BETWEEN:

ELIE MASSEIN ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1933
Sept. 14.
1934
May 9.

Crown—Customs—Seizure—Liability of Crown for failure to restore seized goods pursuant to court order—Jurisdiction—Petition of Right—Right of friendly alien to Petition—Crown bound by judgment or order of court based on written consent—Res Judicata.

Certain goods were seized by Canadian Customs officers, and by consent of counsel, an order was made by the Exchequer Court dissolving such seizure and directing that the property be restored to the suppliant. Some months later when he went for delivery of the goods, it was discovered there was a shortage, for the value of which this action was brought.

Held: That the Crown is liable for the value of goods unlawfully seized or detained if restoration cannot be made.

2. That the Court has jurisdiction to entertain a claim for goods of the subject in the possession of the Crown.

3. That a petition of right will lie against the Crown when specific chattels have found their way into the possession of the Crown, and if restitution cannot be made, for compensation in money.

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4. That a judgment or order of the Court, founded on a written consent between the Crown and the subject, constitutes a definite obligation entered into by the Crown.
5. That a friendly alien may maintain a petition of right.
6. That a friendly alien while in Canada, is in the allegiance of the Crown, and so long as he remains in Canada with the permission of the Sovereign, expressed or implied, he is a subject by local allegiance with a subject's rights and obligations. *Johnstone* v. *Pedler* (1921) 2 A.C. 262.
7. That on the facts the Crown cannot allege that following the date of the judgment the goods had been restored and were in the possession of the suppliant or of the owners.
8. That the subject matter of this petition did not become *res judicata* by virtue of the order made by the Court for the restoration of the goods.

PETITION OF RIGHT by the suppliant claiming compensation from the Crown for goods wrongfully seized and not restored to suppliant pursuant to an order of the Court directing restoration.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court, at Halifax.

J. W. Maddin, K.C. for the suppliant.

J. McG. Stewart, K.C. for respondent.

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

THE PRESIDENT, now (May 9, 1934) delivered the following judgment:

This is in form a petition of right relating to a customs seizure and was heard upon certain admissions of facts made in writing by counsel, oral evidence adduced at the trial, and papers and evidence earlier referred to this court under sec. 174 of the Customs Act, and relating to the same subject matter. From the facts of the case there emerge for determination several unusual points of law and it will be desirable to state at once the relevant facts leading up to this proceeding, and fortunately they are not seriously in dispute.

On June 30, 1927, the master of the steamer *Margaret,* a Canadian revenue boat, seized the French registered ship *Ariel,* together with her cargo of assorted liquors, in the Gulf of St. Lawrence and more than twelve miles from the nearest point of land in Canada, the Magdalen Islands,

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from whence she was towed to Gaspe, Quebec. The *Ariel* was some days later, on July 8, 1927, released and restored to her master, the suppliant herein, but her cargo was detained under seizure and forwarded by customs officers to Halifax, N.S., where the same was placed in a warehouse, by the customs authorities at that port. It might be stated that the *Ariel* cleared from a port in France with her cargo of liquor but she called at St. Pierre, Miquelon, en route to her destination on the high seas, and at the latter port she took aboard some small additional cargo of liquor.

The ship *Ariel* apparently was not charged with any offence after being seized and towed to Gaspe, but the owners of her cargo were charged with the offence of attempting to defraud the revenue of Canada, by attempting to avoid the payment of the duty on the said cargo found on the *Ariel*, which was said to be hovering in British waters off the course of her indicated voyage.

The seizure of the cargo was at once contested through the French Consular Office in Canada, and after ensuing correspondence between the customs authorities and those interested in the cargo the seizure was, on October 5, 1927, referred by the Minister of National Revenue to the Exchequer Court of Canada by virtue of sec. 174 of the Customs Act, without any decision having been made previously in respect of the seizure by the Commissioner of Customs, or by the Minister of National Revenue.

Before the reference was heard the seizure of the *Ariel's* cargo was abandoned on the ground, I assume, that the same was made beyond the territorial waters of Canada and therefore unlawful. On June 14, 1928, just about a year after the seizure of the cargo, the solicitor of the Attorney General of Canada and the solicitor of the owners of the cargo agreed to a dissolution of the seizure in the following terms: "The parties hereto consent to an order dissolving the forfeiture of the property of the claimants and for the restoration of the said property to the said claimants and that the claimants are entitled to costs to be taxed." On the same or the following day an order of this court was made by consent of counsel, in the following terms: "It is ordered that the forfeiture of the property of the claimant be dissolved and that the said

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property be restored to the claimant; and it is ordered that the said claimant recover from the said respondent his costs of this action forthwith after taxation." When the Reference was made to this court the claimant of the goods seized was the owner, Hannapier Peyrelongue et Cie, of Bordeaux, France, but on January 11, 1928, by a consent in writing entered into by the solicitors of the Attorney General of Canada and the owners of the cargo, the name of Elie Massein, the master of the *Ariel* and the suppliant herein, was substituted for that of the owners of the cargo as the claimant of the seized goods, and when the order of the court directing the restoration of the seized goods was made, the name of the master of the *Ariel* appears as claimant.

