HIS MAJESTY THE KING.....APPELLANT;

AND

GERARD BUREAU.....RESPONDENT.

1949

*Feb. 22
*Jun. 2

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs—Smuggling—Seizure—Forfeiture—Acquittal by jury—Whether it invalidates seizure—Notice of seizure—Whether it concludes the right of Crown to make the seizure—Customs Act, R.S.C. 1927, c. 42, ss. 172, 177.

Respondent's automobile and 159,600 American cigarettes were seized by Customs officers at the customs house at Armstrong, Quebec, where the respondent was reporting his re-entry into Canada but without declaring his possession of the cigarettes. The Minister of National Revenue decided that the cigarettes and the automobile should be forfeited but his decision was reversed by the Exchequer Court.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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Held: Taschereau J. dissenting, that as the evidence established that respondent was guilty of a number of breaches of the Customs Act, any one of which was sufficient to warrant the seizure and forfeiture, his acquittal by a jury on a charge of unlawfully importing nor the fact that there had been no "smuggling" did not invalidate the seizure nor affect the right of forfeiture. Section 177 of the Customs Act considered.

Per Taschereau J. (dissenting): The evidence shows that respondent did not smuggle the cigarettes, and as the Court has no jurisdiction to go beyond the reasons given by the Minister in the notice under sec. 172, it cannot therefore inquire whether he committed other infractions justifying the seizure.

APPEAL, ex parte, by the Crown from a decision of the Exchequer Court of Canada (1), Thorson J., reversing the decision of the Minister of National Revenue that respondent's automobile and goods be forfeited for breach of the *Customs Act*.

The material facts of the case and the questions at issue are stated in the above head note and in the judgments now reported.

F. P. Varcoe, K.C. and J. Desrochers for the appellant.

The CHIEF JUSTICE:—On November 19, 1945, the respondent, with his wife and his brother, went to Lewiston in the United States where he purchased 159,600 American cigarettes which he brought in his automobile on his return to Canada on November 20th. He arrived at the Customs Office at Armstrong, which is ten miles inside the border, about one o'clock in the morning of a stormy night. He stopped his automobile near the office. He entered the office and told Mr. Gosselin, one of the customs officers whom he knew, that he had returned from a trip to the United States and that he had brought in his automobile a small ·22 rifle which he had purchased. When Mr. Gosselin, and also Mr. Poulin, another customs officer, asked him if he had any merchandise to declare, he replied that he had nothing else. Officer Poulin, who was on duty that evening, went out from the office to make an inspection of the automobile and, some minutes later, returned to the office saying to Gosselin that the automobile was full of cigarettes and that he was going to find a flashlight.

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Gosselin immediately went out of the office and the respondent followed him. Gosselin says that the respondent and his brother offered him $100 if he would let them proceed, but the brother and also the respondent's wife denied any such promise and Poulin says he did not hear it.

When Poulin went out the first time he had seen three cartons of cigarettes on the front seat and when he made a more complete inspection he found that the luggage compartment of the automobile and the rear seat were full of cigarettes. The cigarettes were unloaded from the automobile and taken into the office and, when Gosselin told the respondent that the duty would be about $2,600, the respondent said that that was too much and that he could not pay it and asked permision to take the cigarettes and return to the store in the United States where he had bought them, but he was refused permission to do this. The officers detained the cigarettes, but because it was night and raining they permitted the respondent to continue his trip to St. Georges de Beauce with his wife and brother on condition that he return to the office the next day to deliver his automobile. When he did not return the officers caused the automobile to be seized.

The respondent admitted that, when questioned in the Customs Office as to whether he had any other goods to declare, he did declare that he had no other goods, but says he did so because there were other people in the Customs Office and he did not wish to declare his cigarettes in front of them, but he knew that the officer would see the cigarettes. It is to be noted that, while the respondent contends that he had understood that the customs duty would be thirty-five per cent of the value of the cigarettes and states that he paid about $1,100 for the cigarettes, nevertheless he did not have with him even $100 at the time he reported to the Customs Office. In addition, it is to be noted that he stopped at the office very late at night when it was dark and stormy, that he stopped a short distance away from the Customs Office and that the cigarettes were covered with two coats.

On December 4, 1945, a notice was given on behalf of the Deputy Minister of National Revenue for Customs and Excise to the respondent that the cigarettes and automobile, valued at $4,910, had been seized and that he was

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charged with smuggling the cigarettes into Canada and with using the automobile for such illegal importation. The notice gave the respondent thirty days within which to submit evidence to refute this charge.

On July 3, 1946, the Minister of National Revenue rendered a decision that the cigarettes and automobile be forfeited, and, on July 4, 1946, notice was given to the respondent's solicitor of the Minister's decision.

On July 3, 1947, the Minister of National Revenue referred the respondent's claim to the Exchequer Court of Canada for adjudication under section 176 of the *Customs Act*.

The solicitors for the claimant and the respondent agreed, *inter alia*, that the evidence given at a trial of the respondent on a charge laid against him under the *Customs Act* in respect of the alleged illegal importation should be used instead of taking evidence in the Exchequer Court, and, further, that the respondent had been found not guilty by a jury of such charge and that there had been no appeal from that verdict.

The case came on for hearing before the learned President of the Exchequer Court at Quebec (1) on January 20, 1948, and on March 9, 1948, he gave judgment whereby it was adjudged that the respondent's automobile and certain goods which had been seized from him should be returned to him upon payment by him of the customs duty, and further that he was entitled to his costs.

