

Between

JOHN SPENCER AND SAMUEL SPENCER DOING BUSINESS UNDER THE NAME, STYLE AND FIRM OF SPENCER BROTHERS..... } SUPPLIANTS;

1906
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AND

HIS MAJESTY THE KING..... RESPONDENT.

Customs Act—Infringement by importation of cattle without payment of duty—Intention to infringe—Exercise of ownership in Canada.

Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles south of the boundary line between Canada and the United States whence they may stray into Canada, constitutes an element in the offence of smuggling.

2. Where cattle are brought into Canada for pasturage, or to a point from which they themselves may stray into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of *The Customs Act* is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle.

PETITION OF RIGHT for the return of certain moneys deposited with the Crown to obtain the release of a number of cattle alleged to have been smuggled into Canada.

The facts are set out in the reasons for judgment.

December 1st and 2nd, 1904.

The trial of the case was begun at Medicine Hat, N.W.T.

Further evidence was ordered to be taken before the Acting Registrar; and it was further ordered that the arguments of counsel be submitted in writing.

A. E. Philips and *J. J. Kilgour*, for the suppliant;

The suppliants seek to recover from the Crown portion of a sum of \$10,000 paid to the Customs.

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Department of Canada upon a seizure of 587 head of cattle, the property of the suppliants, for an alleged infraction of the Customs law. The said sum was deposited with the Department under the provisions of *The Customs Act* to procure the release of the cattle seized; the charge being that the cattle had been "clandestinely introduced and unlawfully imported into Canada," and that the suppliants had defrauded the revenue by evading payment of duty thereon. The seizure was made in June 1902, and on the 10th day of November, 1902, the Minister of Customs gave his decision as required by the Act, directing that \$6000, part of the sum so deposited, be retained by the Department and that the balance of \$4000 be returned to the suppliants. This decision, owing to misdirection in forwarding it to suppliants, did not reach them until the expiration of the statutory period for appealing from the Minister's decision. The Crown, however, has waived this as a matter of defence to these proceedings. The case stands, therefore, as if the suppliants had proceeded regularly to recover back the unpaid balance of the deposit in question; and the only matter to be decided is whether on the evidence the suppliants were guilty or not of the charges made against them by the Crown, and for which the seizure was made. That the action lies in the form in which it is brought is clear from section 187 of *The Customs Act* and from the decision of this court in *Julien v. The Queen* (1).

In weighing the evidence it has of course to be admitted by the suppliants that the burden of proof is, in the first instance, upon them of showing that they were not guilty of the offence charged; and that no penalty or forfeiture had accrued by reason of any acts of theirs. As regards this question, it is sub-

(1) 5 Ex. C. R. 238.

mitted that the suppliants have at the outset clearly shifted the onus to the Crown. It is enough to point out that the suppliants' foreman, and practically all the employees who were in any way connected with importations of the suppliants' cattle into Canada, unequivocally pledged their oaths that there was no smuggling of any of the suppliants' cattle into Canada, or any attempt to evade the Customs law so far as any of them knew. Without exception, too, they swear that all the cattle of the suppliants brought into Canada by them or to their knowledge were duly entered for duty. Upon this evidence it is submitted that the onus must now rest upon the Crown of proving clearly by the preponderance of evidence, and beyond a reasonable doubt, that the suppliants were guilty of the charges made against them, and that failing this the suppliants are entitled to recover as claimed.

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Counsel here reviewed evidence in detail, and submitted that the Crown had not substantiated the charge that the suppliants had smuggled the cattle in question into Canada. At the utmost the Crown has only been able to prove that these cattle found on the ranch at the time of the seizure were cattle that had drifted into Canada; they were not driven in at all.

T. C. Johnstone and *C. R. Mitchell*, for the respondent:

The Crown contends that as these cattle had been driven north by the suppliants in the manner disclosed by the evidence, an infringement of *The Customs Act* had taken place whether the cattle were driven over the International boundary line or had simply drifted across. But it is apparent that it was the intention that the cattle should get into Canada and range in Canada as near the suppliants' ranch as possible without the payment of duty. The evidence of John

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Spencer, one of the suppliants, proves that they were compelled to drive cattle north in order to secure good feeding ground not exhausted by sheep. The evidence further shows that cattle were not only driven to the boundary line but across, and there is nothing to show that they were afterwards driven back.

