
BETWEEN:

MARGARET LIEBMAN, carrying on business under the name or style of MILLS MUSIC MERCHANTS } CLAIMANT;

1945 Feb. 5 — 1948 Jan. 29

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Forfeiture—The War Exchange Conservation Act, 1940, S.C. 1940-41, c. 2, ss. 3(1), 5—Customs Act, R.S.C. 1927, c. 42, ss. 174, 176—Strict construction of penal statutes—Construction of prohibitory statutes to prevent evasion—Application of prohibition of an Act to a thing essentially or substantially the thing prohibited.

The War Exchange Conservation Act, 1940, prohibited the importation of coin-operated amusement devices from a non sterling area without a permit. Claimant imported from the United States all the parts of the devices, except the wooden frames or cabinets which he purchased in Canada, and assembled the machines in Canada. These machines were seized by the Customs officers on the ground that the importa-

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tions of the parts were prohibited and their forfeiture was ordered by the Minister of National Revenue. The claim for the return of the machines was dismissed.

Held: That if a thing is essentially or substantially that which is prohibited by an Act it is within the prohibition of the Act. *Philpott* v. *St. George's Hospital* (1857) 6 H.L. Cas. 338 followed.

2. That whether the thing done is essentially or substantially that which is prohibited is a question of fact.

3. That the importations of parts by the claimant were substantially importations of coin-operated amusement devices contrary to the prohibitions of The War Exchange Conservation Act, 1940, and that the seizure and forfeiture of the machines were lawfully made.

Claim for the return of goods seized and forfeited under the Customs Act on the ground that they had been imported contrary to the prohibitions of The War Exchange Conservation Act, 1940, referred to the court by the Minister of National Revenue.

The claim was heard before the Honourable Mr. Justice Thorson, President of the Court, at Hamilton.

W. Schreiber for claimant.

J. P. O'Reilly K.C. for respondent.

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

The President now (January 29, 1948) delivered the following judgment:

This claim has been referred to this Court by the Minister of National Revenue under section 176 of the Customs Act, R.S.C. 1927, chap. 42. It is for the return of 38 slot machines seized by the Customs and Excise division of the Department of National Revenue at Hamilton and declared forfeited by the Assistant Deputy Minister of National Revenue (Customs) under section 174 of the Customs Act. The grounds for the seizure and forfeiture were that the importations of the goods had been prohibited by section 3 (1) of The War Exchange Conservation Act, 1940, Statutes of Canada, 1940-41, Chap. 2, and that they were subject to forfeiture accordingly under section 5 thereof. Section 3 (1) of the said Act provides:

3. (1) The importation into Canada of any goods enumerated and described in Schedule One to this Act is prohibited except in such cases

as the Minister in his discretion deems desirable and under and in accordance with the terms of a permit granted by him: Provided however that this section shall not apply to:—

(*a*) any goods imported from, and being of the growth, produce or manufacture of, any country within the sterling area or Newfoundland, except, at the discretion of the Minister, goods composed wholly or in part of silk;

(*b*) any goods which on or before the second day of December, 1940, were in transit to Canada.

and section 5 reads:

5. Any goods, the importation of which into Canada is by this Part prohibited shall, unless a permit for their importation has been obtained or such goods have been exempted by the Minister as hereinbefore provided, be deemed to be goods the importation whereof is prohibited by section thirteen of the *Customs Tariff* and any such goods imported shall thereby become forfeited to the Crown and shall be destroyed or otherwise dealt with as the Minister directs; and any person importing any such prohibited goods or causing or permitting them to be imported shall, in addition to any other penalties under the *Customs Act* or the *Customs Tariff*, be liable on summary conviction or on indictment to a fine not exceeding two thousand dollars or to imprisonment for not more than one year, or to both fine and imprisonment.

The relevant tariff item number in Schedule One is ex 466a reading as follows:

Punch boards and pin-ball games; vending machines, games, amusement devices, phonographs, radios, musical instruments, scales, parking meters, locks and lockers, coin-, disc- or token-operated;

The machines are coin-operated amusement devices within the meaning of this tariff item and it is admitted that the importations were subsequent to December 2, 1940, and that no permit was granted.

