

*Privy Council Appeal No. 80 of 1932.*

Consolidated Distilleries, Limited, and another - - - *Appellants*  
v.  
The King - - - - - *Respondent*  
Consolidated Distilleries, Limited, and another - - - *Appellants*  
v.  
The King - - - - - *Respondent*  
Consolidated Distilleries, Limited, and another - - - *Appellants*  
v.  
The King - - - - - *Respondent*  
(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF CANADA.

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 10TH APRIL, 1933.

---

*Present at the Hearing :*

LORD ATKIN.  
LORD TOMLIN.  
LORD THANKERTON.  
LORD RUSSELL OF KILLOWEN.  
LORD MACMILLAN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

---

These are three appeals (consolidated into one) from three judgments of the Supreme Court of Canada affirming the judgments of the Exchequer Court of Canada delivered in three actions which had been brought by the Crown for the purpose of recovering moneys alleged to be due under certain bonds executed by the appellants in favour of the Crown in the circumstances hereinafter mentioned. The appellants Hume and King are parties to all or some of the bonds, but where subsequently used in this judgment the word "appellants" refers to Consolidated Distilleries, Limited, only.

The bonds in question were given in pursuance of the provisions of the Inland Revenue Act (R.S.C., 1906, cap. 51) and the regulations thereunder, in respect of the export of certain spirits which had, pursuant to Section 61 of the said Act (hereinafter referred to as the Revenue Act), been deposited in an excise bonding warehouse at Belleville, Ontario, and on which, accordingly, no excise duty had been paid.

The relevant provisions of the Revenue Act in regard to the export from Canada of spirits so deposited are Sections 58, 68, 140 and 142, which run thus:—

“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.

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.

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 licence 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.”

Certain regulations appear to have been made, which were approved by Orders in Council and which contain the following provisions:—

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.

16. Export bonds shall be conditioned for the due delivery of the goods bonded at the place designated in the entry within a specified time, which time in any case shall not exceed the time usually necessary for the performance of the voyage or journey by the conveyance adopted (allowing a reasonable time for detention within the discretion of the Collector) and for returning the vouchers by the next mail; and in no case shall the period allowed for the cancellation of the export bond exceed six months unless special authority has been granted by the Department.”

“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.

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 first 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 Revenue Act or by the regulations ; but a printed departmental form of bond was in fact used.

The relevant facts may now be stated. It will, their Lordships think, be sufficient if the facts relating to one action only are stated in detail, attention being drawn to any material difference which exists in regard to the others. For this purpose they select the first action (No. 9370).

On the 4th and 5th February, 1924, the appellants received orders from a customer, Consolidated Exporters Corporation, Limited, to ship altogether 4,250 cases of spirits to John Douglas and Company, Corinto, Nicaragua. The cases were taken out of the excise bonding warehouse at Belleville and sent by rail to Vancouver, where they were placed on board the S.S. " Malahat," the master of that vessel signing four " Entry for export ex-warehouse " forms, which covered respectively 1,000, 1,250, 1,000 and 1,000 cases, as having received the goods " on board the S.S. ' Malahat ' for exportation to John Douglas and Company, Corinto, Nicaragua." 2,250 cases were taken out of the warehouse on the 8th February, 1924, and on that date two bonds were executed by the appellants and Hume, one in a sum equal to double the amount of duty in respect of 1,250 cases, the other in a sum equal to double the amount of duty in respect of 1,000 cases. On the 12th February, 1924, two further bonds were executed by the same parties in sums amounting altogether to double the amount of duty in respect of the balance of 2,000 cases which were taken out of the warehouse on that day. The " Malahat " sailed from Vancouver on the 23rd February, 1924.

As appears from her "Report outwards," two of the 2,000 cases never reached the "Malahat"; they apparently disappeared in transit from Belleville, and on them duty has been paid.

