

Between

THE KING ON THE INFORMATION OF }
THE ATTORNEY-GENERAL FOR THE } PLAINTIFF;
DOMINION OF CANADA }

1905
April 25.

AND

GEORGE WASHINGTON LOVEJOY }
AND WILLIAM HENRY LOVEJOY, }
CARRYING ON BUSINESS AS CO-PART- } DEFENDANTS.
NERS UNDER THE NAME, STYLE AND }
FIRM OF "DOMINION DENTAL MANU- }
FACTURING COMPANY"..... }

Smuggling—Penalties—The Customs Act, secs. 192, 236, 246—Averments in information—Sufficiency of—Demurrer—Prescription—Jurisdiction.

In an information for smuggling, laid under the provisions of sec. 192 of *The Customs Act*, it is a sufficient averment to allege that "the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the Custom house." It is not necessary to charge the defendant with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section.

2. In such an information where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found". The offender is only liable to forfeit twice the value of the goods, when the goods are not found but their value has been ascertained.
3. The penalty "not exceeding two hundred dollars and not less than fifty dollars," mentioned in sec. 192 of *The Customs Act* as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace", cannot be sued for in the Exchequer Court of Canada. (*Barraclough v. Brown* [1897] A.C. 615 referred to.)
4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under sec. 240 of *The Customs Act*, where the goods have been seized by a Customs Officer, such seizure is to be deemed a commencement of the proceeding within the meaning of sec. 236.

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INFORMATION for the recovery of penalties by the Crown for an infraction of *The Customs Act*.

The facts of the case are stated in the reasons for judgment.

February 20th 1905.

D. Macmaster, K.C., in support of the demurrer, contended that it was necessary to set out in the information that the defendants "clandestinely" introduced the goods in question into Canada. The character of the offence in the language of the statute creating it should be set out. (Cites sec. 192 of *The Customs Act*, R. S. C. c. 32; *Bullivant v. Attorney-General for Victoria* (1); *Cochran v. United States* (2). The defendants must be apprised in the pleadings of the character of the wrong-doing charged against them.

Again, it should have been averred in the information that the goods were "not found." The plaintiff cannot ask for the value of the goods where the goods are found. The Crown is not entitled to the value of the goods and their forfeiture at the same time. The information is bad in so far as it makes this cumulative claim.

Furthermore this court has no jurisdiction for the recovery of penalties to the amount of \$77. That sum should be sued for before two justices of the peace.

Under the practice of Quebec these objections are properly taken by way of demurrer, and not treated as grounds for a motion to strike out part of the information as in the English practice.

R. Taschereau, contra. The goods were not found; only a formal seizure was made. It was only upon an examination of the defendants' books that an evasion of *The Customs Act* became apparent.

(1) [1901] A. C. 196.

(2) 157 U.S. 286.

The Solicitor-General for Canada (the Honourable R. Lemieux, K. C.,) argued that under sec. 197 of *The Customs Act* it was open for the Crown to sue for the forfeiture of the goods and the treble value thereof as a penalty.

Again, under sec. 228 it is not necessary to set out with particularity the nature of the evasion of the Act.

This section says: "It shall be sufficient to state the penalty or forfeiture incurred, and the Act or section under which it is alleged to have been incurred, without further particulars."

The Exchequer Court has jurisdiction under sec. 22 of *The Customs Act* in respect of the penalties and forfeitures set out in the information. Cites *Bouvier's Law Dictionary*, "Penalty", (1).

THE JUDGE OF THE EXCHEQUER COURT now (April 25th, 1905,) delivered judgment.

The case comes before the court upon an inscription in law against certain allegations contained in the information filed herein (2).

By the first and second paragraphs of the information it is in substance, among other things, alleged that between the months of June, 1899. and March, 1902, inclusive, the defendants imported into Canada goods subject to duties to the value of \$6,524.20. By the third paragraph a claim is made for the duties payable thereon, as to which there is no question at present, and then the fourth paragraph follows in these terms:—

"4. The defendant in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada, and did fraudulently import such goods into Canada,

(1) Rawle's ed. p. 644.

