

M.'s and S.'s evidence was accepted by the Court as true statements of what occurred: that until his car was searched and the spirits discovered M had no knowledge that it was carrying spirits illicitly manufactured.

Held: That the matter is in the nature of a proceeding *in rem* and, if it be established—as it has been done in this case—that the vehicle "had been or was being used for the purpose of transporting spirits unlawfully manufactured" the Court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle.

2. That the partial relief afforded under the provisions of s. 169(A) of the Excise Tax Act is not available to the claimant since the vehicle was seized in his possession.

3. That if in such proceedings the Crown officers had to prove the intention or purpose of the owner or driver of a vehicle in transporting illicit spirits they would have a very difficult task and the whole intention of s. 169(A) of the Excise Act might readily be evaded.

INFORMATION exhibited by the Deputy Attorney General of Canada to have declared forfeited to the Crown a motor vehicle seized and detained under the provisions of section 169 of the Excise Tax Act.

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

R. R. Bell, K.C. and *L. P. O'Donnell* for claimant.

K. M. Martin, K.C. and *K. E. Eaton* for respondent.

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

CAMERON J. now (July 8, 1950) delivered the following judgment:

This is an Information exhibited by the Deputy Attorney General of Canada on behalf of His Majesty claiming to have the automobile above mentioned condemned as forfeited to the Crown. On December 26, 1949, on the highway leading from Charlottetown to Montague in Prince Edward Island, it was seized as forfeited by Corporal W. H. Warner of the Royal Canadian Mounted Police under the provisions of section 169 of the Excise Act (Statutes of Canada, 1934, c. 52 and amendments) and it is alleged that at the time of such seizure it had been or was being used for the purpose of transporting a quantity of spirits unlawfully manufactured, in violation of the said act.

The claimant Mayberry is a baker residing and carrying on his business at Charlottetown. In 1945 he purchased the car in Connecticut (where he formerly resided) for $800 and brought it to Canada in 1949 when he moved here. It is used for pleasure trips, but mainly in making deliveries from his shop.

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December 26, 1949, was a holiday. On that afternoon after an early supper Mayberry's son-in-law Douglas H. Sherren, had occasion to attend to his duties as janitor at the office of the Unemployment Commission in Charlottetown and Mayberry went there with him to assist with the work. That task being completed earlier than usual, they decided to motor out to Cherry Valley to call on Sherren's sister. They proceeded by the main road leading from Charlottetown to Montague, but after going some distance they decided to postpone that visit to the following day (also a holiday) so that they could take their wives with them. The car was turned about and they proceeded towards Charlottetown. They had with them in the car one half dozen bottles of beer, legally purchased, and decided to stop at a convenient point off the road and consume one bottle each. The stop was made at a point a short distance east of Key Hill and lasted about 5 minutes, the lights of the car being left on. They then proceeded towards Charlottetown and after going about 150 yards observed a man on the right side of the road. He was standing erect and so far as they could then see he carried no parcels of any sort. He signalled by his hand that he wanted a lift, and without any hesitation, and following the custom in that area, Mayberry decided to take him along and stopped the car. Mayberry had never seen or heard of the man before; but upon the car being stopped Sherren recognized him as one LeBlanc, who some years previously had played in the Charlottetown band. Upon being invited into the car, LeBlanc took a parcel from the ground and placed it in the rear seat and at the suggestion of Sherren, who did not want anyone to see the remaining bottles of beer in the rear, LeBlanc got into the front seat with Mayberry and Sherren. Neither of the latter paid any attention to the parcel. They then drove towards Charlottetown and after proceeding but a very short distance they were ordered by constables of the Royal Canadian Mounted Police to stop. The car was searched and the officers upon examining the parcel which LeBlanc had placed in the car found it to be a potato sack in which there were 2 one-quart tins which contained spirits illicitly manufactured, commonly called "moonshine." There is no dispute as to the contents of the tins.

To the constables, Mayberry and Sherren each denied any knowledge of the contents of the bag, but LeBlanc immediately admitted ownership thereof and full responsibility for its presence in the car. LeBlanc told the officers that he had been on the roadside and had been "hitch-hiking a ride" and had just been picked up by Mayberry and Sherren. The spirits and car were then seized as forfeited.

Subsequently both Mayberry and Sherren were charged under s. 169 of the Excise Act with having in their possession spirits unlawfully manufactured or imported and were acquitted by the magistrate. LeBlanc was also charged under the Provincial Liquor Act, and the Excise Act, and pleaded guilty.

The claim for a declaration of forfeiture is founded on section 169(2) of the Excise Act. It is as follows:

169. (2) All spirits unlawfully manufactured or imported, or unlawfully or fraudulently removed from any distillery, bonded manufactory or from any bonded warehouse, wheresoever they are found, and all horses and vehicles, vessels and other appliances which have been or are being used for the purpose of transporting the spirits so manufactured, imported or removed or in or upon which the same are found, shall be forfeited to the Crown, and may be seized and detained by any officer and be dealt with accordingly.