On the 7th April, 1924, the appellants notified the Collector of Customs and Excise at Belleville (Mr. Geen) that the owners of the "Malahat" had received instructions from the shippers (Consolidated Exporters Corporation, Limited) and the consignees (John Douglas and Company) to discharge the cargo at Buenaventura, Colombia, in place of Corinto, Nicaragua, and requested him to make a note of the fact on his records.

The appellants subsequently received from the shippers four "Entry for export ex-warehouse forms," covering respectively the 1,250, 1,000, 998, and 1,000 cases upon each of which appeared the following certificate:—

"I. G. W. Yates, do hereby certify that the same identical goods described and contained in the within Export Entry have been landed at the port of Buenaventura in Colombia and have been duly delivered over to the Customs.

Witness my hand and seal of office this 21 day of Marzo 1924.

G. W. YATES."

There appeared upon the document a stamp, or seal, purporting to be the stamp or seal of the British Consular Agency, Buenaventura, and there were pasted on the document what purported to be two tax stamps of the British Consular Agency, Buenaventura, with the date March 21/24. At the foot of the form is to be found the following printed note:—

"NOTE.—If the goods are exported to Great Britain or any British Colony or Possession, this certificate may be signed by any principal officer of Customs or of Colonial Revenue at the place to which the goods are exported, or if such goods are exported to any place in any foreign country, it may be signed by any officer of Customs therein, or any British or foreign Consul or Vice-Consul resident there.

These four documents were forwarded by the appellants to Mr. Geen, in a letter dated the 24th April, 1924. Mr. Geen, acting upon those documents, cancelled the four bonds by making entries in the record book to show that they were cancelled. According to practice, the bonds were not delivered up, but remained on the file at the Excise office where they had been placed when the goods were being shipped.

The "Malahat" returned to Vancouver in ballast on the 15th May, 1924, bringing with her a bill of health and foreign clearance, both dated the 5th April, 1924, the former purporting to be given by the British Consul at Buenaventura, and the latter purporting to grant permission from the Port authority at Buenaventura for the "Malahat" to sail that day for Vancouver direct in ballast.

In truth, the "Malahat" never went to Buenaventura. She sailed right down the coast to a point about 12 miles south of the boundary between the United States and Mexico, and discharged her cargo into sundry vessels at various points from 20 to 50 miles out at sea off the coasts of California and Lower

California. Having disposed of her cargo, she received the bill of health and foreign clearance above mentioned, from a vessel on the high seas, and returned to Vancouver.

In the second action (No. 9371) the facts are substantially the same. The goods, however, were taken from an excise bonding warehouse at Vancouver, and were shipped on board the S.S. "Prince Albert," for delivery to W. O. Watson at Chiperinco, Guatemala. Subsequently, notice was given to the Collector at Vancouver of a change from Chiperinco to Buenaventura. The appellants received a landing certificate signed by the British Consular officer at Buenaventura, stating that the goods had been delivered to the Customs there. The "Prince Albert" never went to Chiperinco. On production of this certificate the Collector at Vancouver cancelled the one bond which had been given, by writing the word "cancelled" on the bond. By admissions consented to by the parties it must be taken that the Collector cancelled the bond upon the belief that the landing certificate was genuine and true. The appellant Smith was a party to this bond.

In the third action (No. 10,314) the facts are substantially the same as in the first action except that the goods were, according to the documents, consigned in the "Malahat" to La Libertad, San Salvador. On receipt of the landing certificates Mr. Geen wrote and informed the appellants that "the bonds covering the above shipments have been cancelled." By admissions consented to by the parties it must be taken that Mr. Geen cancelled the bonds in accordance with his usual custom, that he believed the landing certificates to be genuine and true, and that he cancelled the bonds upon this belief.

When the true facts had been ascertained, the Attorney General of Canada filed three informations in the Exchequer Court of Canada, claiming on behalf of His Majesty the full amount of the sums named in the bonds. Of the three informations, one related to each of the three shipments in the "Malahat," the "Prince Albert," and the "Malahat," respectively.