The learned President held that the respondent's acquittal by the jury on the criminal charge did not make the question of whether the cigarettes were illegally imported *res adjudicata*. He held, however, that the proof showed that the respondent had not smuggled the cigarettes into Canada and that the forfeiture could not be upheld by reason of any other breach of the *Customs Act* because no other breach had been specified in the notice of December 4, 1945, to the respondent. The Minister of National Revenue, in the name of His Majesty the King, now appeals from that judgment.

The Customs Seizure Report by Officer Poulin was to the effect that the respondent was "trying to import into Canada 159,600 cigarettes". The notice to the respondent

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stated that "les dites cigarettes ont été passées en contrebande au Canada et que la dite automobile a servi à cette importation illégale".

After he received such notice the respondent, through his solicitor, sent to Mr. Hicklin, Deputy Minister of National Revenue for Customs, an affidavit stating that he never had any intention of defrauding the customs and that he had imported these cigarettes with the intention of paying thirty-five per cent of their value at the customs office, but that, when he found several persons playing cards in the office, he felt that he would not make the declaration because there were too many people there but that he would wait until the officer in charge had gone out of the office. However, he states, he had told his brother and his wife, who were with him, to tell the officer, when he came to the automobile, that the goods were cigarettes and, as a matter of fact, when Officer Poulin came out his brother informed him that there were cigarettes in the automobile. The affidavit continues to state that when Poulin came out of the office he asked the respondent how many cigarettes he had and that he told Poulin immediately that all the goods in his car were cigarettes, that he had stopped at the office to pay the customs duty, upon which Poulin told him that they were going to unload them, which was done. Gosselin then informed the respondent that it would cost him $3.31 duty on each carton. The respondent answered: "You must be mistaken, because they told me here that the duty was only thirty-five per cent", to which the officer replied that thirty-five per cent represented the duty on other goods but not on cigarettes. Then, it is stated, the respondent asked the officer to give him back the cigarettes as he could not pay such a duty and that he would return them to the store where he had purchased them in the United States. This was refused on the ground that it was too late, although the cigarettes had not yet been seized, but the respondent stated that he said that it was his right to have them returned to him if he did not decide to import them into Canada. It was after that that they were declared seized and the officer kept the cigarettes. He was, however, allowed to pursue his trip to St. Georges de Beauce in his automobile and it was three days after these

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incidents that one Constable Charron, of the R.C.M.P., came to seize the automobile at St. Georges. The respondent's contention was that the automobile could not be seized three days after his return to his home at a time when none of the goods remained in the car, and, moreover, that the automobile was not subject to seizure because at the time he went through customs he had declared the goods in his possession. He denied that the cigarettes had been smuggled and that the automobile had been used for that purpose.

In answer to the affidavit Officer Poulin declared that the way the respondent acted it looked very much as if he wanted to avoid the duties and taxes on the cigarettes. He also denied the respondent's statement that he had been asked about the rate of duty on cigarettes or on any other goods. The declaration that the cigarettes were in the car only came after Poulin had seen them and when there was nothing else that the respondent could say. Poulin stated that as he went to the automobile the respondent did not say one word to him, but that his wife then declared that "they were going to be ruined". He states that he seized the cigarettes because the respondent refused to declare the same when asked and he only let him proceed in his automobile because it was one o'clock in the morning, it was raining and there was hardly any other means for him to go home, and, besides, he knew that he could get the automobile at any time afterwards. Poulin stated as a positive fact that the respondent never declared his cigarettes to him when asked and, therefore, the automobile was liable to seizure.

The statement of Officer Poulin is corroborated by Officer Gosselin.

Having the respondent's affidavit and the statements of the two Customs Officers, the Assistant Deputy Minister of National Revenue decided that the cigarettes should be seized for having been smuggled into Canada and the automobile for having been used therein. He went over the several reports sent to him and concluded that while there were other factors which point towards deliberate intent to smuggle these cigarettes on which duty and taxes exigible were $2,636.20, the mere failure to declare them was

sufficient and the cigarettes and the automobile should be declared forfeited. His recommendation was to that effect and the respondent was notified accordingly.

The respondent's solicitor wrote several letters to the Department asking that the decision on the confiscation should be stayed until the criminal charge against the respondent had been disposed of, but he was told by the Department that the criminal charge was an entirely distinct matter from the seizure and confiscation of the goods and automobile.

On the 24th of October, 1946, the respondent was acquitted of the criminal charge by a jury, and on the 19th of August, 1947, the respondent brought the matter before the Exchequer Court of Canada (1), with the result already mentioned.

The charge before the Criminal Court was that on November 20, 1945, without any legitimate excuse, the respondent had in his possession goods illegally carried into Canada, to wit, 159,600 American cigarettes of dutiable value of more than $200, and on which the duty exigible had not been paid, contrary to section 217(3) of the *Customs Act*.

The evidence of Officer Gosselin was very clear. He said that the respondent came into the Customs Office and declared that he had a rifle which he was bringing from the United States. Gosselin told him that he would have to leave it at the office until he got a permit from the Department to import it. He then asked him whether he was importing other goods and, if he had any, to declare them. The respondent's answer was that he had nothing except a few small parcels of goods purchased in 5, 10 and 15 cent stores of a value of a few dollars. Gosselin repeated the question whether he had anything else, and the answer was "No, sir". Gosselin asked him what amount he had spent in the United States and the respondent's answer was "Almost nothing, perhaps $15, including the rifle." It was then that Officer Poulin said that he would go and inspect the automobile.

When Poulin discovered the cigarettes the respondent and his brother told Gosselin: "Don't be a fool, let us pass, you know us." Gosselin replied "It is too late, I cannot

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let you pass; you ought to have declared that you were bringing cigarettes"; and the respondent told him "We will pay you, we will give you $100."

