34. 1933

In the Privy Council.

No. 80 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

CONSOLIDATED DISTILLERIES LIMITED and W. J. HUME (*Defendants*) - - - - - *Appellants*

AND

HIS MAJESTY THE KING (*Plaintiff*) - - *Respondent*

(Action No. 9370)

AND BETWEEN

CONSOLIDATED DISTILLERIES LIMITED and F. L. SMITH (*Defendants*) - - - - - *Appellants*

AND

HIS MAJESTY THE KING (*Plaintiff*) - - *Respondent*

(Action No. 9371)

AND BETWEEN

CONSOLIDATED DISTILLERIES LIMITED and W. J. HUME (*Defendants*) - - - - - *Appellants*

AND

HIS MAJESTY THE KING (*Plaintiff*) - - *Respondent.*

(Action No. 10314)

[CONSOLIDATED APPEALS.]

CASE FOR THE APPELLANTS.

1. These are appeals by special leave from three judgments of the Supreme Court of Canada delivered on the 15th day of March, 1932, affirming three judgments of the Exchequer Court of Canada delivered respectively on the 13th, 17th and 16th days of March, 1931, whereby the Appellants were ordered to pay to the Crown the penalties named in certain

Record.
p. 73.
p. 155.
p. 221.
p. 66.
p. 147.
p. 211.

S.L.S.S.—WL1802B-11084

Record. p. 278. bonds amounting together to the sum of $587,400. By His Majesty's Order in Council granting special leave to appeal dated the 8th day of August, 1932, the three appeals were consolidated.

pp. 83-90. pp. 158-159. pp. 238-251. p. 56, l. 27. p. 131, l. 38 p. 269, l. 14. **2.** The bonds in question, twelve in number, had been given by the Appellants to the Crown in 1924 for the purpose of securing the due exportation from bond of excisable goods sold by them for export and had after the exportation of the goods been formally cancelled by Collectors of Inland Revenue. The penal sums named in the bonds were in each case double the amount of the duty of excise payable on goods sold for home consumption.

3. The conditions contained in all twelve bonds the subject of these appeals, apart from names of places, etc., are substantially the same. The condition in the first of the bonds sued on in the first action reads as follows :—

p. 84, l. 1. " Now the condition of the above written obligation is such that if the said goods and every part thereof, shall be duly shipped, and shall be exported and entered for consumption or for Warehouse at Corinto, Nicaragua, aforesaid, and if proof of such exportation and entry shall, in accordance with the requirements of the Warehousing Regulations in that behalf, be adduced within sixty days from the date hereof, to the satisfaction of the said Collector of Inland Revenue for the Division of or if the above bounden Consolidated Distilleries Limited shall account for the said goods to the satisfaction of the said Collector of Inland Revenue for the said Inland Revenue Division of Vancouver B.C., then this obligation to be void, otherwise to be and remain in full force and virtue."

p. 65. It was agreed that the word " Vancouver " in the above Condition was a clerical error and that for the purpose of the action the word " Belleville " ought to be substituted.

4. It was alleged on behalf of the Crown that some years after the cancellation of the bonds it was ascertained by the Crown that the purchasers of the goods sold by the Appellants, after exporting the goods from Vancouver in British Columbia consigned to Central American ports, had in fact delivered the goods to persons in small boats off the coasts of Southern California and Mexico and that statements in Consular Certificates furnished by them to the effect that the goods had been landed at the ports to which they had been consigned were false. The cancellation of the bonds took place on the production of these Consular Certificates and the Crown, on the assumption that proof of the falsity of the Certificates had the effect of reviving the cancelled bonds, brought the three actions out of which these

p. 1. p. 121. p. 174.

appeals arise, two on the 12th of March, 1928, and the third on the 26th December, 1928. In each action the full amount of the penal sums named in the bonds was claimed. Record.

