

BETWEEN :

HIS MAJESTY THE KING,.....PLAINTIFF;

AND

HERB CUTHBERTSON,.....DEFENDANT.

1949
March 17
July 12

Crown—Information—Foreign Exchange Control Act, Statutes of Canada 1946, c. 53, s. 22(1)—“Forthwith declare to an authorized dealer”—“Forthwith” in s. 22 of the Foreign Exchange Control Act means within a reasonable time—No declaration of forfeiture.

Held: That “forthwith” in s. 22(1) of the Foreign Exchange Control Act, Statutes of Canada, 1946, c. 53, means within a reasonable time in view of the circumstances of the case and of the subject matter.

INFORMATION exhibited by the Attorney General of Canada seeking a declaration that United States currency surrendered by the defendant be forfeited to the Crown.

The action was tried before the Honourable Mr. Justice O’Connor at Ottawa.

J. Douglas Watt, K.C. for plaintiff.

H. A. O’Donnell, K.C. for defendant.

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

O'CONNOR J. now (July 12, 1949) delivered the following judgment:

The plaintiff seeks a declaration that the sum of \$154 in United States currency, surrendered by the defendant on the 26th day of August 1947, be forfeited to the plaintiff on the ground that the defendant failed to forthwith declare and offer for sale such sum in accordance with the provisions of The Foreign Exchange Control Act, chapter 53 of the Statutes of Canada, 1946.

Section 60(1) of the Act provides *inter alia* that any property of any kind, the possession of which any person fails to declare as required by the Act, may be seized and shall be liable to forfeiture at the instance of the Attorney General of Canada upon proceedings in the Exchequer Court of Canada.

Section 22(1) and (2) provides:—

22(1). Every resident, other than an authorized dealer, who has or acquires the ownership or possession of foreign currency or is or becomes entitled to a right to payment of foreign currency under a negotiable instrument payable either on demand or otherwise immediately payable, or by reason of a deposit, shall forthwith declare to an authorized dealer that he owns or possesses the said currency or is entitled to the said right, provided that this subsection shall not apply in respect of

- (a) foreign currency having a value not exceeding one hundred dollars in the ownership or possession of a resident, unless otherwise required by regulation; or
- (b) foreign currency or any right to payment thereof acquired or held by a resident under a regulation or permit while it is required by the resident for the purpose, and held within the time, specified by the regulation or permit.

(2) Subject to subsection four of this section, where a resident makes a declaration to an authorized dealer under this section relating to foreign currency or to a right to payment thereof for which a rate of exchange with Canadian currency is prescribed under this Act, he shall at the time of making the declaration, sell the said currency or agree to sell the currency payable under the said right to the authorized dealer and for such purpose shall at that time assign or transfer the said right, or direct that payment thereunder be made to the authorized dealer.

Section 22(1) (a) of the Act was amended by P.C. 2045 to provide that every resident who has or acquired possession of foreign banknotes exceeding \$10 shall declare to

an authorized dealer that he possesses such banknotes and offer the same for sale to an authorized dealer pursuant to Section 22 of the Act.

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The facts are not in dispute. The defendant farms near Perth, Ontario, and in addition carries on business as a commission agent purchasing cattle for export to the United States, and during the year 1947, the defendant in the course of his business as such agent, purchased cattle for export amounting in value to approximately \$100,000, which sums were paid in American currency and accounted for by the defendant, according to the regulations under The Foreign Exchange Control Act.

It was the defendant's practice to take the cattle in trucks to the port of entry and to pass them through the Canadian Customs and then to accompany them to the cattle yards over the United States boundary, for the purpose of passing the cattle through the United States Customs.

On the date in question, when he was passing the cattle through the Canadian Customs Port of Lansdowne, he was asked by the port authorities to declare the United States currency in his possession. He stated that he threw everything he had in his pocket out on the counter and this amounted to \$164 in United States currency and \$15 in Canadian currency. Thereupon the port authorities seized \$154 of the American currency and returned \$10 in American currency to him.

It is clear from the nature of the defendant's business that he had to carry United States currency in sums much larger than \$10. He had to make change in United States funds when the cattle were sold and he had to pay United States custom duties on certain cattle in United States funds. That this was necessary to his business was recognized by the Foreign Exchange Control Board which granted him a permit in 1948 and again in 1949 to carry up to \$1,000 a month—\$200 at one time in United States currency.

On the 22nd September 1947, the defendant was interviewed by a constable of the Royal Canadian Mounted Police and gave him a statement in writing, in which he stated *inter alia*, that at the time in question he had in his possession \$154 in American currency which was

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taken from him by the Customs officer and he was informed that he would hear from the Foreign Exchange Board. The statement then continued:

I obtained this money from the sale of cattle. \$50 of it was obtained from the Bank of Montreal, Perth, some time previous which was kept in my pocket and I could not say how much of this \$50 I had at the time of crossing the border.

In his evidence the defendant stated that he was just going over to transfer the cattle and then he intended to return to Perth.

He said that he had obtained part of the money on Form H from the Bank a short time before, but that he had disposed of most of it. He said, "there probably was a little bit left, no large amount, and the other I had received through making change in cattle deals." And that he had received "the other" just a "matter of a few days" before the 26th August 1947.

And under cross-examination he said:—

Q. Just a minute—Mr. Cuthbertson I have a record here—you visited the Port of Lansdowne on the 26th August 1947 but on the 21st of August you sold to the bank \$3,100 in U.S. currency—can you tell me if that is right?