(2) The Code of Civil Procedure

of the Province of Lower Canada, Art. 191 et seq; Audette's Exchequer Court Practice, page 217, Rule 1.

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“ without due entry inwards of such goods at the Custom-house. The value of the said goods has been ascertained and amounts to the sum of \$6,524.20, whereby the defendants forfeited to His Majesty the value of said goods. And in addition thereto a sum equal to the value of such goods, and further became liable to 385 penalties of two hundred dollars each amounting in the aggregate to \$77,000.00 and to imprisonment for a term not exceeding one year in respect of each importation. The said forfeitures and penalties are incurred under section 192 of *the Customs Act.*”

By section 192 of *The Customs Act* it is provided that if any one smuggles or clandestinely introduces into Canada any goods subject to duty, or makes out, or passes, or attempts to pass through the Custom-house any false, forged or fraudulent invoice, or in any way attempts to defraud the revenue by evading payment of the duty, or of any part of the duty on any goods, such goods, if found, may be seized and forfeited; or if not found, but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as so ascertained; and every such person, his aiders and abettors shall in addition to any other penalty to which he and they are subject for each offence forfeit a sum equal to the value of such goods, which sum may be recovered in any court of competent jurisdiction; and shall further be liable on summary conviction before two justices of the peace, or any other magistrate having the powers of two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment.

A number of objections are taken to the sufficiency of the fourth paragraph of the information. They are

contained in clauses (a), (b), (c), (d) and (e) of the first paragraph of the inscription in law. The objections stated in clauses (a) and (b) are that it is not alleged that the defendants smuggled or clandestinely introduced into Canada the goods therein mentioned; or that they passed or attempted to pass through the Custom-house any false, forged or fraudulent invoice, or in any way attempted to defraud the revenue by evading the payment of duty; and that the way in which the defendants defrauded the revenue, or attempted to defraud the revenue is not specified. It is clear of course that it is not necessary for the Attorney-General to charge the defendants with all the offences mentioned in the section of the Act cited. It is sufficient if one offence against the same is set out. What is alleged is that the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the Custom-house. That, it seems to me, is a good and sufficient allegation that the defendants attempted in the way mentioned to defraud the revenue by evading the payment of duty on such goods. These objections, in my opinion, cannot be supported.

The objection to the sufficiency of the paragraph of the information mentioned set up in clause (c) is that it is not stated that the goods so alleged to have been fraudulently imported were "not found," and the defendants are not liable to forfeit a sum equal to the value of the goods except upon the happening of that contingency. That objection, so far as it goes to the particular penalty, is, I think, good. If the goods are found they may be seized and forfeited, and the offender in addition forfeits a sum equal to the value of such

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goods. If they are not found, but their value is ascertained, he forfeits the value thereof as ascertained; and in addition a sum equal to such value; that is, he forfeits twice the value of the goods as ascertained. But that happens only where the goods are not found but the value thereof is ascertained. In the other case the goods may be seized and forfeited, but the offender in addition forfeits the value of the goods only.

Then in clause (*d*) and (*e*) further objections to the fourth paragraph of the information are stated, of which it will be necessary to consider that only which is set up in clause (*d*) and which is that the Crown cannot recover and enforce in this court penalties to which the offender, if liable, is liable only on summary conviction before two justices of the peace or before a magistrate having the powers of two justices of the peace. That objection also appears to me to be good. It is clear, I think, that these penalties cannot be recovered or enforced in this court upon an information filed by the Attorney-General. The case of *Barraclough v. Brown* (1) arose upon a statute which gave the undertakers of the rivers Aire and Calder a right to recover, in a court of summary jurisdiction, certain expenses incurred in removing vessels sunk in the waters mentioned in the statute. Such expenses having been incurred an action was brought therefor in the High Court of Justice, and the case went to the House of Lords; and it was there held that the action would not lie, and that as the High Court had no jurisdiction no declaration ought to be made as to the rights of the parties. Lord Herschell in giving reasons in that case for his opinion said: "The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to

(1) [1897] A. C. 615.