Officer Poulin, who was present with Gosselin in the Customs Office, corroborates Gosselin word for word, except that he did not hear the offer of $100.

Immigration Inspector Caron was also in the Customs Office when the respondent appeared there on the 20th of November, 1945. He heard the questions put to the respondent and the latter's reply that he had with him a rifle and that his wife had some inconsequential things. This last answer of the respondent came when Officer Gosselin asked him if he had brought any other goods with him. Shortly afterwards the cartons of cigarettes were brought into the office. Subsequent to this the respondent told Caron that he had made "une fausse manœuvre" and that he would have to take the consequences.

It was correctly decided in the Exchequer Court (1) that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Foncière Compagnie d'Assurance de France* v. *Perras et al and Daoust* (2).

It was, therefore, necessary for the case to be tried *de novo* absolutely as if no criminal charge had been brought against the respondent.

The respondent, being in possession, without lawful excuse, of goods which were dutiable and whereon the duties lawfully payable had not been paid, had the burden of proving any lawful excuse which he might invoke; and, unless he succeeded in this proof, the goods, according to the law, "shall be seized and forfeited without power of remission." (*Customs Act*, sec. 217(1) and sec. 262(2).

In the present case the following sections of the *Customs Act* are pertinent:—

Sec. 2, s.s. (2). All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

Sec. 2, s.s. (o). "Seized and forfeited", "liable to forfeiture", or "subject to forfeiture", or any other expression which might of itself

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imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed.

Sec. 17. No goods shall be imported into Canada in any vehicle, other than a railway carriage, or on the person, between sunset and sunrise of any day, or at any time on a Sunday or a statutory holiday, except under a written permit from a collector, and under the supervision of an officer.

Sec. 18 (*a*). The person in charge of any vehicle other than a railway carriage, arriving by land at any place in Canada and containing goods, whether any duty is payable on such goods or not, shall come to the Custom-house nearest to the point at which he crossed the frontier line, or to the station of the office nearest to such point, if such station is nearer thereto than any Custom-house, before unloading or in any manner disposing of the same, and there make a report in writing to the collector or proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same.

Sec. 18 (2). Such person shall also then truly answer all questions respecting such goods or packages, and the vehicle, fittings, furnishings and appurtenances and animals, and the harness or tackle appertaining thereto, as the said collector or proper officer requires of him, and shall then and there make due entry of the same, in accordance with the law in that behalf.

Sec. 177. On any reference of any such matter by the Minister of the court, the court shall hear and consider such matter upon the papers and evidence referred and upon any further evidence which, under the direction of the court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, and the court shall decide according to the right of the matter.

Sec. 190. (*a*) Any vehicle containing goods, other than a railway carriage, arriving by land at any place in Canada, whether any duty is payable or not;

(*c*) Any goods brought into Canada in the charge or custody of any person arriving in Canada on foot or otherwise shall be forfeited and may be seized and dealt with accordingly, if before unloading or in any manner disposing of any such vehicle or goods, the person in charge does not

(*a*) come to the Custom-house nearest to the point at which he crossed the frontier line, or to the station of the officer nearest to such point, if such station is nearer thereto than any Custom-house, and there make a report in writing to the collector or proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same; and

(*b*) then truly answer all such questions respecting such goods or packages, and the vehicle, fittings, furnishings and appurtenances appertaining thereto, as the said collector or proper officer requires of him; and

(*c*) then and there make due entry of the same in accordance with the law in that behalf.

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Sec. 193. (1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

Sec. 197. If any goods entered or attempted to be passed through the Customs are found which do not correspond with the goods described in the invoice or entry, such goods may be seized and forfeited.

Sec. 203. If any person

(*a*) smuggles, or clandestinely introduces into Canada any goods subject to duty under the value for duty of two hundred dollars;

(*b*) makes out or passes or attempts to pass through the Custom-house, any false, forged or fraudulent invoice of any goods of whatever value; or

(*c*) in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value;

such goods if found shall 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 ascertained, such forfeiture to be without power of remission in cases of offences under paragraph (*a*) of this subsection.

3. Every one who smuggles or clandestinely introduces into Canada any goods subject to duty of the value for duty of two hundred dollars or over is guilty of an indictable offence and liable on conviction, in addition to any other penalty to which he is subject for any such offence, to a penalty not exceeding one thousand dollars and not less than two hundred dollars, or to imprisonment for a term not exceeding four years and not less than one year, or to both fine and imprisonment, and such goods if found shall be seized and forfeited without power of remission, or if not found but the value thereof has been ascertained, the person so offending shall forfeit without power of remission the value thereof as ascertained.

Sec. 245. All goods shipped or unshipped, imported or exported, carried or conveyed, contrary to this Act, or to any regulation made by the Governor in Council, and all goods or vehicles, and all vessels under the value of four hundred dollars, with regard to which the requirements of this Act or any such regulation have not been complied with, shall be forfeited and may be seized.

Sec. 253. Any person required by this Act, or by any other law, to answer questions put to him by any officer, who refuses to answer or does not truly answer such questions, shall, in addition to any other penalty or punishment to which he is liable, incur a penalty of four hundred dollars.

Without hesitation, I am of opinion that not only has the respondent not succeeded in proving that he had a lawful excuse to have in his possession the goods which were dutiable and on which duties lawfully payable had not been paid, and that he was entitled to recover the goods and the automobile which were seized, but the evidence on behalf of the Crown is conclusive that the

respondent violated the *Customs Act* and that the cigarettes and the automobile were properly and legally seized and declared forfeited.