5. The material facts in the three actions are summarised in the three following paragraphs.

6. In the first action (No. 9370) the Appellants, having on the 4th and 5th February, 1924, received orders from the Consolidated Exporters Corporation Limited of Vancouver to ship 4,250 cases of whiskey consigned to John Douglas and Company, Corinto, Nicaragua, via Vancouver, Steamer " Malahat," gave notice of export of the goods ordered and, for the purpose of obtaining delivery to the carriers from the bonded warehouse in which the goods were stored, executed four bonds in favour of the Respondent dated respectively the 8th and 12th February, 1924, conditioned for payment of the respective sums of $39,994, $34,094, $27,909 and $27,515, the sums named being approximately double the amount of the excise duty. p. 78, l. 5. p. 79, ll. 5 and 20. pp. 81-82. pp. 83-90.

The goods were, in accordance with the orders, duly entered for export and shipped and (with the exception of two cases which were lost or stolen during transit by rail between Belleville in Ontario and Vancouver, British Columbia, and in respect of which the Appellants paid duty at the ordinary rate) were duly exported by the Steamer " Malahat " consigned to Corinto, Nicaragua. On April 7th, 1924, the Appellants, in accordance with advice received from the owners of the ss. " Malahat," notified the Collector of Customs and Excise at Belleville that the cargo would be discharged at Buenaventura, Colombia, instead of at Corinto, Nicaragua. pp. 91-95. pp. 96-97. p. 111.

On the 24th April, 1924, the Appellants having received from Consolidated Exporters Corporation Limited landing certificates signed by a British Consular Officer at Buenaventura and bearing the official stamp of the British Consular Agency stating that the goods in question had been landed at Buenaventura on the 21st March, 1924, forwarded the certificates to the Collector of Customs and Excise at Belleville. Upon receipt of these certificates the Collector cancelled the four bonds. pp. 98-105. p. 112. p. 56, l. 27.

7. In the second action (No. 9371) the Appellants, in accordance with an order received from Western Freighters Limited for goods for export, on the 22nd May, 1924, applied for a permit to ship 401 cases of spirits from a Bonded Warehouse at Vancouver to Chiperinco, Gautemala by the Steamship " Prince Albert " for delivery to W. C. Watson and executed a bond in favour of the Respondent for the sum of $12,795 the sum named being approximately double the amount of the excise duty. p. 157. pp. 158-159.

The goods were accordingly entered for export and about the 22nd May, 1924, shipped by the Steamship " Prince Albert " consigned to Champerico, p. 159, l. 30. p. 131, l. 17. p. 161.

Record. Guatemala. Subsequently notice was given to the Collector of Customs
p. 132, l. 4. at Vancouver that the destination of the Steamship " Prince Albert " had been changed from Chiperinco, Guatemala to Buenaventura, Colombia.

Western Freighters Limited, the purchasers of the goods in question and the owners of the Steamship " Prince Albert," in due course delivered
p. 132, l. 14. to the Appellants a Landing Certificate dated 17th June, 1924, signed by
pp. 163-164. the British Consular Officer at Buenaventura, stating that the goods had been duly delivered over to the customs at Buenaventura and on production of this certificate to the Collector of Customs and Excise at Vancouver on
p. 131, l. 38. the 12th July, 1924, the Collector cancelled the bond in question.

pp. 227-228. **8.** In the third action (No. 10314) the Appellants in October, 1924, sold to the Consolidated Exporters Corporation Limited of Vancouver 1,000 packages of alcohol and 4,900 cases of whiskey for shipment to La Libertad, San Salvador, via Vancouver and, for the purpose of obtaining delivery to the carriers from the bonded warehouse at Belleville, Ontario, in which the goods were stored, executed seven bonds in favour of the
pp. 238-251. Respondent all dated the 15th October, 1924, conditioned for the payment of the respective sums of $104,544, $33,576, $39,435, $35,089, $39,994, $96,228 and $96,228, the amounts named in the bonds being approximately double the amount of the excise duty.

pp. 229-237. The goods were duly entered for export and shipped by rail to
pp. 252-254. Vancouver and were subsequently placed on board the Steamship " Malahat " consigned to La Libertad, San Salvador.

p. 268, l. 1. The Appellants in January, 1925, received from the Canadian Mexican Shipping Company Limited, the owners of the Steamship " Malahat "
pp. 254-265. Landing Certificates signed by a British Consular Officer to the effect that the goods in question had been landed at the Port of La Libertad
p. 268, l. 30. and on the 21st January, 1925, forwarded these certificates to the Collector of Customs and Excise at Belleville, Ontario, asking for notice of the
p. 269, l. 10. cancellation of the bonds. On the 28th January, 1925, the Collector wrote to the Appellants advising that the bonds in question had been cancelled.