As to the suppliants contention that the onus of proving the commission of the offence is upon the Crown, sections 167, 187 (3), and 233, expressly enact that the burden of proof lies upon the suppliants throughout both in respect of negating any offence against the Act, and in respect of showing that the proper duties were paid upon importation.

By their argument in reply, counsel for the suppliants contended that no evidence of intention to infringe *The Customs Act* had been adduced against the suppliants. The committing of an offence against the Act necessarily implies *mens rea*, that is to say, knowledge of the facts which constitute such an offence. There cannot be an involuntary violation of the law. This proposition is self-evident, but it is also laid down by clear authority. *Attorney-General v. Spafford* (1).

THE JUDGE OF THE EXCHEQUER COURT now (January 9th, 1906) delivered judgment.

The suppliants carried on the business of ranching at Milk river, in what is now the Province of Alberta. They bring their petition to recover, with interest and costs, an amount of six thousand dollars, part of a sum of ten thousand dollars deposited with the Crown to secure the release of a number of cattle that were seized for an alleged infraction of the revenue laws of Canada. The seizure was made on the 12th of June, 1902, by Mr. John C. Bourinot, a preventive officer

(1) Dra. 320.

of the Customs, with the assistance of Captain Deane of the North-West Mounted Police Force. The number of cattle seized was five hundred and eighty-seven (587), and their value duty paid was stated in the seizure report to be twenty thousand three hundred and forty-five dollars (\$20,345.00). The offence alleged in the report was that the cattle had "been smuggled" and clandestinely introduced into Canada, and had "been imported and kept in Canada without entry at the Customs House, and without the duties lawfully payable thereon having been paid." They were released from seizure on the payment of a deposit of ten thousand dollars, subject to the decision of the Minister of Customs. The report of the seizure having been made to the Commissioner of Customs the proceedings followed the usual course in such matters. The suppliants filed statutory declarations in support of their claim that no contravention of the law had occurred, and the Commissioner considered and weighed the circumstances of the case and reported his opinion and recommendation thereon to the Minister of Customs. Then the Minister gave his decision. The Commissioner's report was made on the 31st of October, 1902, and the Minister's decision was given on the 10th of November following. The report and decision were as follows:—

"Commissioner's Report *re* Seizure No. 12737-329.

"This is a seizure of 587 head of cattle for having been smuggled and kept in Canada without the duties lawfully payable thereon having been paid. The cattle have been claimed by Spencer Bros. & Co. and released on deposit of \$10,000, pending the Minister's decision.

"The information in this case was obtained from a confidential source, but not from the Conrads or any

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of their employees, as claimed erroneously, by the Spencers.

“It is alleged that in April, 1900, a lot of cattle, numbering about 1,000 head, were brought on behalf of Spencer Bros. to the Canadian Boundary at Bone Pile, where the younger cattle were cut out and taken to Writing-on-Stone. Duty was paid on them to Sergeant Brymner, at Pendant d’Oreille. It is claimed that the balance of the herd was driven to Canada. Only 527 young cattle under twelve months old were entered for duty out of the herd brought in on account of the Spencers in April, 1900. The admissions of Arthur Strong tend to support the allegations in this matter.

“It is now admitted that Spencer Bros. & Co. have some hundreds of cattle in Canada upon which duty has not been paid. They claim, however, that they are all ‘strays,’ but are willing now to pay duty on them. When officer Bourinot visited the Spencers’ ranche early in 1902 they would not admit to have any foreign cattle in Canada upon which duty had not been paid.

“The officers, believing their information to be correct, had, therefore, to resort to a “round up” to settle the matter.

“The following is a summary of the cattle entered for duty by Spencer Bros. & Co.:

	Value.	Duty.
Coutts, 224 calves under 6 months old,	\$1,120	\$224
April 25, 1900, 303 calves over 6 months old and under 12 months old -	3,030	606
Entry 129, 1187.	-----	-----
	\$4,150	\$830

Branded J. 7 and $\bar{\Gamma}$ left hip.		1906		
Coutts, Dec 7, 1900, 189 cows	- - -	4,725	945	SPENCER
Entry 107, 700, 80 heifers	- - -	1,600	320	v.
268 calves about 6 months old	- - -	670	134	THE KING.
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		\$6,995	\$1,399	

