

1955

BETWEEN:

Sept. 16

JOE ZAROWNEY .....CLAIMANT;

Nov. 21

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

*Crown—Seizure—Forfeiture—Motor vehicle used for the purpose of transporting unlawfully manufactured spirits—Information filed in Court for condemnation of thing seized—Claim to property seized—Notice by owner of thing seized—Conditions upon which judge may grant order to protect claimant's interest in the thing seized—The Excise Act, R.S.C. 1952, c. 99, as amended, ss. 114(1) and (2), 115(1), 163(3) and 164(1) and (2)—Claim to property seized dismissed.*

Claimant's truck driven by his son was seized after some jugs of unlawfully manufactured spirits were found in it. Following the seizure claimant gave a notice to the Department of National Revenue, Customs and Excise, that he was the owner of the truck and that he requested its return to him. The matter was referred to this Court on behalf of her Majesty by the Deputy Attorney General of Canada by way of information praying for the condemnation of the truck. Claimant then filed a statement of claim seeking the dismissal of the action and the return of his truck. At the conclusion of the trial claimant sought an extension of the time within which an

application may be made under s. 164 of the Excise Act, R.S.C. 1952, c. 99, for an order declaring his interest in the truck be not affected by such seizure.

*Held:* That the limitation of thirty days within which an application may be made under s. 164 of the Excise Act is statutory. There being no statutory provision permitting the limitation of time to be enlarged the Court has no jurisdiction to grant the order sought by claimant.

2. That section 114 and 115 of the Excise Act, under which the claimant chose to proceed, confers on the Court no discretionary power, such as that conferred by section 164. The Court must release or condemn the truck "as the case requires".
3. That the words of s. 163(3) of the Excise Act are unequivocal. The fact that the use of the truck for the purpose of transporting unlawfully manufactured spirits was without the consent or knowledge of the owner or of the driver of the truck cannot affect the application or effect of that section of the statute. Condemnation is mandatory. There is no room for doubt as to the meaning of the words, "all vehicles that have been used for the purpose of transporting the spirits so manufactured shall be forfeited to the Crown". *The King v. Krakowec* [1932] S.C.R. 134; *Mayberry v. The King* [1950] Ex. C.R. 402 referred to and followed.

INFORMATION exhibited by the Deputy Attorney General of Canada to have condemned as forfeited to the Crown a motor vehicle seized under the provisions of s. 163(3) of the Excise Act.

The action was tried before the Honourable Mr. Justice Ritchie at Regina.

*W. B. Carss* for claimant.

*Edward Bayda* and *P. M. Troop* for respondent.

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

RITCHIE J. now (November 21, 1955) delivered the following judgment:

This is a proceeding *in rem* commenced by an information exhibited on behalf of Her Majesty by the Deputy Attorney General of Canada claiming to have condemned as forfeited to the Crown a 1954 Ford one-ton truck, serial number FCE83BHR17627, model number F350, seized by Royal Canadian Mounted Police officers on November 12, 1954.

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The seizure was made under section 163(3) of the Excise Act, chapter 99, R.S. 1952 as amended by section 6 of chapter 319, R.S. 1952. The relevant parts of section 163 read as follows:

163. (1) Everyone, whether the owner thereof or not, who, without lawful excuse, the proof whereof shall be upon the person accused, sells or offers for sale or purchases or has in his possession any spirits

(a) unlawfully manufactured,  
 is guilty of an indictable offence.

(3) All spirits referred to in subsection (1) wheresoever they are found, and all horses and vehicles, vessels and other appliances that have been or are being used for the purpose of transporting the spirits so manufactured, imported, removed, disposed of, diverted, or in or upon which the same are found, shall be forfeited to the Crown, and may be seized and detained by any officer and be dealt with accordingly.

One Joe Zarowney, a farmer residing at Poplar Bluff in the Province of Saskatchewan, has filed a statement of claim seeking the dismissal of the information and the return of the truck to him.

While the evidence established that the truck had been licensed in the name of Carl Zarowney in order to facilitate his obtaining delivery at the factory and driving it to Saskatchewan I am satisfied that Joe Zarowney, subject to the lien of an unpaid conditional sale agreement, was the real owner of the truck. Carl Zarowney is a son of Joe Zarowney.