9. The questions which arise in these appeals are :—

(1) Whether the Exchequer Court had jurisdiction to entertain the actions ?

(2) Whether, on the ground that the cancellation of the bonds had been due to erroneous information and without the Appellants being parties to any deception, the Crown had the right, by itself and without application to the Court, to treat the bonds as revived and as affording a good cause of action ?

(3) Whether the goods, shown by the evidence of the Appellants to have been exported and not returned to Canada, have been accounted for within the meaning of the conditions in the Bonds ?

(4) Whether in any case the Crown is entitled to recover the penal sums named in the bonds or only the amount of the duty or the loss or damages, if any, actually sustained ?

10. The question of jurisdiction depends on sections 92 and 101 of the British North America Act 1867. The matters in regard to which under section 92 of the British North America Act the Provincial legislatures have exclusive power to make laws include :—

" (13) Property and civil rights in the Province.

" (14) The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

Section 101 of the British North America Act is as follows :—

" 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organisation of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada."

11. The Exchequer Court of Canada was constituted in 1875 in exercise of the power conferred on the Parliament of Canada by section 101 to establish " additional Courts for the better administration of the laws of Canada."

In construing section 101 in *Consolidated Distilleries Limited* v. *Consolidated Exporters Corporation Limited* (1930 S.C.R. at p. 534) the majority of the Supreme Court of Canada (Anglin, C.J.C., Rinfret, Lamont and Cannon, JJ.) said :—

" In the collocation in which they are found, and having regard to the other provisions of the *British North America Act*, the words ' the laws of Canada,' must signify laws enacted by the Dominion Parliament and within its competence. If they should be taken to mean laws in force anywhere in Canada, which is the alternative suggested, s. 101 would be wide enough to confer jurisdiction on Parliament to create courts empowered to deal with the whole range of matters within the exclusive jurisdiction of the provincial legislatures, including ' property and civil rights ' in the provinces, although by s. 92 (14) of the *British North America Act :*

" ' The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts,

Record.

both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts,' is part of the jurisdiction conferred exclusively upon the provincial legislatures."

In the view that it was not within the powers of Parliament "to set up a Court competent to deal with matters purely of civil rights as between subject and subject," the Court affirmed the decision of the Exchequer Court in a case similar to the present setting aside a third party notice whereby the Appellants had claimed indemnity against a third party under an agreement.

12. It is respectfully submitted that if the Dominion, instead of imposing sanctions for the breach of its laws, accepts bonds or other contracts for their due observance, the rights and obligations created are precisely similar in their nature to the rights and obligations arising under similar contracts entered into between subjects; that such rights and obligations do not arise under the laws of Canada but depend entirely upon the laws of the Province in which the contracts were made or in which they are to be performed and that, irrespective of whether or not the Crown is a party, the only Courts competent to give effect to such rights and obligations are the Provincial Courts. In addition the bonds sued on having been cancelled an action or proceeding to restore them could be taken only in a Superior Court of the Province.

13. If it were competent to the Parliament of Canada to confer on its additional Courts jurisdiction over matters of contract such as those involved in the present action, it would also be competent to extend such jurisdiction to matters arising out of contracts entered into by Corporations, such as Banks, Railways and other Companies which, under section 91 of the British North America Act, are subject to the exclusive legislative control of the Dominion.

The decision of the Supreme Court of Canada referred to in paragraph 11 above to the effect that the Exchequer Court has no jurisdiction to entertain a claim for indemnity against a third party, coupled with the decisions of the Supreme Court in the present cases, have the result that the decisions of two Courts are necessary in order to determine the liabilities of the parties concerned in a particular transaction.