The cargo when seized consisted of 1,438 packages of assorted liquors. On November 27, 1928, the seized liquors were examined and inspected by customs examining officers in the warehouse at Halifax, an agent of the owners of the same being present, and it was found that certain demijohns of malt whisky had been opened and all or part of the contents removed. Accordingly the examining officers filled 145 demijohns out of the total of 195 demijohns thus disclosing a shortage of 50 demijohns of malt whisky; this was referred to in the evidence as "reconditioning." On or about February 5, 1929, the schooner *Grace E. McKay,* on behalf of the owners, called at the Port of Halifax to take delivery of the goods ordered to be restored when it was discovered that 105 containers had been tampered with and the contents removed and then filled with water, and these, the master of the schooner refused to accept; while this discovery was only then made, it does not follow, that the theft had not been committed prior to the inspection made in November, 1928, and to this I shall be obliged to return later. It is agreed between the parties that the total shortage amounted to 427·8/12 packages or sacks, the particulars of which are set forth in the written admissions of fact. As will appear later, the Crown alleges as a defence that the failure of the suppliant to take prompt delivery of the goods, following the order of the court, relieves the Crown of any responsibility for the loss of the unrestored portion of the cargo of liquors.

The major question for decision is whether a petition of right lies against the Crown for the value of the goods which cannot in fact be restored to the suppliant, and into that issue there is interjected the question as to whether certain of the Royal Prerogatives are available to the Crown as a defence and whether and to what extent certain statutory provisions modify the common law rules applicable to the case, and therefore I think it desirable, for this and other reasons, at this stage, to refer with some care to the statutory provisions under which the controversy here had its origin. In the administration of the laws relating to customs there must inevitably occur unlawful seizures of property, or seizures of doubtful validity, and consequently there are to be found in the Customs Act, R.S.C. 1927, Chap. 42, certain enactments which provide for an enquiry by the Department of Government administering the Customs Act, and by the courts, into the validity of any seizure, so that eventually right may be done in the matter and any injustice or abuse of authority, may be reasonably avoided. Sec. 171 of the Customs Act requires that when any vessel or goods have been seized, the seizing officer must forthwith communicate the circumstances of the seizure to the Commissioner of Customs. By the next following section the Commissioner of Customs is then required to notify the owner of the thing seized or detained, of the reasons for the seizure, and to call upon him to furnish within thirty days from the date of such notice, such evidence in the matter as he desires to furnish. Sec. 173 provides that after the expiration of the said thirty days, or sooner, if the person so called upon to furnish evidence so desires, the Commissioner of Customs may consider and weigh the circumstances of the case, and report his recommendation thereon to the Minister, the Minister of National Revenue. The Minister may thereupon give his decision in the matter respecting the seizure, and the terms, if any, upon which the thing seized or detained may be released or the penalty or forfeiture remitted, or he may refer the matter to the Exchequer Court for decision. In the case of this particular seizure the Minister made no decision but referred it to the court on October 5, 1927. Sec. 177 then provides that

On any reference of any such matter by the Minister to the court, the court shall have and consider such matter upon the papers and evidence

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referred to and upon any further evidence * * * and the court shall decide according to the right of the matter.

It was under sec. 174 that this court was empowered to entertain the reference made by the Minister, and to grant the order for judgment already mentioned.

Departing here for a moment in my references to the provisions of the Act. Upon a Reference to the court under sec. 174, and sec. 176, it has always been my view that all the court was required to pronounce upon was whether the seizure, detention, penalty or forfeiture was maintainable or not, and the terms, if any, upon which the thing seized or detained might be released, or the penalty or forfeiture remitted, which are precisely the same matters upon which the Minister himself might render a decision under sec. 174. I know of no case where the court, having decided that a seizure was unlawful, formally directed that in the event of the failure of the Crown to restore the seized property, the value thereof should be paid the claimant or owner. Possibly such an order might be made at this stage but for the moment I doubt it. I refer to this particularly because it was contended at the hearing of this petition, though not pleaded, that the cause of action raised by this petition was *res judicata* by virtue of the judgment already rendered, and to this point I shall return later.