At this point it is necessary to state the form of the condition of the bonds. After proclaiming that the persons in question are bound to the King in the stated sum, the document recites that the appellants have given notice of intention to export to the specified port in the specified ship of which the specified individual is master, the specified goods (designated by the marks, numbers, and contents of packages) and then proceeds as follows (the sample given being the bond covering the 1,250 cases taken out of the bonding warehouse on the 8th February, 1924) :—

"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 60 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."

It is common ground that in this condition the word " Belleville " must be substituted for the words " Vancouver B.C."

The information in each case contained specific allegations showing that the condition of the bond had not been performed.

The appellants in each case pleaded (amongst other pleas) that they were not indebted ; that the bonds were void ; that the goods were actually exported from Canada, had left Canada, and had never been relanded in Canada ; and that the Court of Exchequer had no jurisdiction to decide the matter at issue.

In reply, it was roundly alleged that the appellants had devised a fraudulent scheme to obtain the removal of liquors from customs bond without payment, by the production of landing certificates forged or otherwise fraudulently procured, and that any cancellation of the bonds based on the production of such false certificates was ineffective.

It must here be stated that this charge of fraud against the appellants was never established, and that the case fell and falls to be decided upon the footing that the appellants had no reason to believe that the landing certificates which they sent to the Collector were other than honest documents being what they purported to be, and that the facts therein certified were correctly and truthfully certified. It should further be stated that it was not established in the actions whether the landing certificates were in fact forgeries or (if genuine) by what means they had been procured.

In the Exchequer Court it was ordered and adjudged that the plaintiff do recover from the defendants the full sums named in the bonds without interest with his taxed costs of action. The learned President (MacLean J.) held that the conditions of the bonds had not been performed, that the cancellations did not discharge the defendants because the cancellations were procured by fraud. He also held that the Exchequer Court had jurisdiction to deal with the matter ; but that no interest was recoverable.

Upon appeal to the Supreme Court by the defendants and cross-appeal by the plaintiff (as to interest), the appeal and cross-appeal were both dismissed with costs. The question of interest was not further in dispute before the Board.

Anglin C.J.C. upheld the jurisdiction of the Exchequer Court, and thought that a breach of the condition of each bond had been clearly established, and that the full amount named in each bond must be paid.

Duff J. (with whom Rinfret and Lamont JJ. concurred) agreed that the Court had jurisdiction. He thought that the

cancellations of the bonds were inoperative, the documents upon which the cancellations proceeded being concocted documents, and that the conditions under which the regulations alone permitted cancellation never came into effect. He further held that what he termed "the alternative condition" of the bond had not been performed, because there was no ground for finding that the appellants did account for the goods to the satisfaction of the Collector. He thought that the whole amount named in the bond was recoverable.

Upon appeal to His Majesty in Council various points were argued and discussed but in the view which their Lordships take of the rights of the parties it is only necessary to deal with two matters, viz., (1) whether the Court of Exchequer had jurisdiction to try the actions and (2) whether in the circumstances which exist in these cases the condition of the bonds was fulfilled so that the bonds, without the necessity of any cancellation (in the sense of a release of an otherwise existing obligation), became void and ceased to be binding according to their tenor. In particular their Lordships express no opinion upon the correctness of the view which has prevailed in the Courts below that the Crown (if entitled to succeed in the actions) was entitled to recover the full amount of the penalties secured by the bonds.

The question of jurisdiction depends upon a consideration of the British North America Act, 1867, and the Exchequer Court Act (R.S.C., 1927, cap. 34). The matters in regard to which the Provincial legislatures have exclusive power to make laws, include under the British North America Act, section 92 (13): "Property and civil rights in the Province," and section 92 (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, however, provides that: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the . . . establishment of any additional Courts for the better administration of the laws of Canada."