There is very little dispute as to the facts. The claimant is the owner of a business in Hamilton carried on under the name of Mills Music Merchants and also of Coin Craft Canada. It was transferred to her in 1940 by her husband, Eric Liebman, who was its former owner and continued to be its manager. There were two importations. The first one was under Customs entry number 1426 A, dated April 17, 1941, consisting of 30 boxes of goods described as "parts for coin-operated machines". The imported goods included all the parts, supports, top assemblies, bolts, nuts and screws necessary for the complete assembly of 25 coin-operated machines known as "Chrome Bells" except the wooden frames or cabinets. On this importation the claimant paid $1,510.07 by way of customs duty, war exchange tax and sales tax. The second importation was

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under Customs entry number 5773 A, dated June 6, 1941, consisting of 26 boxes of goods described as "(service parts for Canadian shipments)". These goods also included all the parts, levers, hand assemblies, screws, bolts, nuts and nails necessary for the assembly of 25 coin-operated machines known as "Mills Hand Load Jackpot Bells" except the wooden frames or cabinets. On this importation the claimant paid $1,198.64 for customs duty, war exchange tax and sales tax. Liebman had also arranged with the Canadian Fixture Company of Hamilton for the purchase of wooden cabinets for the machines, each consisting of a wooden base and two wooden uprights, and these were delivered about June 13, 1941. Liebman then proceeded to assemble the parts and on June 20, 1941, after an inspection of the claimant's premises by a Customs officer, applied for and obtained a sales tax and manufacturer's licence and later, after an audit, paid $509.26 by way of sales tax and $3,475.09 as excise tax. On July 15, 1941, Inspector C. H. Tyers of the Customs and Excise division at Hamilton seized 38 of the machines, 16 Chrome Bells and 22 Hand Loads, in the claimant's shop on the ground that their importation had been prohibited by The War Exchange Conservation Act, 1940. On November 9, 1942, both Liebman and the claimant were charged with unlawfully importing the goods. Magistrate Burbidge of Hamilton found each of them guilty in respect of one of the importations and fined the claimant $100 and costs and Liebman $200. A *nolle prosequi* was entered in respect of the charges in connection with the other importation. Appeals from these convictions were taken to His Honour Judge Schwenger, the Junior County Court Judge of Wentworth County, who allowed the appeals and quashed the convictions. Notwithstanding this fact, the Assistant Deputy Minister of National Revenue (Customs) on January 21, 1944, decided, under section 174 of the Customs Act, "that the goods be and remain forfeited and be dealt with accordingly." The claimant's solicitor notified the Department of National Revenue, Customs Division, that she would not accept the decision as final and on June 27, 1944, the Minister, under section 176 of the Customs Act, referred the claim against the decision to this Court for adjudication.

The evidence clearly establishes what Liebman intended to do. Shortly after the Act came into effect he consulted Mr. Williams, the local Appraiser at Hamilton, and Mr. Leask, the chief clerk in the Long Room. He said that he told Mr. Williams that he intended to import everything but the wooden parts for the machines and asked him whether it would be permissible to do so and that Mr. Williams, after consulting the Act, thought that such parts could be imported. Mr. Williams denied this and said that Liebman had merely inquired about the importation of parts and that he had suggested to him that he should communicate with Ottawa. I accept Mr. Williams' statement. Liebman also said that he told Mr. Leask the same thing but on cross-examination modified this statement and said that he had told him that he intended to bring in parts for new machines. Mr. Leask said that Liebman had merely asked about parts and that he had told him the matter came under the Appraiser. These conversations took place early in January, 1941. On January 6, 1941, Liebman wrote to Mr. P. F. Jackson, a Customs practitioner in Ottawa, asking him to get a ruling from the Customs Department on the subject of the importation of parts "for replacement or for original equipment purposes". Mr. Jackson obtained a written ruling from Mr. L. R. Younger, writing for the Commissioner of Customs, dated January 15, 1941, to the effect that parts of coin-operated amusement devices and vending machines were not prohibited from importation, but that a complete set of parts imported in an unassembled condition would not be considered as parts and that if all the parts required to make the device were purchased outside the sterling area the importation of such parts would be prohibited. Subsequently, on January 31, 1941, Liebman showed this letter to Mr. Ballantyne, the Collector of Customs and Excise at Hamilton, who cautioned him to remember the concluding part of the ruling. It is obvious that Liebman then decided upon his course of action, namely, that he would import as much in the way of parts as possible short of importing all the parts. Early in February, 1941, he gave instructions to the Mills Novelty Company of Chicago to ship him all the parts needed in building "25 Chrome Venders" except the wooden cabinets. Liebman paid the