Resuming now my reference to certain of the provisions of the Customs Act. Sec. 161 enacts

That no action * * * shall be brought against the Crown or against any officer or person * * * for the recovery of the thing seized until a decision has been first given by the Minister or by a court of competent jurisdiction in relation to the condemnation of the thing seized.

Such an action must be brought within three months after such decision has been given. I refer to this section because it purports to give a right of action against the Crown for the recovery of goods seized, after the Minister or a court has rendered a decision, apparently under sec. 177 of the Act, in respect of a seizure. If the "decision" by the Minister or the court were that the seized property should be restored to its owner, and there were no appeal, I can hardly conceive of any action that might be commenced against the Crown except one for the value of the seized goods if they were not restored, or one for damages in any way arising from the seizure. In any event it is

clear, I think, that this section contemplates a right of action against the Crown for the recovery of goods unlawfully seized, in sufficiently apt words I think, and it does not distinguish between the Crown and any officer of customs; this negatives the suggestion that the Crown is not liable for acts because they savour of tort. If this section is applicable here I should point out that the limitation as to time for the commencement of such an action was not pleaded by the Crown, and it is improbable that in the circumstances of a case of this kind that the Crown would think of doing so. Then I might point out that the Act frequently treats the value of property as the equivalent of the property itself. Goods seized may be released on a deposit in money being made to the duty paid value thereof pending a decision as to the validity of the seizure and the money deposited shall be forfeited if the goods are ultimately condemned. No proceedings for the recovery of the said money from the Crown shall be instituted except within six months from the date of the deposit thereof. See sections 168 and 169. Perishable goods seized may be sold and the proceeds thereof deposited to the credit of the Minister of Finance, and shall abide the judgment of the court with respect to the condemnation of the thing seized (sec. 170). Then, if judgment is rendered in any proceeding for any penalty or forfeiture under the Act, directing the restoration of property to the claimant thereof, the execution of any such judgment shall not be suspended by reason of any appeal from such judgment, if the claimant gives sufficient security to be approved of by the court to deliver the thing seized or the full value thereof if the judgment appealed from is reversed (sec. 280).

It is quite clear, I think, that the seizure in question was not made in exercise of the Prerogative but under a statute. It was not contended by either party that the seizure was not made under the Act. Indeed, the Customs Act frequently speaks of seizures made "under the Act," and it contemplates that some seizures may be held to be unlawful. The statute provides machinery for determining as between the Crown or its officers, and the claimant of any property seized, the question of the validity of any seizure. The statute obviously contemplates that

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where a seizure is not maintainable the thing seized must be restored to the claimant, and, in the absence of a certificate of probable cause, the statute would appear to make an unlawful seizure actionable; and it seems to say that an action may be maintained against the Crown as well as against any officer of customs. It does not appear to make any distinction between the Crown, and its officers of customs. Here, in proceedings in which the Crown apparently was a party and represented by His Attorney General, and by consent of the Attorney General on behalf of the Crown, it was ordered by the court that the seized goods should be restored to the claimant, because the seizure could not be maintained upon one ground or another. The owner of the goods had therefore, at that time at least, a legal right to the restoration of the goods, and there was a legal obligation cast upon the Crown to restore the same. That was, I think, the clear intendment of the statute, and that view the Crown conceded. The suppliant now claims he should be paid the value of such of the goods as have not and cannot be restored; that is the relief that is prayed for, and not damages for an unlawful seizure of the goods, or for damages for their unlawful detention, or for negligence on the part of servants of the Crown resulting in the loss of certain of the goods. The theft of a portion of the goods by a third party, because it was a tortious act, cannot I think be relied on by the Crown as a defence against the suppliant.

The Customs Act has given to the Crown statutory powers which render the exercise of the Prerogative unnecessary because the statutory powers conferred are wider and more comprehensive than the Prerogative itself; therefore the things which the Act empowers the Crown to do can only be done by and under the statute and subject to all the express or implied conditions and obligations imposed by the Act. The Act, I think, indicates that it was the intention of the legislature that the powers of the Crown should be exercised in an equitable manner; that the validity of any seizure or detention of property should be determined "according to the right of the matter" to use the words of the statute itself; and that no one should suffer loss of his property by the unlawful exercise of such powers by the Crown. "Right" means an interest recog-

nized and protected by the law. Therefore when powers covered by the statute are exercised by the Crown it is to be presumed that they shall be exercised under the statute and therefore subject to the provision that if property is seized or detained without right, they shall be restored; if that is correct, then, I think, it should follow that the Crown was liable for the value of goods unlawfully seized or detained, if restoration could not be made, otherwise the powers granted would not be exercised in an equitable manner, and "right" would not be done in the matter.