The respondent may truly be said to have violated almost all the sections of the *Act* applying in the circumstances which have been established in evidence. He was importing the cigarettes at a time when he could not do so except under a written permit from a collector and under the supervision of an officer. In the Custom-office he declared only the rifle which he had in his possession and he failed to declare the cigarettes; and, moreover, when questioned as to whether he had any other goods in his possession, he declared positively that he had none, contrary to s.s. 2 of sec. 18. It was, therefore, more than a failure to declare the cigarettes; it was an untrue answer, contrary to sec. 253, and a positive act for the purpose of defrauding the government, contrary to sec. 203 and its subsections. At that very moment the respondent had the cigarettes in his possession and concealed them and acted in a way so that the duties lawfully payable on the goods should not be paid, contrary to sec. 217 of the *Act*. Undoubtedly he was contravening sec. 245 of the *Act* in carrying and conveying the cigarettes without complying with the requirements of the *Act*. Under every one of these sections the cigarettes and automobile were liable to seizure and forfeiture.

Referring again to subsection (*o*) of section 2, the words "seized and forfeited", "liable to forfeiture" or "subject to forfeiture", or any other expression which might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed. Therefore, in acting as he did, the respondent made himself liable to the seizure and forfeiture of the cigarettes and the automobile, even if he had not subsequently got beyond the Customs Office in possession of these goods.

We are not concerned, therefore, with the necessity of inquiring whether what the respondent did really comes

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under the definition of "smuggle", because the contravention of the several sections to which I have referred was sufficient to warrant the seizure of the cigarettes and the automobile and their forfeiture. By virtue of subsection (*o*) of section (2)—"the forfeiture shall accrue at the time and by the commission of the offence"—there is no necessity of any subsequent act on the part of the respondent. Such subsequent act became unnecessary and the forfeiture accrued, even in the absence of such subsequent act, to wit: although he did not actually go beyond the Custom Office with the cigarettes in his possession.

Of course, I am not at all disturbed by the respondent's explanation that the reason why he made his untrue answer to the questions put to him by the Customs Officers was because some other people were playing cards in the office. It would indeed be an easy way out of a contravention of the *Customs Act* and to escape the penalties and the forfeiture for a false declaration, if it were recognized that a smuggler would be relieved of the obligation of giving true answers to questions put to him by Customs Officers merely by reason of the fact that there were "too many people in the Customs Office".

Nor, with respect, do I agree with the learned President (1) that in the Exchequer Court of Canada the case had to be decided exclusively on the reasons given by the Minister when he ordered the seizure and forfeiture of the cigarettes and automobile. Under Section 177, dealing with the reference by the Minister to the Court, the Court is directed to hear and consider such matter upon the papers and evidence referred and upon any further evidence which, under the direction of the Court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, "and the court shall decide according to the right of the matter". In my opinion, that section authorizes the Exchequer Court to explore the whole subject matter and the circumstances referred to it—not to say anything of the fact that, in the present case, that is precisely what was done in the evidence submitted to that Court, to which the respondent made no objection. In the circumstances, it was fully within the power of the Exchequer Court to

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declare the seizure and forfeiture valid upon all the contraventions of the *Act* which were allegedly proven in the case.

For these reasons, I am clearly of opinion that the appeal should be allowed with costs both here and in the Exchequer Court, that the respondent's claim should be dismissed and that the decision of the Minister of National Revenue, declaring the cigarettes and the automobile seized and forfeited in this matter, should be maintained.

TASCHEREAU, J. (dissenting): L'intimé a été arrêté et traduit devant les tribunaux criminels à St-Joseph de Beauce, pour répondre à l'accusation suivante:

> Que Gérard Bureau, ci-dessus décrit, a, à Armstrong dans le District de Beauce, le ou vers le 20 novembre 1945, sans excuse légitime, eu en sa possession des effets illégalement importés au Canada, à savoir, 159,600 cigarettes américaines, d'une valeur imposable de $2,636.20, sur lesquelles les droits légitimes exigibles n'ont pas été acquittés, contrairement à l'article 217 (3) de la *Loi des Douanes du Canada* et ses amendements.

Le procès présidé par l'honorable Juge Cannon s'est instruit devant un jury, et le prévenu a été acquitté. Le Ministère du Revenu National avait cependant, avant de loger sa plainte, saisi à Armstrong les 159,600 cigarettes américaines ainsi que la voiture automobile dans laquelle elles étaient transportées des États-Unis. L'intimé a reçu après la saisie, l'avis requis par l'article 172 de la *Loi des Douanes,* en vertu duquel il était mis en demeure de fournir dans un délai de trente jours des explications de nature à justifier sa conduite.

Le 26 janvier 1946, au moyen d'un affidavit, l'intimé a tenté d'expliquer la raison pour laquelle il avait été trouvé en possession de ces cigarettes, mais le 4 avril de la même année, le Sous-Ministre du Revenu National a avisé Bureau que le Ministre avait ordonné que "l'automobile et les cigarettes fussent confisquées". Après avoir été avisé que cette décision n'était pas acceptée, le Ministre, s'autorisant des pouvoirs qui lui sont conférés par l'article 176 de la *Loi des Douanes,* a référé la question à la Cour d'Échiquier. L'honorable Président de cette Cour (1) en est venu à la conclusion qu'il n'y avait pas eu d'importation illégale, et a ordonné que mainlevée soit donnée de la saisie de l'automobile ainsi que des cigarettes sur paiement des droits de Douane.

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En vertu de l'article 18 de la *Loi des Douanes,* toute personne en charge d'une voiture, et dans le cas présent d'une voiture automobile, contenant des effets sur lesquels des droits sont exigibles ou non, doit avant de les décharger ou d'en disposer de quelque façon que ce soit, se rendre au Bureau de la Douane le plus rapproché de la frontière, et faire une déclaration par écrit indiquant la qualité et la valeur des marchandises.