The Exchequer Court of Canada was constituted in the year 1875 in exercise of this power. It was conceded by the appellants (and rightly as their Lordships think) in the argument before the Board, that the Parliament of Canada could, in exercising the power conferred by section 101, properly confer upon the Exchequer Court jurisdiction to hear and determine actions to enforce the liability on bonds executed in favour of the Crown in pursuance of a revenue law enacted by the Parliament of Canada. The point as to jurisdiction accordingly resolves itself into the question whether the language of the Exchequer Court Act upon its true interpretation purports to confer the

necessary jurisdiction. The relevant section is section 30, which is in the following terms :—

“ 30. 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, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information *in rem*, and as well in *qui tam* suits for penalties or forfeiture as where the suit is on behalf of the Crown alone ;

(b) in all cases in which it is sought at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands ;

(c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer ; and

(d) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. R.S., c. 140, s. 31.”

By virtue of section 2 (a) the Crown means the Crown in right or interest of the Dominion of Canada.

The learned President held that the Exchequer Court had jurisdiction inasmuch as the bonds were required to be given by a law enacted by the Parliament of Canada in respect of a matter in which it had undoubted jurisdiction. The subject matter of the actions directly arose from legislation of Parliament in respect of excise.

The Chief Justice thought that the cases fell clearly within Section 30 (d), and probably also within Section 30 (a). Duff J., while suggesting a possible doubt as to the application of subsection (a), held that the cases were plainly within subsection (d).

Their Lordships are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by section 30, beyond what is necessary for the decision of this particular case. Each case as it arises must be determined in relation to its own facts and circumstances. In regard to the present case their Lordships appreciate that a difficulty may exist in regard to subsection (a). While these actions are no doubt “ cases relating to the revenue,” it might perhaps be said that no law of Canada is sought to be enforced in them. Their Lordships, however, have come to the conclusion that these actions do fall within subsection (d). It was suggested that if read literally, and without any limitation, that subsection would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be *ultra vires* the Parliament of Canada as one not covered by the power conferred by Section 101 of the British North America Act. Their Lordships, however, do not think that subsection (d), in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding subsections the actions and

suits in subsection (d) must be confined to actions and suits in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the subsection could not be said to be *ultra vires*, and the present actions appear to their Lordships to fall within its scope. The Exchequer Court accordingly had jurisdiction in the matter of these actions.

There remains for consideration the second question, which is indicated above, and which turns mainly upon the true construction of the condition of the bonds. This construction appears reasonably plain. The obligation is to be void upon the happening of one of two alternative events. The first of these is a compound event consisting of (1) the goods being shipped, exported and entered for consumption or for warehouse at the specified port; and (2) proof of such exportation and entry in accordance with the regulations being adduced within a fixed time to the satisfaction of the Collector. The second alternative event is the appellants accounting for the goods to the satisfaction of the Collector. It was contended on behalf of the Crown that upon the true construction, the first limb of the compound event indicated above applied to the whole condition. This does not appear to their Lordships a construction consonant either with grammar or with probability. It would give but small scope for the operation of the last sentence of the condition; for if the actual fact of exportation and entry must exist in all cases before the obligation is avoided, it follows that the existence of that fact must be established by proof, in which case there could be (apart from the question of time limit) no room for any other or further accounting for the goods. On the other hand, a reasonable and probable construction is that the last sentence is introduced as a second alternative event (a safety-valve) which though it would include the first alternative will also meet the cases, which must from time to time occur, where compliance with the opening sentence of the condition has for some reason become impossible. Of such cases, the first shipment here in the "Malahat" (which was not plying on a published route or schedule) would form an excellent example if the shippers had been acting honestly. Owing to a change after the execution of the bond of the port specified in the condition, the obligation could never have been avoided according to its tenor if the Crown's construction were the correct one. The obligation would necessarily continue unless and until cancellation (in the sense of release) was obtained by furnishing to the satisfaction of the Commissioner of Customs and Excise the evidence required by the later part of Regulation 17 within the period of three months from the date of the bond.