A. I cannot say. I have no recollection.

Q. But you did from time to time sell U.S. currency to the bank?

A. Oh, yes.

Under Sections 60(2) and 56(1), if it is established that the defendant did any act or omission for which a permit is required, then the burden of proof is on the defendant that he possessed the necessary permit or had been exempted from the applicable provisions of the Act.

That does not affect the position here, however, because the defendant does not contend that he had a permit which would permit him to have possession of foreign banknotes without having to forthwith declare the same to an authorized dealer. What the defendant contends is that having received the foreign currency only "a few days" before the 26th August 1947, he did not fail to "forthwith declare" and "sell" the same to an authorized dealer, within the meaning of Section 22(1) as amended.

The plaintiff does not contend that the defendant was about to export this currency from Canada to the United States or had any intention of so doing. On the contrary, counsel for the Crown agreed that the sole ground on

which the declaration is sought is that the defendant failed to "forthwith declare and offer for sale" the said currency to an authorized dealer.

The sole question is, therefore, did the defendant in having possession of the United States currency for "a few days," fail to "forthwith declare" the same to an authorized dealer.

That in turn depends on the construction to be placed on the word "forthwith" in Section 22(1).

Wharton's Law Lexicon XIV edition defines "forthwith" as:—

When a defendant is ordered to plead "forthwith", he must plead within twenty-four hours. When a statute or rule of Court requires an act to be done "forthwith", it means that the act is to be done within a reasonable time having regard to the object of the provision and the circumstances of the case (*Ex parte Lamb (1881) 19 Ch. D. 169; 2 Chit. Arch. Prac. 14th ed., 1435*).

Mozley and Whiteley's Law Dictionary V edition makes the same statement that in a statute the word means "within a reasonable time."

Webster's New International Dictionary defines "forthwith" as:—

Immediately; without delay; directly; Hence, within a reasonable time under the circumstances of the case; Prompt and with reasonable dispatch;—the meaning of the term in a particular case is relative to the circumstances.

Where the word "forthwith" occurs in a statute it has usually been construed as meaning "within a reasonable time in view of the circumstances of the case and of the subject matter" as will be seen from the following:—

I agree that the word "forthwith" is not to receive a strict construction like the word "immediately", so that whatever follows, must be done immediately after that which has been done before. By referring to section 50 (of a private Act) it seems that whatever is to be done under it, ought to be done without any unreasonable delay. I think the word "forthwith" there used, must be considered as having that meaning. *R. v. Worcestershire JJ. (1839), 7 Dowl. 789, per Coleridge J., at p. 790.*

. . . The Act of Parliament (Bastardy Act, 1845, s. 3 (repealed)) says, that the party entering into the recognizance shall "forthwith" give notice of his having done so to the mother of the child. Now, without putting any critical construction on the word "forthwith"; it means I think, with as little delay as the circumstances will reasonably admit of. *Ex p. Lowe (1846). 3 Dowl. & L. 737, per Coleridge J. at p. 739.*

To act "forthwith", . . . seems to mean "reasonably soon in the circumstances". *Brown v. Bonnyrig Magistrates, (1936) S.C. 258, per Lord Carmont (Lord Ordinary), at p. 262.*

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"Forthwith after the threshing" (in s. 5 of the Threshers' Lien Act, which deals with the right to exercise a right of lien on grain) I think means as soon after the work is completed as it is reasonably practicable for the giving of the notice. *Partridge v. Aylwin*, (1924) 2 W.W.R. 671, (C.A.) *per cur.*, at p. 674.

"Forthwith" in The Controverted Elections Act, C.S.N.B. 1903, c. 4, s. 6, means that the petition must be published within a reasonable time, in view of the subject matter and the attendant circumstances . . . (C.A.) *Owens v. Upham* (1909), 39 N.B.R. 198.

"Forthwith" means within a reasonable time, having regard to all the circumstances of the case, as used in the Immigration Act, R.S.C. 1927, c. 93, s. 19(2) . . . *In re Immigration Act, In re Poll.* (1937) 3 W.W.R. 136.

The defendant appears to have acted in good faith in the matter. When he was asked to declare the currency he had with him, he at once made the declaration and handed the currency to the Customs official. Nor do the Board appear to have questioned his good faith, because they subsequently issued a permit to him in each of the years 1948 and 1949, which permitted him to carry substantial sums in foreign currency.

Giving "forthwith" the meaning of "within a reasonable time" in view of the circumstances of the case and of the subject matter, there remains only an examination of the circumstances and of the subject matter.

The evidence shows that in the year 1947 the defendant had handled \$100,000 worth of American currency and that this during the year had been turned into an authorized dealer. Apparently he had turned \$3,100 in United States currency five days before the date in question, and he had \$164 in American currency on the day in question. He stated that he had acquired part of this sum on a form H from the bank a short time before and that "there probably was a little bit left of the \$50 but I think no large amount and the other I had received through making change in cattle deals;" and his evidence was he had received this last amount "just a matter of a few days" before the 26th August 1947. According to his evidence on the time in question there was American money "everywhere—in the stores and everywhere."

The section cannot have intended that even a retail merchant should go to the bank every time he received a United States bill. He would probably declare and sell the United States currency every time he went to the

bank in the ordinary course of business, which in the case of a retail merchant, would probably be every few days.

Here the defendant is a farmer and a cattle buyer travelling about the country. Having regard to the circumstances and the subject matter, it cannot be said, in my opinion, that the defendant failed to "forthwith declare" and "sell" the currency because he had it in his possession for "a few days."

The plaintiff is not, therefore, in my opinion, entitled to the declaration sought in the information. The defendant is entitled to the costs of the proceedings.

Judgment accordingly.

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