En revenant des États-Unis, ayant dans sa voiture les 159,600 cigarettes américaines en question, l'intimé s'est arrêté à Armstrong qui était l'endroit le plus rapproché où il devait traverser la frontière, et il déclara à l'inspecteur en charge qu'il n'avait aucune marchandise dans sa voiture, sauf une carabine calibre .22, mais les autorités douanières en inspectant l'automobile se sont vite aperçus de la quantité de cigarettes qu'elle contenait. L'explication de l'intimé à l'effet qu'il n'a pas voulu déclarer devant les personnes présentes dans le bureau de l'inspecteur cette grande quantité de cigarettes, parce qu'il ne voulait pas que la chose fût connue, me paraît inadmissible et ne peut en aucune façon excuser ou justifier cette fausse déclaration qui a été faite.

Mais, malgré cette fausse déclaration, il demeure que l'intimé n'a pas importé de cigarettes au Canada, car elles ont été saisies avant l'"importation" au sens de la *Loi des Douanes.* En effet, pour qu'il y ait importation illégale, il faut que les marchandises aient traversé la frontière sans que les droits exigibles aient été payés. Or ici, tel n'est pas le cas. Aucune marchandise n'a traversé la frontière et, en conséquence, il n'y a pas eu d'importation illégale.

Il y a clairement, cependant, une tentative d'importer illégalement des cigarettes et il y a eu également, de la part de l'intimé, une déclaration fausse faite à l'inspecteur des Douanes. La tentative d'importation est une offense prévue à l'article 203 (1) (*c*) de la même loi. En vertu de l'article 190, les cigarettes et l'automobile qui les contenait, pouvaient être légalement saisies pour cette double offense.

Mais il y a, pour que la saisie soit légale, une procédure essentielle qui doit être suivie. En vertu de l'article 172, aussitôt que la saisie est faite, le Commissaire des Douanes doit notifier le propriétaire de la chose saisie, et doit lui expliquer *les motifs de cette saisie,* et lui demander de

fournir dans les trente jours de la date de l'avis toute preuve qu'il désire apporter pour obtenir mainlevée de la saisie. Or, dans le cas présent, aucun avis n'a été donné à l'intimé qui avait tenté d'importer illégalement des marchandises, ou qu'il avait fait une fausse déclaration à l'inspecteur des Douanes à Armstrong. L'avis qui lui a été signifié le 4 décembre 1946 informe l'intimé que le 20 novembre 1945, on a saisi 159,600 cigarettes et une automobile parce que "lesdites cigarettes ont été *passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale*". Or, il est clairement établi qu'aucune offense de cette nature n'a été commise, et il en résulte que l'avis prescrit par l'article 172 n'a pas été légalement donné, et cet avis est une condition essentielle préalable à la validité de la saisie. Comme l'a dit l'honorable Président de la Cour d'Échiquier, (1) la Cour n'a pas juridiction pour décider une confiscation. Ce pouvoir est conféré exclusivement au Ministre, et la question que le Ministre peut référer à la Cour est la décision de confisquer qu'il a prise, et dans le cas actuel, la décision de confisquer parce qu'il y aurait eu *importation illégale*. C'est ce seul point que la Cour a à décider, et elle n'a pas à rechercher s'il y a eu d'autres offenses prévues à la *Loi des Douanes*, qui pourraient justifier la confiscation. En donnant son avis, et les motifs qui selon lui ont justifié la saisie, le Ministre limite la juridiction de la Cour. L'appel donné à la Cour d'Échiquier n'est qu'une revision de la validité de ces motifs.

L'appel doit être rejeté.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.:—This is an appeal from a judgment of the Exchequer Court (1), Thorson, P., dated March 9, 1948, pronounced on a reference by the Minister of National Revenue under section 176 of the *Customs Act*, R.S.C., cap. 42. The evidence consisted of the documents remitted to the Exchequer Court by the Minister, together with a transcript of the evidence taken in the Court of King's Bench, for the District of Beauce, upon the trial of the respondent for a breach of section 217(3) of the *Act*, viz., of being in possession of goods unlawfully imported on which the duties had not been paid.

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It appears that on the 19th of November, 1945, the respondent, accompanied by his wife and his brother, went by automobile to Lewiston, in the State of Maine, where he purchased, for resale in Canada, 159,600 American cigarettes. Returning on the following day, he arrived about 1.00 a.m. at the custom house at Armstrong, which is about ten miles inside the Quebec border. The respondent got out of his car, leaving the left front door open, entered the custom house and reported to the officers present that he had a ·22 rifle to declare. He was asked if he had anything else to declare and he said, as he admits, that he had not, giving as the reason for this statement, according to the transcript, that there were other people in the office and that he did not want to declare the cigarettes before them.

Poulin, one of the officers, then went outside and as he approached the automobile he saw three packages of cigarettes on the front seat. The brother and the respondent's wife were both sitting in the front seat and, on being asked why they had not entered the custom house to declare the cigarettes, they made no response. Poulin then proceeded to examine the car and found, as he says, that it was full of cigarettes. According to the respondent himself, apart from the three packages on the front seat, the remainder of the 159,600 cigarettes were in the trunk of the car and in large cartons between the front and the back seats. The cartons between the seats had a covering over them which Romeo Boudreau said was made up of his coat and that of his brother, but which Poulin says were old bags. The respondent in his evidence says as to these cartons that:

cela ne se cache pas complètement.