It was further contended that the condition should be construed in the light of the regulations which are referred to therein, and that the light so shed, in particular by No. 16, revealed that the bonds were to be solely conditioned for the due delivery

of the goods at the place designated in the entry for export. Even if regulation 16 may properly be read for the purpose of construing the condition (and their Lordships are not satisfied that it may), it does not bear the construction placed upon it by the Crown. The emphasis is upon the necessity of a limit of time within which delivery has to take place, and there is no prohibition in the regulation of a condition with alternatives.

Upon the true construction of the condition their Lordships feel no doubt that the obligation under the bonds was avoided if and when the appellants accounted for the goods to the satisfaction of the Collectors.

The final question then remains, did they in fact so account for the goods ?

The appellants believed and the Collectors believed that the goods had been landed at Buenaventura and La Libertad. They had no reason to doubt the genuineness or the truthfulness of the landing certificates. Mr. Geen, in his evidence in the first action, says that he acted upon them and cancelled the bonds, believing that the goods had gone to Buenaventura. The fact of what has been called the cancellations of the bonds, is the best possible evidence that in each case the appellants did in fact account for the goods to the satisfaction of the Collector. Once that state of affairs was brought into existence, then according to the terms of the bond, the obligation thereunder became void. Their Lordships can see no escape from that conclusion.

It was argued that this result could not ensue because the crucial fact had been brought about by the production of fraudulent documents. Whatever might be the position if the appellants had been parties to the fraud (as to which their Lordships say nothing), the facts here are otherwise. The appellants acted in good faith.

It was further contended that the satisfaction of the Collector having been brought about by innocent misrepresentation, the obligation under the bonds should in some way be re-created and restored. Such an argument might be sustainable if the appellants had been forced to rely upon cancellation in the sense of a release, or an agreement to release. It might then be said that that was a transaction which had been procured by innocent misrepresentation, and that it should be set aside with the result of restoring that which had been released or contracted to be released. Their Lordships express no view as to this. There is, however, no room for such a contention here. The appellants are not relying upon any outside transaction to free them from liability. They are relying only upon the terms of the document which created the liability and which provided that the liability should end with the happening of a certain event. Their Lordships are not aware of any doctrine equitable or otherwise which entitles the Crown to say that the event is to be deemed not to have happened, or that liability under the bond is to survive notwithstanding that the

event, which according to the bond avoids the obligation, has in fact happened.

The result is that in the opinion of their Lordships the appellants are under no liability in respect of the bonds. When the true position is realised it would seem strange if the Crown could in these cases recover these double duties. The actual destination of the liquor may well be suspected ; the least likely scene of its actual consumption is Canada. So long as it left Canada and was not relanded there, no duty would be payable under the Revenue Act. The Revenue Act is not concerned with prohibition legislation, but with collecting excise duty where under its provisions it is properly payable. It would indeed be matter for comment and wonder if the Crown were entitled to double duties in a case where no duty was payable under the Act at all, and where the bonds in suit were only required by the Act to be given as security for the payment of duty.

This appeal should be allowed, the orders of the Supreme Court and the Exchequer Court should be set aside (but as to the orders of the Supreme Court not so far as they dealt with the Crown's cross-appeal and dealt with the costs thereof), and an order should be made in each of the three actions dismissing the action with costs. The respondent should pay to the appellants their costs of their appeals in the Supreme Court and here.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

---

CONSOLIDATED DISTILLERIES, LIMITED,  
AND ANOTHER

<sup>v.</sup>  
THE KING

CONSOLIDATED DISTILLERIES, LIMITED,  
AND ANOTHER

<sup>v.</sup>  
THE KING

CONSOLIDATED DISTILLERIES, LIMITED,  
AND ANOTHER

<sup>v.</sup>  
THE KING,

*(Consolidated Appeals.)*

---

DELIVERED BY LORD RUSSELL OF KILLOWEN.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1933.