At the trial the claimant admitted that at the time of the seizure three one-gallon jugs of unlawfully manufactured spirits were found in the truck.

The relevant parts of section 114 of the Excise Act, pursuant to which the claimant has filed his statement of claim, are subsections (1) and (2), which read as follows:

114. (1) So soon as an information has been filed in any court for the condemnation of any goods or thing seized under this Act, notice thereof shall be posted up in the office of the registrar, clerk or prothonotary of the court, and also in the office of the collector or chief officer in the excise division wherein the goods have been seized or thing has been seized as aforesaid.

(2) Where the owner or person claiming the goods or thing presents a claim to the same and gives security and complies with all the requirements in this Act in that behalf, the said court, at its sitting next after the said notice has been so posted during one month may hear and determine any claim that has been duly made and filed in the meantime, and release or condemn such goods or thing, as the case requires; otherwise the same shall, after the expiration of such month, be deemed to be condemned as aforesaid, and may be sold without any formal condemnation thereof.

On November 12, 1954, the day on which the truck was seized, Joe Zarowney instructed his son Carl to take the truck to Benito and obtain a quantity of electric light bulbs, groceries and other supplies for use at a gathering in celebration of the marriage of one of the other children of Joe Zarowney. Both father and son testified at the trial that Carl Zarowney had not been instructed to procure any intoxicating liquor. Carl Zarowney was emphatic and unshaken in his testimony that he had no liquor in his possession at any time that day and had no knowledge that liquor was on the truck until told by Kluk immediately before the seizure.

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While in Benito making his purchases, Carl Zarowney met his cousin Fred Kluk and agreed to drive him to the Zarowney home so that he would be there for the wedding celebration. The two had lunch at the Kluk home, which was on the route between Benito and the Zarowney residence. During lunch Carl Zarowney noticed Fred Kluk leave the house for a short while but thought nothing of it. After lunch Carl Zarowney and Fred Kluk proceeded on their way. At a point on the road Kluk noticed a Royal Canadian Mounted Police patrol car parked so as to observe oncoming traffic. On noticing the patrol car, Kluk immediately told Carl Zarowney to stop as he (Kluk) had unlawfully manufactured liquor in the truck. As soon as the truck came to a stop Fred Kluk seized jugs from the open box body of the truck and attempted to dispose of them. Kluk's attempt to dispose of the jugs attracted the attention of the officers in the patrol car who closed in on the truck. Kluk ran for the woods. The R.C.M.P. officers caught Kluk, found illicit spirits in the truck and promptly informed Carl Zarowney the truck was seized and forfeited to Her Majesty. Carl Zarowney did not join in the attempt to get rid of the illicit spirits but remained at the steering wheel until one of the officers told him to get out of the truck.

Following the seizure, the claimant's solicitor, on December 6, 1954, addressed to the Department of Justice a letter (Exhibit B) advising that Joe Zarowney was the owner of the truck, asking that it be released, and requesting that in any event the letter be considered as a claim to the truck on behalf of Joe Zarowney. The claim so made is acknowledged by paragraph 3 of the information filed herein.

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On December 14, 1954 (Exhibit C) the Assistant Deputy Minister of Justice acknowledged the letter written by the claimant's solicitor under date of December 6, 1954 and advised it had been referred to the Department of National Revenue.

Under date of February 14, 1955 the claimant's solicitor addressed a letter (Exhibit D) to the Department of National Revenue reviewing the circumstances leading to the seizure and asking that the truck be released.

The Deputy Minister of National Revenue on March 2, 1955 (Exhibit E) acknowledged the February 14, 1955 letter from the claimant's solicitor, advised

(a) that on the basis of the evidence before the Department there was no authority under the Excise Act whereby the truck could be released;

(b) that special consideration as an act of executive clemency could hardly be expected in view of the attempt of Carl Zarowney and Kluk to destroy the evidence and their refusal to give any information as to the source of the alcohol;

(c) that in view of the claim under section 115 the Department would be obliged to refer the matter to the Department of Justice with a request that it be brought before the Exchequer Court and a judgment of forfeiture sought; and

(d) that substantial costs would be awarded against the claimant if the judgment was unfavourable to him and so to allow further time for consideration no reference to the Department of Justice would be made until April 2, 1955. At the trial the Crown presented no evidence that Carl Zarowney had attempted to destroy the illicit spirits or refused to give any information as to the source from which the alcohol was obtained.