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same price for these parts as he would have paid for the assembled machines or devices less the cabinets, namely, $121.50 United States funds "per complete and assembled device less an allowance of $6.00 per wooden frame or cabinet not shipped". Having successfully imported these parts, by the importation of April 17, 1941, Liebman then ordered parts for a different kind of machine, called the Mills Hand Load Jackpot Bell. The Mills Novelty Company had not been in the habit of selling these machines in parts, but Liebman went to Chicago and gave them personal instructions as to how he wanted the shipments made. He admitted that he had done so and also that he had gone to the exporter's school for some weeks to learn how to assemble the machines. The second lot of parts was shipped in due course. The price paid for these parts was the same as would have been charged if they had been assembled namely, "$101.50 per complete and assembled device, less an allowance of $6.00 per wooden frame or cabinet not shipped". The price of the second lot of parts was less than that of the first because certain "vending parts" were not included. In each case, when the goods were shipped the invoice described them as parts, and it would not have been possible for the Customs officers, without investigation, to determine whether the imported parts were all the parts necessary for the complete assembly of the prohibited machines or not. From the evidence it seems quite clear to me that Liebman had carefully planned his course with a view to importing as much of the slot machines in the form of parts as he thought he could safely do without importing the complete machines or all the parts. He thought that he had worked out a scheme, within Mr. Younger's ruling, whereby he could safely and lawfully import all the metal and working parts that no one but the exporter could make and buy in Canada the wooden frames or cabinets that almost anyone could make and thereby circumvent the prohibitions of the Act without coming within its express terms or becoming subject to its sanctions. That his mind was not entirely free from doubt is shown by the careful precautions he took, including a special trip to the exporters in Chicago, to have the machines, less the wooden frames or cabinets, shipped in the form of parts rather than in an assembled condition.

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But the issue is not what Liebman intended or thought, but only whether what he did was prohibited. The rules for the interpretation of such an Act as The War Exchange Conservation Act, 1940, help to answer the question. It is a prohibitory Act designed to conserve dollar exchange by prohibiting, except as permitted, the importation of specified goods from other than sterling areas. It is a penal Act in the sense that it attaches penal consequences to breach of its prohibitions. It is said that penal statutes must be construed strictly, but this really means no more than the statement in Maxwell on the Interpretation of Statutes, 8th edition, at page 231:

> But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

But while this is so, the Act is primarily a prohibitory one and it has been said that a prohibitory statute should be construed with a view to preventing evasion of it. This use of the word "evasion" was criticized by Lord Cranworth L.C. in *Edwards* v. *Hall* (1), where he said:

> I never understood what is meant by an evasion of an Act of Parliament: either you are within the act of parliament or not within the act of parliament. If you are not within it, you have a right to avoid it, to keep out of the prohibition; if you are within it, say so, and then the course is clear; and I do not think you can be said not to be within it because the very words have not been violated.

But, as Maxwell points out, at page 101, the word "evasion" is sometimes used to mean "avoidance". Indeed, the word is used in two senses, one meaning a course of conduct designed to circumvent the objects of the Act and really amounting to a breach of it, and the other merely an avoidance of coming within its terms. There is nothing unlawful about the latter, but the Courts seek to prevent the former. At page 101, Maxwell makes a number of statements that show the state of the law on the subject from very early times:

> The office of the Judge is, to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited

(1) (1856) 25 L.J. Ch. 84.

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or enjoined. *Contra legem facit, qui id facit quod lex prohibet. In fraudem vero legis facit, qui salvis verbis legis sententiam ejus circumvenit;* and a statute is understood as extending to all such circumventions, and rendering them unavailing. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

All these statements are of long standing and great authority. Then follow two leading statements in the House of Lords. In *Philpott* v. *St. George's Hospital* (1) the head note states:

> Prohibitory statutes must not be interpreted on a principle of tendency; if any thing done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is within the true construction of the statute, the thing prohibited.

And Lord Cranworth L.C. said, at page 348:

> Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done that is substantially that which is prohibited, I think it is perfectly open to the Court to say that it is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things, actually prohibited.

There were similar expressions in *Jeffries* v. *Alexander* (2) by Blackburn J., at page 623:

> The principle, as I understand it, is that whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly, and endeavoured to conceal that they have done so.

And by Byles., at page 628:

> what the statute forbids must not be done either directly or indirectly,

These principles are applicable to the present case. While it is not permissible that the Court should extend the prohibitions of the Act beyond its express terms to things not covered by them, it is imperative that the terms should be read as applying to things that are essentially or substantially within the prohibitions. For example, the fact that the parts of coin-operated amusement devices are not expressly prohibited does not warrant the assumption that all the parts of such devices may be lawfully imported. Indeed, if all the parts, including the wooden cabinets, had been imported I think there can be no doubt that such an importation would have been a prohibited one. It was similarly held in *R.* v. *Greene* (3) that sets of complete

(1) (1857) 6 H.L. Cas. 338.
(2) (1860) 8 H.L. Cas. 594.
(3) (1941) 81 C.C.C. 346.

parts for drums which were imported in Canada unassembled, but which might be assembled into completed drums without additional material, were "brass band instruments" within the meaning of The War Exchange Conservation Act, 1940, and that their importation into Canada without a permit was unlawful. To have held otherwise would, in my judgment, have wholly defeated the declared object of the Act.