14. Section 30 of the Exchequer Court Act (Revised Statutes of Canada 1927, ch. 34) provides as follows:—

> "The Exchequer Court shall have and possess concurrent original jurisdiction in Canada—
>
> "(*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada . . .
>
> * * * * * *

" (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner." Record.

It is submitted that the present case does not properly come within paragraph (*a*) of section 30 and in regard to paragraph (*d*) of section 30 that legislation by the Parliament of Canada in regard to actions and suits of a civil nature is *ultra vires*.

15. The Consular certificates which led to the cancellation of the bonds were received and transmitted to the Collector by the Appellants in good faith and the fact that the bonds were cancelled in consequence of false statements contained in the certificates does not, it is submitted, in itself render the cancellation entirely inoperative or revive the bond so as to give the Crown a good cause of action for the penalties therein specified.

16. The evidence adduced by the Respondents establishes that all the goods in question were in fact exported from Canada and were disposed of at a great distance from Canada and in circumstances precluding the possibility of their return to Canada. Accordingly it is submitted that the goods have been accounted for within the intention of the bonds and the relevant legislation.

17. The following provisions of the Inland Revenue Act, Revised Statutes of Canada, 1906, chapter 51, are referred to :—

" 58. No goods, subject to a duty of excise under this Act, shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, licensed as herein provided, or from any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required.

* * * * * * *

" 61. Spirits, malt, tobacco, cigars and other articles subject to duty under this Act may, subject to the following provisions and to such regulations as the Governor in Council makes, be deposited in any suitable excise bonding warehouse licensed for the purpose, without payment of the duty hereby imposed.

" 62. Before any license is granted to any person for a bonding warehouse, for goods subject to excise duties, such person shall give good and sufficient security by bond of a guarantee company, approved by the Department, for an amount equal to the sum to which it is estimated the duty on the average quantity of goods in the warehouse will amount.

Record.

" (2.) Such bond shall be conditioned for the payment of all such duties and all penalties to which the owners of any goods warehoused therein, or the owner of any such warehouse may become liable under this Act.

" (3.) Whenever the duties on the goods warehoused in such warehouse exceed the amount for which the bond is taken, a new bond may be taken for a sum sufficient to cover the increased amount of duty.

* * * * * * *

" 68. Goods warehoused under this Act may be transferred in bond, and may be exported or removed from one warehouse to another, without payment of duty, under such restrictions and regulations as the Governor in Council deems necessary.

* * * * * * *

" 118. If any goods subject to excise entered to be warehoused are not duly carried into and deposited in the warehouse, or, having been so deposited, are afterwards taken out of the warehouse without lawful permit, or, having been entered and cleared for exportation, are not duly carried and shipped or otherwise conveyed out of Canada, or are afterwards re-landed, sold or used in or brought into Canada without the permission of the proper officer of the Crown, such goods shall be forfeited to the Crown and may be seized by any officer of Excise and dealt with accordingly.

* * * * * * *

" 140. The Governor in Council may make such regulations for the warehousing and for the ex-warehousing, either for consumption, for removal, for exportation, or otherwise, of goods subject to a duty of excise, and for giving effect to any of the provisions of this Act, and declaring the true intent thereof in any case of doubt as to him seems meet.

* * * * * * *

" 142. All regulations made under this Act, whether made by the Governor in Council or departmental, shall have the force of law, and any violation of any such regulation shall subject the holder of a license under this Act or any other person in the said regulations mentioned, to such penalty or forfeiture as is, by the said regulations, imposed for such violation; and the same shall be enforced in like manner as other penalties and forfeitures imposed by this Act."

18. The General Warehousing Regulations regarding the warehousing of goods liable to duty of excise dated 13th April, 1924, contain the following :—

"15. Entry of goods ex-warehouse for exportation must be made on the forms sanctioned by the Department, and must contain an exact specification of the goods intended for exportation. (See Section 10). With every such entry, an export bond shall be taken in the prescribed form. Record. p. 116, l. 3.

* * * * * *

"17. . . . .