The only relevant part of section 115 of the Excise Act, under which the claimant first gave notice that the truck was his, is subsection (1) and reads as follows:

115. (1) All vehicles, vessels, goods and other things seized as forfeited under this Act or any other Act relating to excise, or to trade or navigation, shall be deemed and taken to be condemned, and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof, within one month from the day of seizure, gives notice in writing to the seizing officer, or to the collector in the excise division in which such goods were seized, that he claims or intends to claim the same.

Joe Zarowney impressed me as an honest, hard-working person. That Joe Zarowney has some standing in the community in which he resides is evidenced by his having held the office of Reeve for a period of four years. The evidence of Joe Zarowney and Carl Zarowney was not contradicted.

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At the conclusion of the trial the claimant sought an order extending the time in which he was entitled to proceed under section 164 of the Excise Act, which provides that whenever any vehicle has been seized as forfeited anyone (other than the person accused of an offence resulting in such seizure or person in whose possession such vehicle was seized) who claims an interest in such vehicle may, within thirty days after such seizure, apply to any judge of any Superior Court of any province or to a judge of the Exchequer Court for an order declaring his interest. If the judge is satisfied that the claimant

- (a) is innocent of any complicity in the offence resulting in such seizure or of any collusion with the offender in relation thereto; and
- (b) exercised all reasonable care in respect of the person permitted to obtain the possession of such vehicle to satisfy himself that they were not likely to be used contrary to the provisions of the Act

he may order that the claimant's interest be not affected by such seizure. The limitation of thirty days within which an application may be made under section 164 is statutory. There is no statutory provision permitting the section 164 limitation of time to be enlarged. I therefore have no jurisdiction to grant the order the claimant now seeks.

Were I dealing with an application under section 164 of the Excise Act I would have no hesitation in ordering that the claimant's interest be not affected by the seizure. The situation is different, however, when considering a claim under sections 114 and 115 under which the claimant has chosen to proceed. The statutory enactment must be adhered to. Sections 114 and 115 confer on the Court no discretionary power such as is contained in section 164. I must release or condemn the truck "as the case requires".

The words of section 163(3) of the Excise Act are unequivocal. The fact that the use of the truck for the purpose of transporting unlawfully manufactured spirits was without the consent or knowledge of the owner or of

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the driver of the truck cannot affect the application or effect of section 163(3) of the statute. Condemnation is mandatory. There is no room for doubt as to the meaning of the words, "all vehicles that have been used for the purpose of transporting the spirits so manufactured shall be forfeited to the Crown."

An extract from the judgment of Rinfret J., as he then was, in *The King v. Krakowec* (1) at page 141 is particularly appropriate to the circumstances of this case. When the Krakowec judgment was delivered no provision such as contained in the present section 164 was included in the Excise Act. There was, however, a section similar to the present section 163(3). The extract from the judgment is lengthy but so appropriate that I will quote it in full.

The section, it will be noticed, sets out no qualification as to ownership of the "horses and vehicles, vessels and other appliances which have been or are being used." On the contrary, it says that all such horses, vehicles, etc., "shall be forfeited to the Crown, and shall be dealt with accordingly." Upon the bare words of the enactment it must, therefore, follow that any vehicle used for the purpose of removing spirits unlawfully manufactured or imported is subject to the forfeiture therein prescribed, unless something be found in the context or in the general scope of the Act to justify a departure from the well known rule that the intention of the legislature must be determined from the words it has selected to express it. Here we find nothing of the kind in the context or in the subject-matter of the statute. The learned trial judge observed that, when dealing with penalties, the expression "whether the owner thereof or not" is used in the section, while it is not there when the section comes to deal with the forfeiture. But the explanation is that it was necessary, in order to avoid doubt, to insert the expression in the one case, while it was not in the other. In the first part of the section, mere possession is the mischief aimed at by the legislature. Now, possession may be possession by the owner, or it may be possession in the name of or for another; and it was, of course, essential, in the premises, to specify that "possession" alone would be sufficient to incur the penalty, "whether" the person found in "possession" of the spirits was "the owner thereof or not." It was not so, however, in that part of the section dealing with the forfeiture of vehicles, and the other appliances mentioned. It may be a question whether, the legislature having once said that the penalty was incurred by the mere possessor, whether owner or not, the expression does not *ipso facto* extend to the whole section without the necessity of its being repeated. It is sufficient to say that, in the provision respecting forfeiture, the object in view is the connection between the vehicles and the spirits unlawfully manufactured or imported. The point is that the vehicles "have been used or are being used for the purpose of removing the same"; and it is immaterial to whom the vehicles belong. In the words of Sedgwick J., in *The Ship "Frederick Gerring Jr." v. The Queen*, (1897) 27 Can. S.C.R. 271, at 285,