The claimant has complied with all of the requirements of sections 115 and 116 of the Excise Act, but the car has remained in the custody of the seizing officers.

Section 112(1) places the burden of proof on the claimant. Without the slightest doubt I accept his evidence as a true statement of what occurred; that until his car was searched by the constables and the spirits discovered he had no knowledge whatever that his car was carrying spirits illicitly manufactured. His statement is fully corroborated by that of Sherren whose evidence I also accept at full value. Both are reputable citizens of Charlottetown and so far as the evidence shows, have never had any difficulties with the police or been connected in any way with LeBlanc or any bootlegger. LeBlanc was not available at the hearing of this matter, but by consent, the magistrate's notes of his evidence given in the police court were admitted. For what that evidence is worth, it corroborates the statements of Mayberry and Sherren. LeBlanc said that after purchasing the spirits at the roadside from an

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unknown person, who later vanished, he decided to hitch-hike into Charlottetown. Several cars refused his request for a lift but finally Mayberry's car did stop in response to his signal. I am completely satisfied that the picking up of LeBlanc was not by pre-arrangement, but merely the courteous act of the driver of a car in giving assistance to a hitch-hiker. Neither Mayberry nor Sherren paid any attention to the bag placed in the rear seat. It was a potato bag, and apparently that type of bag is commonly used throughout the province as a convenient method of carrying all sorts of articles.

On behalf of the Crown it is contended that the mere fact that the car transported spirits illicitly manufactured is sufficient to warrant the declaration of condemnation, that the provisions of section 169(2) are absolute and that the court has no discretion under these circumstances, but must declare condemnation upon the facts here proven. Counsel for the Crown also submits that under the circumstances established, section 169(A) provides the only form of relief from forfeiture and that as the vehicle was in possession of the claimant when seized that section does not apply to him. I am satisfied that the claimant here cannot avail himself of the provisions of section 169(A).

It is established, on behalf of the Crown, that close to the place where Mayberry and Sherren stopped to consume the beer, there is a cottage or shack occupied by a man who has been convicted as a bootlegger on several occasions. Neither Mayberry nor Sherren knew him or anything about him. It is also shown that LeBlanc has been a bootlegger for many years, with numerous convictions under the Provincial Liquor Act and the Excise Act. It is also established that it was possible for LeBlanc to have seen the lights of the parked car from his position at the roadside. I am asked to draw the inference from these facts that picking up LeBlanc was not a mere coincidence but a plan which had been pre-arranged, that those in the car were waiting until LeBlanc appeared at the roadside ahead and that he and his illicit spirits would then be picked up and taken to Charlottetown. In the light of the evidence which I have accepted I must refuse to draw any such inference. Had the Crown established that Mayberry or Sherren were

connected in any way with bootlegging or with LeBlanc there might have been some ground for suspicion, but the evidence is quite to the contrary.

Then it is pointed out that when the car was stopped and searched by the officers they detected a strong odour of "moonshine" in the car, caused by the liquor leaking out of one of the tins and wetting the bag. It is urged that the odour was so noticeable that Mayberry and Sherren must have detected it and therefore must have known that the car was transporting "moonshine." Mayberry had no knowledge of the odour of "moonshine" but Sherren said that he knew what it was like. Both said they did not observe any such odour in the car and LeBlanc's evidence was to the effect that until the time the car was searched by the police there was no noticeable odour of "moonshine" in the car. When it is recalled that both Mayberry and Sherren had just consumed a bottle of beer and that the spirits were in the car only long enough for the car to travel one-quarter of a mile, I think that it is quite impossible to find that they must have known that they were transporting spirits. I accept their statements that they had no knowledge of it whatever. I am quite satisfied that neither Mayberry nor Sherren were in any degree parties to LeBlanc's offence and that they were quite innocent of any complicity therein or of any collusion with LeBlanc in regard thereto.

The facts of the matter in my opinion are those stated by the claimant, but unfortunately that finding does not entitle him to the relief which he now claims. This matter is in the nature of a proceeding *in rem* and, if it be established—as I think has been done in the instant case—that the vehicle "had been or was being used for the purpose of transporting spirits unlawfully manufactured" the court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle. The only exception to that statement is the partial relief afforded under the provisions of section 169(A), which section is not available to the claimant herein, inasmuch as the vehicle was seized in his possession.

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Reference may be made to *The King* v. *Krakowec et al* (1). In that case proceedings were taken for a declaration of forfeiture of a vehicle shown to have been used in the transportation of illicit spirits. The facts are stated shortly in the headnote as follows:

A truck in the possession and use of its purchaser under a conditional sale agreement, by which the property in and title to it remained in the vendors until payment in full and on which a balance remained unpaid, was seized under circumstances which, as held on facts admitted, must be taken to have made it liable to forfeiture to the Crown under said s. 181.

It was held, reversing judgment of the Exchequer Court:

1. That the vehicle was liable to forfeiture not only as against the person in whose possession it was seized but also as against the said vendors, although the latter had no notice or knowledge of the illegal use which was being made of it,

2. That the court is not vested under s. 124 of the Act with any discretionary power in the matter. It must decide according to law.