Now, does a petition of right lie against the Crown for the recovery of the value of the goods which have not been restored? It would appear to operate as grave injustice if that question had to be answered in the negative; but I do not think the statute means that, nor do I think that such is the law. A petition of right was the only available step to which the suppliant could resort to reap the full fruits of his judgment recovered, under the provisions of the statute, against the Crown, and with its consent. A writ of execution could not issue against the Crown, and the remedy of mandamus was not available against the Crown. Unable to obtain a return of the goods in specie, then, I think, the relief contemplated by the statute extends to a claim for their value. In *Buckland* v. *The King* (1), a petition of right proceeding, the suppliant sought the return of certain films which had been seized by customs officials, or their value, and damages. While the suppliant failed upon statutory grounds, yet, apparently no objection was taken at the trial, or on appeal, that a petition of right did not lie against the Crown for goods wrongfully detained by the servants of the Crown, or their value, or that the action should have been taken against the customs officers seizing the films. The definition of the word "relief" in sec. 2 (*c*) of the Petition of Right Act is, I think, in its terms sufficiently wide to cover a claim for a declaration that the suppliant is entitled to the value of the goods. Further, sec. 18 (*d*) of the Exchequer Court Act enacts that the Exchequer Court of Canada shall have exclusive jurisdiction to hear

(1) (1933) 1 K.B.D. pp. 329 and 767.

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and determine "any claim against the Crown arising under any law of Canada." The Supreme Court of Canada, in *The King* v. *Armstrong* (2), held that where the Exchequer Court Act gave jurisdiction it imposed a liability upon the Crown. I think that this claim is one arising under the Customs Act, a statute of Canada.

But there is another section of the Exchequer Court Act which clearly seems to confer jurisdiction upon the court, and to create a liability against the Crown, in precisely a case of this kind, concurrently with any remedy to be found in the Customs Act. Sec. 18 of the Exchequer Court Act states that the Exchequer Court shall have jurisdiction in all cases where "the land, goods or money" of the subject are in the possession of the Crown; and this does not relate to "land, goods or money" taken for any public purpose, for, in that case jurisdiction is conferred by sec. 19 (*a*); sec. 18 also refers to contracts entered into by or on behalf of the Crown. Taken in their plain meaning these words clearly give jurisdiction to the court to entertain a claim for goods of the subject in the possession of the Crown; then if there is jurisdiction so conferred, under the decision of the Supreme Court of Canada in the case of *Armstrong* v. *The King* (*supra*), a liability is imposed upon the Crown. The claim here arises from the fact that the goods were in the possession of the Crown, and it matters not for the purposes of this case if that possession has in some way been lost. The suppliant claims restoration of the goods, and failing that, their value; if the goods cannot be restored, then, I think, the suppliant is entitled to their value. The word "subject," which I shall later on discuss, includes a friendly alien. The purpose of this section was to give jurisdiction and to impose a liability against the Crown in the class of cases mentioned, and to modify or perhaps rather to clarify, the common law in such cases; it seems to me to embody what were the common law rules in respect of such subject matters. In *Feather* v. *The Queen* (1), it was said that the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the pur-

(2) 40 S.C.R. p. 229.

(1) (1865) 6 B. & S. 257.

pose of the petition is to obtain restitution; or, if restitution cannot be given, compensation in money; or where the claim arises out of contract, as for goods supplied to the Crown, or to the public services. Sec. 18 is really a restatement of the principles there laid down, and was designed to place the Crown, and the subject whose land, goods or money were in the possession of the Crown, in the same position as subject and subject, or party and party. A petition of right will lie for the enforcement of a statutory right.

Clear of the statute however, I think, the authorities are to the effect that a petition of right will lie against the Crown when specific chattels have found their way into the possession of the Crown, and that if restitution cannot be given, then compensation in money. This seems to have been the view of several of the earlier text writers in respect of remedies against the Crown where goods of a subject had found their way into the hands of the Crown. In *Feather* v. *The Queen* (*supra*), it was stated by Cockburn C.J., who delivered the judgment of the Court, that a petition of right may be entertained where specific goods have found their way into the possession of the Crown, and if restitution cannot be given then compensation; and the same principle was affirmed by the Judicial Committee in *Windsor & Annapolis Railway Co.* v. *The Queen* (1). These and other authorities upon this point are referred to in Robertson's work on Crown Civil Proceedings at pages 335 and 336.

That a petition of right will lie in a case of this kind, may, I think, be rested on another ground. It is now settled law that in a claim founded upon a contract, a petition of right will lie against the Crown. That is expressly recognized by the Exchequer Court Act. I would say with some confidence that a judgment or order of a court, founded, as in this case, on a written consent between the Crown and the suppliant, is something untainted by tort and not affected by the principle that the King can do no wrong, and constitutes as definite an obligation or liability as any contract entered into by the Crown to purchase property of any kind; and if goods

(1) (1886) 11 A.C. 607 at p. 614.