(1) [1932] S.C.R. 134.

In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence.

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That the proceeding is, under the *Excise Act*, "a proceeding against the thing," that is, in the nature of a proceeding *in rem*, is apparent throughout the Act (Secs. 79, 83, 121, 124, 125, 131, etc.), but is nowhere more evident than in sec. 125, under which all vehicles, vessels, goods and other things seized as forfeited\*\*\* shall be deemed and taken to be condemned and may be dealt with accordingly, *unless the person from whom they were seized, or the owner thereof*,\*\*\* gives notice that he claims or intends to claim the same.

As will be noticed, the automatic condemnation is against the thing seized. Moreover, the right to object is given both to the owner and "the person from whom (it was) seized"—a right quite incompatible, if forfeiture resulted only in cases where the owner was also the offender.

We agree that, when the meaning of a statute is doubtful or ambiguous, the courts should not, unless otherwise compelled to do so, give it that interpretation which might lead to unjust consequences; but even penal statutes must not be construed so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation would comprehend (*Dyke v. Elliott*; *The "Gauntlet"*, (1872) L.R. 4 P.C. 184, at 191); and it is surely not for the judge so to mould a statute as to make it agree with his own conception of justice (Craies on Statute Law, 3rd ed., pp. 86, 444). Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the legislature, when it passed the *Excise Act*, that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

Whether such a thing exists as what is referred to by Lord Cairns (in *Partington v. Attorney-General*, (1869) L.R. 4 H.L. 100, at 122) as the "equitable construction" of a statute, we cannot see that this is a case for its application, and we find no reason why we should not simply adhere to the words of the enactment.

It is not for the court to say if, in some cases,—such as, for example, when the vehicle utilized was stolen from its owner—the forfeiture may effect a hardship. Such cases are specially provided for in subs. 2 of sec. 133 of the *Excise Act*. The power to deal with them is thereby expressly vested in the Governor in Council, thus leaving full play to the operation of sec. 91 of the *Consolidated Revenue and Audit Act* (c. 178 of R.S.C., 1927), for the remission of forfeitures. We are unable to agree with the decision in *Le Roi v. Messervier*, (1928) Q.R. 34 R.L. n.s. 436, already referred to, that the discretionary power is also vested in the court under sec. 124 of the Act. In our view, that section means nothing more than this:

After the vehicles, vessels, goods and other things have been seized as forfeited under sec. 181, the person from whom they were seized, or the owner thereof, may prevent the automatic condemnation of the said vehicles, etc., by giving notice as provided for in sec. 125 "that he claims



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or intends to claim the same"; whereupon, an information for the condemnation of the vehicles, etc., having been filed (as was done in this case), the court may hear and determine the claim made by the person from whom they were seized or from the owner, and the court may release or condemn the vehicles, etc., as the case requires, i.e., according as they come or not under the provisions of the Act. The court thereunder is vested with no discretion, it must decide according to law.

As my brother Cameron did under somewhat similar circumstances in *Mayberry v. The King* (1), I must apply the words of the statute and order the condemnation of the truck.

There will be judgment declaring condemnation of the truck as forfeited to the Crown. The costs of the application must be borne by the claimant.

The claimant also claimed compensation for loss of use of his truck. That claim will be dismissed but without costs.

While the condemnation may be a great hardship to the claimant, the way is open to him to apply for consideration under section 22 of the Financial Administration Act, chapter 116, R.S. 1952.

*Judgment accordingly.*