When the respondent went outside with Gosselin, the other officer, after Poulin had reported what he had found, Gosselin said the respondent offered him $100 to allow him to go through. The respondent denied this. The respondent, on being advised that the duty was some $2,600 said he could not pay and asked permission to take the cigarettes back to the United States. This was refused, with the result the cigarettes were seized but the respondent was allowed to continue his trip to St. Georges de Beauce,

where he lived, on his undertaking to return the next day and surrender the car. When he did not live up to this undertaking the car was seized by the Royal Canadian Mounted Police.

While the respondent suggests that in bringing in the cigarettes he relied on having been informed by one of the officers some days previously, (which is denied) that the rate of duty on goods from the United States was 35 per cent, it is significant that he had only a few cents with him on his return and was therefore not in a position to pay any duty.

Eventually, on the 4th of December, 1945, a notice was served upon the respondent under section 172 of the *Act*, the reasons for the seizure being stated to be:

que lesdites cigarettes ont été passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale.

By section 203(3) it is provided that every one who "smuggles" goods into Canada is guilty of an indictable offence. The section provides for the seizure and forfeiture of the goods and section 190 provides for the seizure and forfeiture of the car.

The learned trial judge (1) held that the respondent had not smuggled the cigarettes into Canada and ordered the release of the goods and car. He refused to entertain the contention of the Crown that although the evidence of the offence of smuggling was not established, nevertheless if the evidence established an infraction of any other statutory provision, the Crown could support the seizure under the notice given. The learned trial judge also held against the contention of the respondent that because of his acquittal upon the charge under section 217(3), it was, as between the respondent and the Crown chose jugée that the cigarettes were not "unlawfully imported" and therefore the seizure could not be maintained.

Dealing with the last point first, while it might be contended with considerable force that an acquittal under section 217(3) would preclude a subsequent finding that the cigarettes had been "smuggled" into Canada within

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the meaning of section 203, I think, for reasons to be given, that the Crown is not thereby precluded from justifying the seizure under other provisions of the statute.

In my opinion the act of "smuggling", within the meaning of section 203, is not complete unless the goods are carried past the line of customs. That line, perhaps, may vary in differing circumstances. It may be that the mere crossing of the border with no intention of clearing the goods at any custom house, whether there be one at the point of crossing or not, would, in certain circumstances, be sufficient. As applied to the facts of the present case however, I think the act of smuggling had not been completed as the goods in fact were halted at the line of customs.

In *Keck* v. *United States* (1), it was held that the act of smuggling is not committed by an act done before the obligation to pay or account for the duties arises although such an act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. In the view of the majority of the court the act of smuggling was established only by the overt act of passing the goods through the line of the customs authorities without paying or securing the duties. The majority reached this view upon the meaning of smuggling at common law and in view of the fact that the legislation with which they had to deal dealt with a number of specific acts prior to the actual passing of goods through the line of customs, which acts were visited with penal consequences. In their view this indicated that the offence of smuggling was not made out by evidence of the commission of one or more of these preparatory acts. In my opinion this reasoning is applicable to the Canadian statute. It is enough to contrast clauses (*a*), (*b*) and (*c*) of subsection 1 of section 203.

In Bacon's Abridgment under the heading of "Smuggling and Customs", the following appears under letter F:

> As the offence of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offence. For the sake of preventing or putting a stop to such practices, penalties and

(1) 172 U.S. 434.

forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end, without providing at the same time against the means of accomplishing it.

So also Blackstone defines smuggling to be "the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise" (4 Black. Com. 154). The words "importing without paying the duties" obviously imply the existence of the obligation to pay the duties at the time the offence is committed, and which duty to pay is evaded by the commission of the guilty act.

In *Grinnell* v. *The Queen* (1), Ritchie, C.J., delivering the judgment of himself and of Fournier and Taschereau JJ., said:

> The term "smuggling" has been defined to be the difference of importing prohibited articles, or defrauding the revenue by *the introduction of articles into consumption* without paying the duties chargeable thereon.
>
> It is a technical word, having a known and accepted meaning. It implies illegality, and is inconsistent with innocent intent. The idea conveyed by it is that of a *secret introduction of goods* with intent to avoid payment of duty.

I therefore think that the offence of smuggling was not committed by the respondent in the present case.

I proceed to deal therefore, with the other statutory provisions to which I have referred. In my opinion the evidence establishes a sufficient basis upon which the seizure and forfeiture are to be supported, and I think, with respect, that the learned trial judge erred in holding that the terms of the notice given by the Crown under section 172 precludes the seizure from being supported upon this footing.

Section 203(1) (*c*) is as follows:

> If any person *in any way attempts* to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value; such goods if found shall be seized and forfeited.

By section 171 it is provided that wherever any vehicle or goods have been seized under any of the provisions of the statute or any law relating to customs, or when it is alleged that any penalty or forfeiture has been incurred, the proper officer shall forthwith report "the circumstances of the case" to the Deputy Minister of National Revenue for Customs and Excise. In the present case the report

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states that the officer had seized the cigarettes and the car for "trying" to import and that he had charged the respondent with contravention of the customs laws as follows:

Trying to import United States cigarettes in Canada illegally.

This report was followed by the notice to the respondent, already referred to. That notice included a copy of sections 171 and 178, inclusive, of the statute. The respondent on the 26th of January, 1946, sent in an affidavit setting out the facts from his point of view. Neither in that affidavit however, nor in the letter of his solicitor, which accompanied it, nor at any subsequent time, did respondent take any objection to the notice, nor did he construe it as an allegation of "smuggling" within the meaning of section 203. On the contrary, in his affidavit he states that he had never had any intention of "defrauding the revenue".

In the report of the Deputy Minister, in pursuance of section 173, the facts are reviewed and the report concluded as follows:

There are other facts which point towards deliberate intent to smuggle these cigarettes on which duty and rates were $2,632.20, but it is submitted that the failure to declare them is sufficient and they and the automobile should be forfeited.