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directed by the court to be restored to the owner thereof are not so restored then, I think, a petition of right will lie as readily as upon a contract. Probably a case quite like this has never arisen before, here or elsewhere, but I believe the common law courts of England in the nineteenth century would have been disposed to put a case of this kind on a parity with contracts and would have held that a petition of right would lie for the value of goods which could not be restored to the suppliant. I can see no distinction in principle between a sum due by the Crown under a contract, and goods admittedly due to be delivered by the Crown to their owner under an order of the court. If such goods are not delivered then I fail to see why a petition of right should not lie against the Crown for their value.

The next point for discussion is whether an alien can maintain a petition of right against the Crown. There does not appear to be any suggestion of such a limitation in the Petition of Right Act, and the Customs Act makes no distinction between an alien and a subject. There is, I confess, a strange absence of definite authority upon the point and Mr. Stewart, for the Crown, stated there was no definite weight of authority one way or the other, but his submission was that there was no authority to the effect that an alien had the right to maintain a petition of right. Upon this point I was referred to sec. 18 of the Exchequer Court Act which reads thus:

> The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made, or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of contract entered into by or on behalf of the Crown.

It was suggested that the use of the words "of the subject" operates as a bar to any suit or action brought against the Crown by an alien in the cases in which this Court is given jurisdiction by this section of the Exchequer Court Act. I think this section of the Act goes to the jurisdiction of the court and not to the status of any litigant; if the statute were intended to mean that only a British subject could bring suit against the Crown by petition of right, it would, I think, have said so, but

I do not think that was intended. The use of the word "subject" in a statute conferring jurisdiction upon a court in proceedings against the Crown is perhaps natural, but I do not think it was intended to create a distinction between an alien and a subject of the Crown; I think the word "subject" was intended to include any person ordinarily having access to our courts. And this would be equally applicable to the Petition of Right Act. Sec. 19 of the Exchequer Court Act gives exclusive jurisdiction to this court to hear and determine several enumerated claims that might be brought against the Crown, and the word "subject" is not used therein, nor is there any suggestion of prohibiting an alien from bringing an action under any one of such claims. The words "any person" might be read into all the subsections of sec. 19.

Clode, in his work on the law and practice of Petition of Right states that all subjects of the Crown entitled to and governed by the common law of England may present a petition of right is well established by usage, whatever its origin may have been, but, he states, it is doubtful whether an alien can, and he seems to think that there is no authority extending this privilege to aliens; but he points out one possible exception to this rule, where under the Colonial Stock Act, 1877, it is enacted that "any person claiming to be interested in colonial stock to which this Act applies * * * may present a petition of right in England, in relation to such stock * * *" and he emphasizes the use of the words "any person" and not "any subject." I think it is fair to say that the discussion of this point in Clode does not appear sufficiently exhaustive as to afford authority for a conclusion one way or the other. In Robertson's Crown Civil Proceedings, Chap. III, there appears a rather exhaustive discussion on the point as to who may present a petition of right; that author states that it has been doubted whether anyone but a British subject may approach the Crown by petition of right, but he thinks there is no good reason for such doubt, and that there is nothing to support it in the Petition of Right Act 1860; the use of the word "subject" in sec. 7 of that Act does not in his opinion amount to a pronouncement on the matter. He then proceeds to say:—

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It is true that Staundford, Praerog. 72 sqq., speaks of petition of right as a remedy of "the subject," but he was not applying his mind to the question of subject as against alien; and, indeed, in his time the question would probably have remained an academic one. On the other hand, Fitzherbert, Abr. Error, 8, speaks merely of a person, "homme," as proceeding by petition of right; and so does Brooke, Abr. Prerog. 2, who cites him. Blackstone, 3 Comm. 256, speaks of King and subject in this connection, but the same observation applies to him as to Staundford, and also to Chitty, Prerog. 340, 341. The remark of the last named, that petition of right is "the birthright of the subject," does not appear to be borne out by his authorities. It seems probable to the author that, subject to any disabilities to which an alien person or corporation may still be subject, the Courts would not hold that an alien could not proceed by petition of right. They would remember that, at the date of the early authorities cited above, the right of an alien to maintain even a personal action was by no means admitted.