Brands $\bar{\Gamma}$ J. 7 F., left ribs and hip.			
Coutts, 5 old bulls and 82 cows	- - -	2,175	435
April 20, 1901, 20 heifers about 2 years old	- - -	400	80
Entry 196, 1182, 59 calves, from under 1 month to 9 months old	- - -	295	59
		<hr/>	<hr/>
		\$2,870	\$ 574

"At the round up in June, 1902, after allowing for the cattle (450) entered for duty which would be then three years old and upwards, the Customs officers claim to have found the following stock, three years old and upwards, which had not paid duty, viz:

	Value each.
30 steers over 5 years old	- - - \$42 50
168 steers 3 to 5 years old	- - - 40 50
164 cows (besides their calves) 3 yrs and over.	35 00
225 dry cows	- - - 28 00

587 Value, \$20,345.

"As to the cattle, which have not paid duty as above, only 79 head out of the lot of 303 (between 6 and 12 months) entered April 25, 1900 are computed as being three years old at the time of the round up in June, 1902. This is probably correct. But if the whole of the 303 be taken as three years old in June, 1902, there would still remain 360 head of Spencers' cattle in Canada, valued at over \$10,000, without duty paid thereon.

"That the Spencers had cattle in Canada without duty having been paid thereon must have been well

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known to them or their agent from the fact that some of the cows which had not paid duty, bearing only the Montana brand, were followed by calves marked with Spencers' Canadian brand. 169 steers and cows bearing only the Montana brands of Sam Spencer and John Spencer and which had not paid duty in Canada, were rounded up in November, 1901, about ten miles east of Spencers' ranch in Canada and shipped to the United States (*vide* affidavit F. C. Tabor, &c.).

"The cattle seized were all found on the public domain and not on Spencers' ranch.

"The owners of the cattle seized ask for exemption from penalties in view of the leniency extended in respect of duties on stray cattle. Had they paid duties when the charges were first presented they would have had a stronger claim for lenient treatment. Penalties have been heretofore imposed on them for bringing cattle into Canada without payment of duty.

"Since this matter has been taken up large payments have been received for cattle imported into the North-West Territories, and the question as to infractions of the laws by other importers of cattle is now being investigated under the directions of the Chief Inspector of Customs, who is also enquiring as to the improvement of the frontier service.

"The interests of the revenue and a consideration for the rights of those who pay the lawful duties seem to require that this seizure be maintained, without however, imposing extreme penalties in view of the situation on the frontier.

"I am of the opinion that the public interest would be served by retaining, say \$6,000, out of the amount deposited. The expenses incurred are about \$3,200.

"I would recommend that \$6,000 out of the amount deposited be retained and remain forfeited and that the balance of the deposit be returned.

31st October, 1902.

(Sgd.) JOHN McDOUGALD,
Commissioner of Customs.

"Decision of the Minister of Customs in the foregoing matter is in the terms of the above recommendation.

Nov. 10th, 1902.

(Sgd.) WM. PATERSON,
Minister of Customs."

The suppliants were notified of the Minister's decision, but the notice did not reach them in time to enable them to give the Minister notice in writing that his decision would not be accepted as provided in the 181st section of *The Customs Act*, and no further proceedings were taken under that Act. They were however dissatisfied with the decision, and subsequently filed their petition. The Act makes the Minister's decision final where no notice that it will not be accepted is given. But the Crown under the circumstances of this case waives that provision, and the principal issue is as to whether or not such an infraction of *The Customs Act* had occurred in respect of the cattle seized, or any of them, as would justify the decision come to. The burden of proof on that issue is on the suppliants.

By the 192nd section of *The Customs Act* it is, among other things, provided that if anyone smuggles or clandestinely introduces into Canada any goods subject to duty, or makes out or passes, or attempts to pass through the Custom House any false forged or fraudulent invoice, or in any way attempts to defraud the revenue by evading the payment of the duty, or of any part of the duty on any goods, such goods if found,

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may be seized and forfeited; and every such person, his aiders and abettors shall, in addition to any other penalty to which he and they are subject for such offence, forfeit a sum equal to the value of such goods, which sum may be recovered in any court of competent jurisdiction. In this case the money deposited stood in the place of the cattle seized, but the Minister did not, as he might have done, decide that the whole amount was forfeited. He exercised a discretion in that respect and refrained from imposing the full penalty that he thought the suppliants liable to. The six thousand dollars declared to be forfeited did not, if one may take averages, represent the value of more than one hundred and seventy or two hundred head of cattle out of the five hundred and eighty-seven seized. In the present proceeding no question as to the double penalty prescribed by the statute arises.