“ be found in the enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is to recover such expenses from the owner of such vessel in a court of summary jurisdiction. I do not think the appellant can claim to recover by virtue of the statute; and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right.” So in this case the defendants, if liable to the penalties in question, are liable only upon summary conviction before two justices of the peace, or before a magistrate having the powers of two justices of the peace. There is no common law liability; and nothing in the statute constituting such penalties a debt. The question that has arisen in a number of cases as to whether an indictment will lie for the contravention of a statute in respect of which a particular remedy is given or proceeding prescribed by the statute, has been decided upon somewhat analogous grounds (1); *R. v. Buck* (2); *R. v. Jones* (3); *R. v. Wright* (4); *R. v. Robinson* (5); *R. v. Harris* (6); *R. v. Buchanan* (7); *R. v. Mason* (8); *R. v. Bennett* (9).

In the 5th paragraph of the information a schedule of the goods imported by the defendants, with the value of the goods, the dates when the goods were imported, and the duties payable thereon, is given. Some of these importations took place more than three years before the filing of the information, and as to these it is objected that any claim for such penalties would be prescribed under section 240 of *The Customs Act*, and that, I think, would be so, except as to any goods that were seized, in which case the seizure by

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(1) 2 Hale's P.C. 171.

(2) 2 Str. 679.

(3) 2 Str. 1146.

(4) 1 Burr. 543.

(5) 2 Burr. 805.

(6) 4 T. R. 205.

(7) 8 Q. B. 883.

(8) 17 U. C. C. P. 534.

(9) 21 U. C. C. P. 235.

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the officer is to be deemed to be a commencement of the proceeding. (section 236.)

Objections similar to those that have been considered with reference to the fourth paragraph of the information are raised with respect to the 6th, 7th and 8th paragraphs thereof, and may, I think, be disposed of, without discussing them further. In my opinion the objection set up in clause (a) of the 3rd paragraph of the inscription in law cannot be sustained, while the objections stated in clauses (b) and (c) of that paragraph are good. The objection to the 9th paragraph of the information has already been disposed of in considering the objections to the 4th paragraph. The objections that have been sustained do not constitute an answer to the causes of action set up. They go only to the question of the amount of the penalties recoverable and not to the right of the Crown to maintain the information upon the facts set out.

With reference to the objection taken that twice the value of goods cannot be recovered except in the case mentioned, of the goods not being found, an application on behalf of the plaintiff was made at the hearing of the inscription in law for leave to amend the information by adding an allegation to that effect; and that application will be granted and leave given. If such an amendment is made it will also be necessary to amend the allegation in the 9th paragraph of the information to the effect that the goods were seized. If they were not found they could not be seized. If they were seized they must first have been found. It may, of course, be true that some of the goods were found and seized and that some of them were not found. And if that is the case the amendment may be so made as to set out the actual facts.

Then with regard to the other objections that have been sustained the following portions of the information will be rejected and struck out, that is to say:—

(1.) In the 4th paragraph the following allegation:—“And further became liable to 385 penalties of two hundred dollars each amounting in the aggregate to \$77,000, and to imprisonment for a term not exceeding one year in respect of each importation.”

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(2.) In the 6th paragraph, the following allegation:—“And further became liable to penalties of two hundred dollars each and to imprisonment for a term not exceeding one year.”

(3.) In the 7th paragraph the following allegation:—“And further the defendants have become liable to 385 penalties of two hundred dollars each and to imprisonment in respect of three hundred and eighty five different offences for a term in each case not exceeding one year and not less than one month.”

(4.) In the 8th paragraph the following allegation:—“And further the defendants have become liable to 385 penalties of two hundred dollars each and to imprisonment with respect to 385 different offences for a term in each case not exceeding one year and not less than one month;” and

(5.) In the 9th paragraph the clauses lettered (d.) and (f.)

Nothing will be struck out of the fifth paragraph of the information. The allegations therein contained are relevant and material. Even if some portion of the penalties alleged to have been incurred in respect of the importations therein referred to has been prescribed, the duties payable thereon constitute a debt due to His Majesty (*The Customs Act*, s. 7) and are not prescribed.

The costs of this hearing and of any amendment made in pursuance of the leave given will be costs to the defendants in any event.

Judgment accordingly.