He then refers to the case of *Rustomjee* v. *The Queen* (1), where the petition contained an allegation that the suppliant was a subject of the Queen, but this he points out was essential to the claim in that case, since the fund, a share of which the suppliant claimed, was only distributable among British subjects. He then proceeds to refer to instances of petitions of right by an alien in the following language:—

On the other hand *in re* von Frantzuis (1858), 2 De G. & J. 126; 27 L.J. Ch. 368, was an instance of a petition of right by an alien, to wit, a native of Prussia, apparently resident in Prussia, and no objection was taken on the part of the Crown. De Dohse V.R. (1886), 66 L.J.Q.B. 422, n.; 3 T.L.R. 114, was a petition of right by an ex-captain in the Austrian army, who still retained his Austrian nationality, but resided at New Cross. The point was raised in the pleadings by the Crown—not in the demurrer, as it presumably would have been had the Crown thought it a complete bar to the proceedings, but in the answer—in these terms: "The suppliant was a person born out of Her Majesty's dominions and not of English parents." No allusion, however, seems to have been made to this plea in the course of the proceedings in any Court, and it is not repeated in the printed case lodged by the Crown in the House of Lords. It may be remarked that, to judge by the form of the Crown's plea, the Crown's advisers meant to suggest that neither an alien nor a naturalized alien could proceed by petition of right. It has been pointed out above that there seems to be no authority for the former part of this proposition; still less is there any for the latter.

The author's view is rather supported by the fact that by the Colonial Stock Act, 1877 (40 & 41 Vict., c. 59), s. 20 (as to which, see above, p. 348), it is provided that "any person claiming to be interested in colonial stock to which this Act applies "may present a petition of right in England in respect of it. "Any person" clearly includes aliens, and the legislature did not think it necessary to be more specific, as it ought to have been, if by the general law an alien could not present

(1) (1876) 2 Q.B.D. 69.

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a petition of right" * * * * "There seems to be no reason why, subject to the limitations contained in the two preceding chapters, any person or persons should not present a petition of right who would be entitled to bring an action against a subject, whether jointly or severally, by assignment, representation, or succession.

Halsbury's Laws of England, Hailsham Edition, Vol. 9, page 693, states that the suppliant in a petition of right, "may it seems, be either a British subject, or an alien." Then again it is pertinent to say that petitions of right have been presented in this Court, by others than a British subject, without any objection being taken to the status of the suppliant as an alien.

My conclusion is that in England and here, an alien may maintain a petition of right. The friendly alien has access to our courts like any subject, upon terms perhaps, and if the Petition of Right Act is merely procedural, it is unlikely that it was intended to refuse an alien the right to maintain a petition of right against the Crown upon securing the fiat, without express words of exclusion. The use of the words "subject and subject" in sec. 8 of our Petition of Right Act merely means that in a proceeding against the Crown by petition of right all the defences available in a proceeding between "subject and subject" shall be available to the Crown. This is far however from saying that an action could not be maintained by a petition of right by any friendly alien against the Crown. I do not think the mind of the legislature was directed to that point at all. I therefore think that the suppliant here, even if an alien, was entitled to proceed by petition of right in his claim for relief. I might point out that under the Customs Act an alien is subject to the same penalties and forfeitures and enjoys the same rights and remedies as a subject; no distinction is of course made between them.

But, there is another aspect to the question, as to whether a petition of right might be brought by the suppliant here, who is a citizen of France. In this petition the suppliant is described as of Sydney, Nova Scotia, the inference being that at the time the fiat was granted, Massein was a resident of or had his domicile at Sydney. It was only in the last amended statement of defence that it was pleaded that the suppliant was not a subject of His Majesty and therefore not entitled to the relief claimed,

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but it is not denied that the suppliant was resident at Sydney when the petition was filed, and there is nothing to indicate that the suppliant is not now resident at Sydney. Assuming then that the petitioner was resident at Sydney when the petition was filed, yet there is no suggestion that he was an alien enemy. A friendly alien while in this country, as a matter of law, is in the allegiance of the Crown, and so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations. This principle was discussed at great length in the House of Lords in *Johnstone* v. *Pedler* (1), and I would refer to that authority. Here, I think, the suppliant was competent to file a petition of right upon the ground that he was a subject by local allegiance, and was entitled to the protection of British law as would be a British subject.