"In all cases where the exportation out of Canada is by a bonded railway, or by a vessel clearing for a Port outside of Canada and plying on a published route and schedule, with first Port of call a Port outside of Canada, such evidence of exportation of the goods as is above herein provided for, shall operate as a cancellation of the bond, notwithstanding the actual terms of the obligation of the bond. p. 116, l. 45.

"In all other cases the bond shall not be cancelled, unless :—

"(1) Within the period named in said bond, there be produced to the proper collector or officer of Customs and Excise, the duly authenticated certificate of some principal officer of Customs at the place to which the goods were exported, stating that the goods were actually landed and left at some place (naming it) out of Canada, as provided by the said bond ; or,

"(2) Within the period of three months from the date of the exportation of the goods, evidence satisfactory to the Commissioner of Customs and Excise shall be furnished to him that the goods so undertaken to be exported shall not have been re-landed in Canada, or if re-landed in Canada, that the proper entry has been made at Customs and the proper duties paid thereon.

"Where a shortage occurs in goods so forwarded, ex-warehouse for exportation, and same are not accounted for by exportation from out of Canada to the Department of Customs and Excise on Export Entry No. B-13, it is the duty of the Collector of Customs and Excise at the Frontier Port where such goods were short received for exportation, to notify the Collector of Customs and Excise of the Port from which such goods were shipped for exportation, when the Collector of Customs and Excise for said Port shall require the consignor to pass Entry, and pay the lawful duty payable upon the goods short delivered at the Frontier Port, in accordance with the regulations contained in Departmental Circular No. G.797."

No form of bond was prescribed by the Statute or the Regulations and there is no statutory authority for the insertion in the bond of a penalty of double the amount of the duty.

Record.

19. The object of the statutory provisions and Regulations above set out and the purpose of the bonds in question was, it is submitted, to secure that in case the goods were not actually exported out of Canada or were subsequently re-landed in Canada, the duty would be paid.

The goods having been exported and not having been re-landed in Canada this purpose was, it is submitted, satisfied and the bonds ceased to be operative.

20. Any claim by the Crown for penalties would, it is submitted, be prescribed under section 48 of the Ontario Limitations Act (Revised Statutes 1927, chapter 106) which reads, in part, as follows :—

> " 48. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned :
>
> * * * * * *
>
> " (H) An action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved within two years after the cause of action arose ;
>
> * * * * * * "

21. By the judgments of the Exchequer Court (Maclean J.) in the three actions delivered on the 13th, 17th and 16th days of March, 1931, the Appellants were found liable for the full amount of the bonds, namely, $587,400. The reasons for judgment in the three actions were substantially the same.

p. 66. p. 147. p. 211.

The learned Judge in dealing with the question of the jurisdiction of the Court distinguished the case of *The King* v. *Consolidated Distilleries Limited* (1930 S.C.R. 531). He considered that there could be no doubt that the Parliament of Canada had jurisdiction to legislate in respect of customs and excise and that the subject matter of the action directly arose from Dominion legislation in respect of excise.

p. 69, l. 13. p. 150, l. 20. p. 214, l. 15.

The learned Judge considered that no proof of the exportation and entry of the goods within the period stipulated had been adduced to the satisfaction of the Collector of Inland Revenue at Belleville and that there had not been an accounting for the goods to the satisfaction of the Collector and that accordingly the Appellants were liable upon the bonds. Neither the cancellation of the bonds which had been procured by fraud nor the fact that the goods were purchased and disposed of by a purchaser discharged the Appellants' obligation.

p. 150, l. 1.

p. 69, l. 1. p. 214, l. 2.

The learned Judge disallowed the claim of the Crown for any interest on the bonds prior to the date of the judgment.

p. 70, l. 22.

22. The Appellants appealed to the Supreme Court of Canada and on the 15th March, 1932, the Court (Anglin, C.J.C., Duff, Rinfret and Lamont, JJ.) delivered judgment dismissing all three appeals and also dismissing three cross-appeals by the Respondent in respect of interest. Record. p. 73. p. 155. p. 221.

The appeals and cross-appeals were heard concurrently and one judgment was delivered in all three appeals. pp. 75-77.