In the present case all the parts of the coin-operated amusement devices were imported except the wooden cabinets. Can the fact that the cabinets were not imported have the effect of taking the importations of all the other parts out of the prohibitions of the Act? The answer, according to the principles referred to, depends on whether the imported parts were essentially or substantially goods whose importation was prohibited by the Act. If they were, then the forfeiture must stand. The question can also be put otherwise. Were the imported goods essentially or substantially things other than those which could not lawfully be imported? In whichever form the question is put it is one of fact. On this point, the evidence is conflicting but some of it is merely a matter of difference of opinion. Liebman said that the machines were not sold for use in private homes but for use by the public, that the machine was a commercial amusement device designed for making money for its owner, and that for such purpose it had no value without the base and the two sides. He gave as his reasons for this conclusion that the wooden base and sides enclosed the mechanism, including the cash box, and supported all the working parts, that a number of the parts were attached to the cabinet, that it was the only support for the main operating lever, that the whole front, top and back of the machine were attached to the cabinet, that the cash box slide was attached to the base and that the metal back could not be attached securely to the machine without the base and sides. He stated further that he would not think of putting one of the machines on location if the wooden frame was not there, that no one would buy the machine without the base and sides and that it could not be used commercially without them. Liebman insisted that the wooden cabinet was a necessary part of the machine and that it could not be

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operated without it. Counsel for the respondent, on the other hand, contended that the base and sides served only the purpose of giving support to the machine for handling it and moving it from place to place or to set it up for show purposes and make it more attractive in appearance, but was not necessary for use of the device. It is clear that the machine would work without the cabinet. It appears that counsel operated it in the Police Court in Hamilton, that a coin was inserted, the lever pulled and the works put into motion, but Liebman contended that this operation of the machine could not be regarded as a commercial one. He admitted that the lever and the wheels worked and the discs went around but insisted that it did not work commercially.

In my view, the importations of the parts without the cabinets must be regarded as if the machines had been imported in an assembled condition without the cabinets. How would the imported goods have then been described? There can be no doubt that their proper description would have been "coin-operated amusement devices" even although there were no cabinets with them. If an attempt had been made to import them in that state there is no doubt as to what would have happened. Their entry would have been refused and, in my opinion, properly so for their proper description would have brought them within the express prohibitions of the Act. If they could not have been called coin-operated amusement devices what else could they have been called? The answer is that they could not have been properly described otherwise. The fact that the addition of the wooden cabinets would be required for their sale does not determine the matter. If we were to suppose that the importation of motor cars was prohibited could it be said that motor cars less the tires or less the bumpers could lawfully be imported? Without such parts the articles would still be motor cars, although not saleable as such. I can see no basic difference in the present case. The goods imported by Liebman were substantially coin-operated amusement devices within the meaning of tariff item ex 466a, even although they were imported in the form of parts without the wooden cabinets. That the cabinets were not also imported did not so change the character of the imported goods as to make them

something other than coin-operated amusement devices and so take them out of the ambit of the prohibitions.

Nor can the claimant draw any comfort from the pretention that work and labour were required to assemble the parts. Liebman said that the cost of this was from $30 to $40 for the first few machines but from $10 to $12 for the later ones. There is no evidence apart from his own word to substantiate this statement but there is an estimate of a much smaller amount on the departmental file which by section 177 of the Customs Act is made part of the record. Whatever the cost of assembly was it is clear that all of it except that of putting the base and sides on, which was a simple matter, could have been saved by the claimant if the machines less the wooden cabinets had been imported in their assembled condition, for he paid as much for the parts as he would have paid for the assembled machines—but to do this would have been to invite certain rejection of the machines, which Liebman sought to avoid. He thought he had carefully worked out a scheme for the avoidance of the prohibitions of the Act, but what he did was really an evasion of the terms of the Act amounting to breach of them. His importations of the parts were substantially importations of coin-operated amusement devices contrary to the prohibitions of the Act. It follows that the seizure and forfeiture of the machines were lawfully made and that the claim for their return must be dismissed with costs.

Judgment accordingly.