The Crown pleads that on the entry of the judgment the suppliant became entitled to the possession of the goods and that they were thereafter in the possession of the Crown at the risk of the suppliant, and that the suppliant was guilty of negligence and laches in not accepting delivery before February 6, 1929. I do not think that this doctrine is applicable to the facts of this case. Perhaps the facts applicable to this point should be stated with some care. The suppliant, it is true, did not demand or accept delivery of the goods immediately after the recovery of the judgment. It will be remembered that the goods were under detention by the Crown for about one year prior to the date of the judgment. One can readily recognize the difficulties of the suppliant in the situation following upon the events I have narrated, and they were not of the suppliant's making. The actual owner of the goods was in France, the ship *Ariel* had probably long since returned to France, the goods could not be sold in Canada, and the solicitor of the owners of the cargo was insisting on a return of the full cargo. The owners of the cargo no doubt felt that they had unfairly suffered by the seizure and the year's detention of the goods, and had been otherwise seriously damaged, and

(1) (1921) 2 A.C. 262.

they no doubt entertained the belief that the customs authorities might in justice and with propriety, await the reasonable convenience of the owners in arranging for acceptance of delivery of the goods and their removal from Canada. And I am bound to say that would not appear, in the circumstances, to be an unreasonable expectation. In any event nothing immediately transpired in connection with the restoration of the goods to the owners. While the customs authorities, it is true, were pressing the suppliant from time to time to take delivery of the goods at Halifax, still it is also apparent that the same authorities were endeavouring to accommodate the suppliant, and even to the very end customs never acted, I think, upon the legal fiction that the goods had passed into the possession of the owners. The letter of January 18, 1929, from the Assistant Commissioner of Customs to Mr. Maddin is evidence of this. The customs authorities were aware they could not deliver or restore all the seized goods because in September, 1928, the Assistant Commissioner of Customs wrote to Mr. Maddin, the suppliant's solicitor, asking him to arrange to take delivery of the goods, and he stated "that any shortage that is finally established can be made good by delivery of other forfeited goods in substitution." Prior to the date of this letter correspondence had evidently been going on respecting a known shortage. Then later there was another letter from the same officer to Mr. Maddin stating that "any claim for shortage would be arranged afterwards." As late as November, 1928, the examining customs officers at Halifax reconditioned certain of the liquor containers, as I have already explained. The suppliant's solicitor apparently was taking the position that the seized goods were not to be restored by offering delivery of only a portion of the same at one time, and the balance at another time, which would obviously add to the perplexities of the suppliant's situation. It is possible that the suppliant might have demanded delivery of the goods beyond the territorial waters of Canada, but this was not done. The customs authorities evidently realized the difficulties concerning their own duties and obligations in the situation obtaining, and they never definitely took the position that in law the goods were in the possession of the suppliant, or that they were in warehouse at

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the risk of the owners. In the end it was the customs authorities at Halifax that delivered the goods at the ship's side. I do not think that in the facts of the case the Crown can now be heard to say that following the date of the judgment the goods had been restored and were in the possession of the suppliant or the owners. If there were any foundation for asserting such a position it was never done but was waived.

There is another aspect to this point to be considered. If the unrestored goods were stolen before the date of the judgment then not even under a legal fiction could the same be deemed to have passed into the possession of the owners. The fact that a portion of the shortage was discovered only when delivery of the restored goods was made—I refer to the containers where water was substituted for the original contents—does not prove that the theft of the same had not occurred before the date of the judgment; and the burden of showing this should not, I think, rest upon the suppliant. However, we may refer to the evidence of Mr. Acker, Collector of Customs at Halifax. Mr. Acker in cross-examination stated that two weeks after the goods were stored it was discovered that some of the goods were missing and at that time the skylight "was nailed up." So the theft commenced early in the history of the unlucky cargo, after arriving at Halifax. Earlier, in his direct examination, Mr. Acker stated that on the same occasion it was found persons had entered the warehouse through a skylight on the roof and thus had gained access to the floor on which the goods were stored; then the owner of the rented warehouse planked the skylight up and Mr. Acker states that "the goods were not touched after that." When the goods were stored in the warehouse, Mr. Acker stated, the owner of the warehouse put up a partition with "heavy two-inch plank, spaced between." It was later discovered "that it was possible to slip two of the planks up," and, he stated, "no doubt that is how the goods disappeared." That this could be done was only discovered in November, 1928, but actual theft of the goods must have occurred before the planking of the skylight, because after that, Mr. Acker stated, the goods were not touched. This evidence seems to fix very definitely the fact that the theft of the missing goods

occurred prior to the date of the judgment. I think it may safely be inferred that the theft of all the missing goods occurred before the date of the judgment, though the full extent of the loss was unknown until the remaining goods were delivered to the master of the *Florence E. McKay*. That simply means that the containers in the end found to be filled with water were erroneously believed, at the examination in November, 1928, to contain the original contents. Now, that being so, and the missing goods having been stolen before the date of the judgment, the same could not in law be deemed to have passed into the possession of the suppliant or the owners, and this point therefore falls to the ground.