23. Chief Justice Anglin considered that if authority to hear and determine such claims was not something which it was competent for the Dominion under section 101 of the British North America Act to confer upon a Court created for " the better administration of the laws of Canada " he would find it very difficult to conceive what that section was intended to convey and that it was clear that Parliament intended to confer such jurisdiction (the case probably falling within clause (*a*), but if not, certainly under clause (*d*) of section 30 of the Exchequer Court Act). On the construction of the bonds a breach of the condition of each bond had been equally clearly established and he agreed with the contention of the Crown that the whole amount named in the bonds ought to be paid. The learned Chief Justice would have allowed the Crown's claim for interest as from the date of default. p. 75.

24. Mr. Justice Duff, with whom Mr. Justice Rinfret and Mr. Justice Lamont concurred, had no doubt that " the better administration of the laws of Canada " embraced, upon a fair construction of the words, such a matter as the enforcement of an obligation contracted pursuant to the provisions of a statute of the Parliament of Canada or of a regulation having the force of a statute. As to the jurisdiction of the Exchequer Court in so far as that depended upon the construction of the Exchequer Court Act, something might be said for the view that these cases are not within the class of cases contemplated by sub-section (*a*) of section 30, but that was immaterial because they are plainly within sub-section (*d*). He considered that the professed cancellation of the bonds was inoperative and that there was not the slightest ground for finding that the Appellants had complied with the alternative condition by accounting for the goods to the satisfaction of the Collector of Inland Revenue. p. 76.

As to the amount recoverable he considered that the purpose of the bonds being to prevent frauds on the revenue, generally speaking the sum named was recoverable in full and he had some difficulty in affirming that the penalties named in these bonds were not, in each case, " a genuine pre-estimate of the creditors' probable or possible interest in the due performance of the principal obligation." As to interest he was unable to conclude that at any date prior to judgment the penalty became payable as a " just debt " within the meaning of Lord Macnaghten's judgment in *Toronto Railway* v. *Toronto Corporation* [1906] A.C., pp. 120 and 121. p. 76, l. 44. p. 77, l. 27.

25. It is submitted that the appeals should be allowed and the Respondent's actions dismissed for the following among other

REASONS.

(1) BECAUSE the Exchequer Court of Canada had no jurisdiction to entertain the actions on the bonds in question.

(2) BECAUSE the cancelled bonds did not afford a good cause of action.

(3) BECAUSE the purpose of the bonds was to secure payment of the excise duty in case the goods were not exported or were, after exportation, re-landed in Canada.

(4) BECAUSE the Respondent's evidence shows that the goods were exported and could not have been re-landed in Canada.

(5) BECAUSE the Appellants have, within the intention of the bonds and the relevant legislation, accounted satisfactorily for the goods.

(6) BECAUSE the sums named in the bonds were penal and the Respondent is not in any event entitled to recover double duty or more than the loss or damage actually sustained.

(7) BECAUSE any claim by the Crown for penalties is prescribed under section 48 of the Ontario Limitations Act.

W. N. TILLEY.

F. T. COLLINS.

In the Privy Council.

No. 80 of 1932.

On Appeal from the Supreme Court of Canada.

BETWEEN

CONSOLIDATED DISTILLERIES LIMITED and W. J. HUME (*Defendants*) - - - *Appellants*

AND

HIS MAJESTY THE KING (*Plaintiff*) - *Respondent*

(Action No. 9370)

AND BETWEEN

CONSOLIDATED DISTILLERIES LIMITED and F. L. SMITH (*Defendants*) - - - *Appellants*

AND

HIS MAJESTY THE KING (*Plaintiff*) - *Respondent*

(Action No. 9371)

AND BETWEEN

CONSOLIDATED DISTILLERIES LIMITED and W. J. HUME (*Defendants*) - - - *Appellants*

AND

HIS MAJESTY THE KING (*Plaintiff*) - *Respondent*

(Action No. 10314)

[CONSOLIDATED APPEALS.]

CASE FOR THE APPELLANTS.

BLAKE & REDDEN,

17 Victoria Street, S.W.1.