That judgment was of course delivered before s. 169(A) was incorporated in the Act. The seizure and forfeiture of the vehicle had been made under s. 181 of the Excise Act which in substance was much the same as the present s. 169, although the words "for the purpose of removing the same" have been changed to "for the purpose of transporting the spirits so manufactured . . ." In that case Rinfret, J. (as he then was) said at pp. 142-3:

We agree that, when the meaning of a statute is doubtful or ambiguous, the courts should not, unless otherwise compelled to do so, give it that interpretation which might lead to unjust consequences; but even penal statutes must not be construed so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation would comprehend (*Dyke* v. *Elliott;* The "Gauntlett" (1872) L.R. 4 P.C. 184, at 191); and it is surely not for the judge so to mould a statute as to make it agree with his own conception of justice (Craies on Statute Law, 3rd ed., pp. 86, 444). Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the legislature, when it passed the Excise Act, that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

Whether such a thing exists as what is referred to by Lord Cairns (in *Partington* v. *Attorney-General* (1869) L.R. 4 H.L. 100, at 122.) as the "equitable construction" of a statute, we cannot see that this is a case for its application, and we find no reason why we should not simply adhere to the words of the enactment.

It is not for the court to say if, in some cases,—such as, for example, when the vehicle utilized was stolen from its owner—the forfeiture may

(1) (1932) S.C.R. 134.

effect a hardship. Such cases are specially provided for in subs. 2 of sec. 133 of the Excise Act. The power to deal with them is thereby expressly vested in the Governor in Council, thus leaving full play to the operation of sec. 91 of the *Consolidated Revenue and Audit Act* (c. 178 of R.S.C., 1927), for the remission of forfeitures. We are unable to agree with the decision in *Le Roi* v. *Messervier* (1928) Q.R. 34 R.L.n.s. 436, already referred to, that the discretionary power is also vested in the court under sec. 124 of the Act. In our view, that section means nothing more than this:

> After the vehicles, vessels, goods and other things have been seized as forfeited under sec. 181, the person from whom they were seized, or the owner thereof, may prevent the automatic condemnation of the said vehicles, etc., by giving notice as provided for in sec. 125 "that he claims or intends to claim the same"; whereupon, an information for the condemnation of the vehicles, etc., having been filed (as was done in this case), the court may hear and determine the claim made by the person from whom they were seized or from the owner, and the court may release or condemn the vehicles, etc., as the case requires, i.e. according as they come or not under the provisions of the Act. The court thereunder is vested with no discretion, it must decide according to law.

Had I any authority under the Act to exercise any discretion in dealing with the established facts I would unhesitatingly have granted relief to the claimant and directed that his car be returned to him. But no such authority exists and it is my duty to apply the law as found in the statute and in the light of the interpretation placed on it in the case which I have cited. I must therefore find that as the Crown has established the fact that the vehicle was used in the transportation of spirits admittedly of unlawful manufacture, judgment must go declaring the said automobile condemned as forfeited to the Crown by virtue of the provisions of the Excise Act.

Counsel for the claimant submitted that while the vehicle undoubtedly was used "in the transportation" of spirits unlawfully manufactured, it could not be said that it was used "for the purpose" of transporting spirits unlawfully manufactured. He argued that as the driver and owner had no knowledge of the presence of spirits in his car, he therefore lacked the intention or purpose of using his car for such transportation. I am unable to interpret the section in that way. The obvious purpose under the Act is to provide something more drastic in the way of penalties than fines or imprisonment and to provide for the forfeiture of vessels and vehicles illicitly engaged in the liquor traffic. If in such proceedings the Crown officers

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had to prove the intention or purpose of the owner or driver of such vehicle in transporting the illicit spirits they would face a very difficult task and the whole intention of the subsection might readily be evaded.

The finding which I have made will doubtless work a great hardship to the claimant. I realize also that it could create very substantial difficulties for motorists who may "give a lift" to strangers who may be in possession of a very small quantity of illicit spirits, concealed possibly on their persons. Notwithstanding the lack of any discretion in the court under the Excise Act as it now stands, there is power to deal with such cases of hardship under the Consolidated Revenue and Audit Act, 1931, c. 27, s. 33, such powers for the remission of forfeitures being expressly reserved to the Governor in Council under s. 124 of the Excise Act. I cannot leave the matter without suggesting that this is a case where consideration might well be given to any such claim as may be advanced by the claimant herein.

There will therefore be judgment declaring condemnation of the automobile in question as forfeited to the Crown, as claimed in the information. The costs of the Crown proceedings are in the discretion of the Court. The Crown under the law had the right to institute these proceedings and has succeeded in establishing the claim. In the exercise of a judicial discretion, I cannot do otherwise than to find that the costs must follow the event. The claimant must therefore pay the costs of the Crown proceedings and of his claim to the return of the motor car, *if demanded by the Crown,* which I hope will not be the case.

The claimant also asked for compensation for loss of use of his vehicle. That claim will be dismissed without costs.

Judgment accordingly.