Mr. Stewart contended also that the subject matter of this petition was *res judicata* by virtue of the order made by the court upon the Reference. This point was not raised in the pleadings, and it should have been raised there if at all, or, on a motion in the nature of demurrer. The Reference, as I have already mentioned, could only determine the question of the validity of the seizure and detention of the goods, and whether or not they should be forfeited or released. A portion of the goods not having been restored, and being incapable of restoration, the suppliant now seeks from the Crown the value of such goods by this petition, which is, I think, another matter entirely; and it does not, I think, constitute an abuse of the process of the court. I cannot see that any other remedy was open to the suppliant than to proceed as he now does, and as I have already stated, I do not see how the matter now standing for determination here could have been raised upon the Reference; in fact it was not disclosed to the court at the time the order for judgment was granted that the Crown was unable to make full restoration of the seized goods, though it must have been known at that time that some of the goods were missing. I think the Crown must fail upon this point.

Another point raised as a defence may be briefly disposed of. It was urged that the lost goods were stored in a customs warehouse and that the Crown is not liable for any loss of goods occurring while the same are in a customs warehouse, which, under the Customs Act, means any place where imported goods are retained without pay-

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ment of duty. Under the Customs Act, any seized goods are required to be placed in the custody of the nearest collector of customs, and secured by him; they might, so far as I can see, be stored in any building. In this case the goods were not imported goods and they were stored in an ordinary warehouse. I agree that if imported goods are lost while in a customs warehouse in transit to the importer, as in the case of *Corse* v. *The King* (1), the importer must bear the loss; and ordinarily such goods would be insured. I do not think that is this case at all. I do not think it is of importance here how or where the goods were stolen; the fact is they were not restored to their owners.

There remains to be considered one further point urged on behalf of the Crown. When the master of the schooner *Grace E. McLeod,* accepted delivery of the returned portion of the cargo at Halifax, he gave an undertaking in writing to deliver to the Collector of Customs at Halifax, within thirty days, a foreign customs landing certificate of the goods laden aboard his schooner, and having failed to deliver such foreign customs landing certificate, it is claimed by the Crown that the suppliant is liable to certain penalties under the Customs Act, and upon this is based a counterclaim in the amount of $47,280. The master of the schooner was not authorized to give such an undertaking and it should not, I think, have been demanded of him in the circumstances. In the proper sense of the word, and within the intendment of the Customs Act, this shipment of goods was not, an export. The master made an entry outwards in compliance with sec. 91 of the Act. Under sec. 96 (2) of the Customs Act, a bond is required upon the export of wines and spirituous liquors, and a foreign customs landing certificate is required before the bond is cancelled; but no bond was required of the master of the schooner here, or of any person representing the owner of the goods. I have no doubt the customs authorities both at Halifax and at Ottawa did not regard this shipment as an export of wines or spirituous liquors. At any rate I do not think the master of the schooner had any authority to give the undertaking he did, and I do not

(1) (1892) 3 Ex. C.R. 13.

think the customs authorities had any right to demand such an undertaking of him; the goods were not wines and spirituous liquors being exported from Canada within the meaning of sec. 96 of the Act. It was said that the customs authorities were exercised lest the goods should be smuggled back into Canada. The answer to that suggestion is that if they were they might be seized, and the master, together with his ship and cargo, would be liable to severe penalties. The counterclaim, I think, is utterly without foundation and the suppliant is not liable to any penalty for failure on the part of the master of the schooner to deliver a foreign customs landing certificate. It was suggested by Mr. Stewart that if the landing certificate had been supplied the claimant would have been paid for the shortage of goods in question. If that were intended, then there being no authority, so far as I can see, for requiring the delivery of a foreign customs landing certificate, and there being no suggestion that the liquors were ever landed in Canada, I think, that the Crown should not have set up the counterclaim.

It is my opinion therefore that the Crown is liable to the suppliant for the value of that portion of the seized cargo which has not been restored. Now, is the value of such goods the price at which the same were said to be tentatively sold, or the replacement cost of such goods in Canada at the time of the seizure, or the cost, insurance, freight, etc., plus the ordinary commercial profit usually enjoyed in the case of such a class of goods, or is it the price which the goods would likely bring if offered for sale and delivery upon the high seas, at or near the point of seizure. At once I conceive of many difficulties in reaching an entirely satisfactory conclusion upon this point. I have decided to reserve this question until the settlement of the minutes when I would desire further argument of counsel, and a further discussion of the effect of the evidence upon this phase of the case. It is clear, I think, that the value of the goods must be determined as of the time of seizure. The cost of the goods at the time and place of export, freight, insurance, and such items, I might now say, do not give me much concern. My difficulty is in determining the value of the goods to the owner at the time of seizure, and it is upon this point that I should

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like to hear counsel again. If any further evidence is available to either party which would assist me, it may be presented by affidavit.

The suppliant is entitled to succeed in his petition and costs will follow the event.

Judgment accordingly.