I recommend that the cigarettes and the automobile be forfeited.

This recommendation was accepted by the Minister and it is clear that the ground upon which the seizure was maintained was not that of "smuggling" but failure to declare with intent to smuggle.

On the reference of the matter to the Exchequer Court (1) the respondent filed a formal pleading in which he took no exception to the notice of the 4th of December, 1945. It is clear from this pleading that the respondent not only was not prejudiced in any way by the contents of the notice but that he understood the issue involved. Paragraphs 2 and 9 are sufficient to illustrate this:

2° Le réclamant n'a jamais eu l'intention de frauder le Gouvernement de Sa Majesté ni d'introduire clandestinement au Canada lesdites cigarettes et il n'a jamais fait servir son automobile à cette fin;

9° En conséquence, il est avéré que le réclamant n'a pas violé la loi dans cette affaire et il prétend qu'on a saisi sur lui lesdites cigarettes et son automobile, contrairement à la loi;

In his defence the Minister denied both of these paragraphs and alleged, *inter alia*, the following:

8° Le réclamant a tenté d'introduire clandestinement des cigarettes au Canada sans payer de droits de douane, et il a ainsi tenté de frauder le

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revenu, contrairement à l'article 190 de la même loi, il a omis de faire, au bureau des douanes le plus rapproché de l'endroit où il avait traversé la frontière, une déclaration par écrit au percepteur des douanes, déclaration énonçant le contenu de toutes les marchandises qu'il importait;

15° Le réclamant n'a jamais eu l'intention de payer les droits sur les 159,600 cigarettes saisies. Lors de son retour au Canada, au moment de la saisie, il ne lui restait, de même qu'à sa femme et à son frère, qu'une somme totale liquide d'au plus $179.00;

16° Appelé à l'intérieur du bureau des douanes à faire la déclaration des marchandises qu'il importait, le réclamant a omis à ce moment de déclarer ses cigarettes, et il a fait une fausse déclaration qui rendait toute marchandise non déclarée, passible de saisie et de confiscation en vertu de l'article 251 de la Loi des Douanes du Canada;

17° Le véhicule du réclamant ayant servi à importer des effets frappés de confiscation, devait aussi être saisi et confisqué conformément à l'article 193 de la Loi des Douanes;

I think it is plain that the parties thoroughly understood that the seizure of both the goods and the vehicle was being supported by the Crown upon an alleged attempt to defraud the revenue and that the completed act of "smuggling" within the meaning of section 203(3) was not the issue.

In my opinion the proceedings before the Exchequer Court under the provisions of section 177 were not limited by the terms of the notice given under section 172. By section 171 the proper officer is required to report to the Deputy Minister "the circumstances of the case". He did so and in that report the charge was not "smuggling" but "trying to import illegally". Again, by section 173, it is the "circumstances of the case" which the Deputy Minister is required to consider and report upon to the Minister and upon which the Minister gives his decision under section 174. Further, the decision of the court under section 177 is not an appeal from the decision of the Minister nor limited in evidence to that which was before the Minister. New evidence may be permitted and the court is called upon to decide "according to the right of the matter". In my view, therefore, the contention of the Crown is correct, that, if the evidence adduced before the Exchequer Court established an attempt to defraud the revenue within the meaning of section 203(*c*), or a breach of section 18(2), if that be not included in the former subsection, the seizure would be well founded.

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There remains therefore, for consideration the question as to whether or not the respondent has met the onus resting upon him under section 262 of the statute and has established that he was not guilty of a breach of the statute apart from section 217(3) and section 203(3). In my opinion it should be found that he has not. As already noted, the only evidence before the Exchequer Court (1) in addition to that which was before the Minister, was a transcript of the evidence in the Court of King's Bench. The explanation of the respondent for his false statement that he had nothing to declare beyond the rifle, that he did not want to make his declaration in the custom house because there were some strangers there, and that he intended to make full disclosure when he got outside, is not to be accepted. It is perhaps conceivable that, had the respondent himself given evidence in the court below, he might have impressed the learned trial judge with his honesty of purpose, but evidently his counsel did not think that the transcript of his evidence would be added to by respondent's presence in the witness box.

The whole circumstances are pregnant with suspicion. The cigarettes in the interior of the car were covered, or substantially so, with coats, or, as the officers say, old bags. The respondent had no money with which to pay the duty at the rate of 35 per cent or at any other rate. The conclusion which I draw from all the circumstances is that the respondent was presuming on being known to one of the officers, upon the lateness of the hour and the fact that it was raining, in the hope that by presenting himself at the custom house and declaring the rifle, and giving the assurance he had nothing else, he would be allowed to pass. Whether or not this be a correct appreciation of his intention, I think the court, in the absence at least of an opportunity of judging of the respondent's honesty from his presence in the witness box, should not be expected to say that the onus provided by section 262 is met in circumstances such as are here present. I would therefore allow the appeal with costs here and below and confirm the seizure.

ESTEY J.:—I agree it is not here established that the cigarettes were smuggled into Canada. The evidence, however, justifies the conclusion that the appellant at 1.00 a.m.

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on November 20, 1945, at the Customs House in Armstrong, Quebec, attempted to smuggle the cigarettes into Canada and in the course of doing so failed to make the report in writing to the collector or proper officer at the Customs House of the quantity and value of the cigarettes as required by sec. 190 of the *Customs Act*, R.S.C. 1927, c. 42, and amendments thereto, and at the same time attempted to defraud the revenue by endeavouring to avoid payment of the duty within the meaning of sec. 203 of the *Customs Act*. These issues were raised before the learned President (1) and if either was established the cigarettes and the automobile were subject to seizure and forfeiture under sec. 143, 147 and 203 of the *Customs Act*.

The cigarettes and the automobile were seized by the customs officers at Armstrong on the morning in question.

Sec. 172 provides that the Deputy Minister of Revenue for Customs and Excise may notify the respondent "of the reasons for the seizure" and advise him that he may within 30 days from the date of the notice tender such evidence in the matter as he may desire for the purpose of contesting the validity of the seizure and possible forfeiture. The notice in this case was dated December 4, 1945, and gave as a reason for the seizure of the cigarettes and automobile:

...que lesdites cigarettes ont été passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale.

The learned President was of the view that this language restricted the issue to the act of smuggling and that the owner or claimant "must answer only those reasons," or as he further stated: "The only seizure regarding which the Minister may give his decision under section 174 is that of which the reasons have been made known according to section 172. There is no other seizure before him," and that "the Court has no power to do what is not permitted to the Minister." He then stated:

Since the evidence shows that the claimant has not smuggled the cigarettes into Canada and has not used his automobile for such importation, it follows that the reasons for the seizure of the cigarettes and the automobile are unfounded and the decision respecting the forfeiture, being based on the said seizure, is ill-founded and must be quashed.

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Upon receipt of the notice of December 4, 1945, the respondent consulted his solicitor who prepared an affidavit which he forwarded to the Deputy Minister with the request that the automobile be released.

The Deputy Minister made further inquiries and under sec. 173 submitted his report to the Minister. The Minister under sec. 174, and under date of July 3, 1946, directed "that the cigarettes and the automobile be forfeited."

174. The Minister may thereupon either give his decision in the matter respecting the seizure, detention, penalty or forfeiture, and the terms, if any, upon which the thing seized or detained may be released or the penalty or forfeiture remitted, or may refer the same to the court for decision.

The respondent was immediately notified of the Minister's decision and, after further correspondence, the Minister under date of July 3, 1947, referred the matter to the Exchequer Court under sec. 176.

176. If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within thirty days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the court.

The terms of the Minister's reference in this case are as follows:

By virtue of the powers vested in me in that behalf, under Section 176 of the *Customs Act*, I hereby refer to the Exchequer Court of Canada for adjudication the claim of Gérard Bureau against the decision of the Minister of National Revenue, given on July 2, 1946, in the matter of the said Customs Seizure No. 20415/2164, the said decision being to the effect "that the cigarettes and the automobile be forfeited."

The directions to the Exchequer Court upon such a reference are contained in sec. 177.

177. On any reference of any such matter by the Minister to the court, the court shall hear and consider such matter upon the papers and evidence referred and upon any further evidence which, under the direction of the court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, and the court shall decide according to the right of the matter.

The foregoing sections 172 to 174 provide for the filing of material by the owner and consideration by the Deputy Minister who thereafter makes a report to the Minister upon which the latter either makes his decision or he may "refer the same to the court for decision." If, therefore, in the opinion of the Minister the matter, in the first instance, is of such importance that it should be made the subject

of a formal trial, where evidence is heard and the issues more thoroughly examined than is possible under the informal procedure contemplated up to the time the report is made to him, he may then direct under sec. 174 that it be referred to the Exchequer Court. It is significant that the language providing for this reference in sec. 174 is in effect identical with that of sec. 176 and when read with sec. 177 it is clear that the procedure is the same in the Exchequer Court whether the Minister has or has not made a decision.

It is therefore clear that these sections do not direct that the reference shall be merely a review of the Minister's reasons nor do they contemplate that if he has based his decision upon a particular section or provision in the statute that it must be either affirmed, varied or reversed upon that same basis. Parliament here provides for a disposition of the matter referred to the Court upon its merits. It contemplates in the Exchequer Court a trial *de novo* "upon any further evidence which, under the direction of the court" (sec. 177) either party may produce and in this regard the concluding words are of particular significance, "and the court shall decide according to the right of the matter," (sec. 177).

The parties hereto have proceeded upon the basis of a trial *de novo* and filed pleadings in the Exchequer Court (1). The defence filed for the Attorney-General of Canada raised not only the issue of smuggling but also those of making a false declaration and of attempting to defraud the revenue. No exception was taken to these pleadings nor to any of the issues raised thereby and upon these issues the evidence was tendered before the learned President. It is, with great respect, the issues raised by the parties through their pleadings and not the terms of the notice under sec. 172 that determine the issues before the Exchequer Court. At most the intent and purpose of the notice under sec. 172, prepared by those charged with the administration of the *Act,* is to assist the owner or claimant in what may be the initial stages of dealing with the matter through the informal procedure before the Minister.

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The accused had been prosecuted for an offence arising out of his conduct at the customs on the morning of November 20, 1945, and found not guilty in October 1946, some time after the Minister made his decision. The parties hereto agreed that the evidence taken at the criminal trial should be tendered and made a part of the record in the Exchequer Court. It was this evidence and the material filed before the Minister that constituted the record before the learned President. It was in every respect a trial *de novo* upon the issues determined by the pleadings.

The evidence before the learned President was a matter of record. No witnesses gave oral testimony and therefore the appellate Court is in as good a position to draw inferences and conclusions from this evidence as the judge presiding at the trial. Upon this evidence there is no question but that the respondent failed to make the report in writing as required by sec. 190 and therefore the cigarettes and automobile were properly seized and subject to forfeiture.

The appeal should be allowed and an order directed that the cigarettes and the automobile be forfeited to the Crown.

Appeal allowed with costs.

Solicitors for the appellant: *F. P. Varcoe and P. Fontaine.*