The questions to be determined are, I think, these: First: Has it been shewn that no contravention of the provision cited occurred in respect of any of the cattle seized? If so, the petition should be sustained and judgment entered for the suppliants for the full amount claimed.

Secondly: If that has not been shown, has it been made to appear that the value of the cattle in respect of which such contravention occurred was less than six thousand dollars? If not, then it seems to me that the Minister's decision should stand and the petition be dismissed.

In the year 1899 the suppliants leased from the Government of Canada, for a stock farm or ranch, five townships at Milk River and adjacent to the boundary line between Canada and the United States. Each of them at the time had a ranch in the State of Montana, one about ninety and the other about one hundred and twenty-five miles south of the boundary

line, where they had carried on business for a number of years. Finding that the grazing lands of Montana were becoming exhausted they had determined to transfer their respective businesses to Canada. With that end in view they obtained the lease above mentioned and commenced business in Canada. Mr. William A. Taylor was made manager of the Canadian business and given an interest in the enterprise. They do not seem to have had any definite knowledge as to the number of cattle they had in Montana at the time. Perhaps that is an incident of the business, but the absence of records or of any accurate and reliable information as to the number of cattle owned or collected is one of the difficulties presented by the case. It was their intention, however, as it was in their interest, to dispose of their beef cattle in the United States markets, and to bring their breeding stock and young cattle into Canada. There was no object and nothing to be gained by bringing beef cattle into Canada, except to fatten them and then to collect them and take them out again. With the five hundred and twenty-seven calves included in the entry of April 25th, 1900, mentioned in the Commissioner's report, the suplicants sent north some four or five hundred head of cattle that were not entered at the Customs. They say that their object in doing this was to allow the cattle to run on the sweet grass hills that are situated in Montana near the boundary line, and if the cattle drifted over into Canada that is what happened in the case of hundreds and thousands of other American cattle, and that in this respect they were in the same position as other persons who were in the cattle business in Montana whose cattle were not seized. I am not able, however, in all respects to adopt that view. They were, I think, in the same position, so far as it was an advantage to them to have

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their stock range on Canadian public lands, and when the beef cattle were fit for the market to collect them and take them across the line. But there is nothing to suggest that any of the other American stockmen had any Canadian interests, any lands under lease in Canada, any Canadian cattle with which their American cattle could run, or any Canadian branding irons; and there is no evidence that any of them drove their cattle into Canada or to a point two or three miles south of the boundary line and turned them loose there. But one or the other of the things last mentioned is what was done with the cattle driven north with the calves entered in April, 1900. As to that it appears that the instructions as to what was to be done with these cattle were given by Mr. Taylor. He says he sent word to turn them loose. John D. McLaughlin, who carried his instructions to John Rice, the foreman in charge of the herd, says that he told the latter to turn them loose. But Rice says that the cattle which at that time were at a place called Pile-of-Bones, some two or three miles south of the boundary line, were supposed to be taken to a place some eight or nine miles north of the line, called Dry River Bed or Black Horse Coulee, and that he gave instructions to that effect. As he left the men in charge of the cattle to go to the ranch he does not know whether his instructions were carried out or not. The men, of whom there were a number, had however time in which to do what he had instructed them to do. Arthur Strong, one of these men, says that the cattle were turned loose at the Bone Pile. He ought to know, but I am not able to rely upon his testimony with any strong degree of confidence. But in the view I take of the case it does not make any great difference whether the cattle were turned loose a few miles north or a few miles south of the bound-

ary line. In the latter case it was, I think, to be expected that a large number of them, if not all, would find their way into Canada. So far as that constitutes an element in the offence of smuggling, I see no substantial difference between driving cattle into Canada and driving them to a point from which, following their natural bent, they would themselves cross into Canada. There is also some evidence that a good many head of cattle that were never entered for duty were driven north with those entered on December 7th, 1900; but this is denied, and the evidence leaves the matter in great doubt. There is however no question that when in June of 1902 the suppliants' cattle were collected, a considerable number of their cattle bearing American brands only were found in Canada, and that afterwards they sought to enter these cattle at the Customs; from which it is, I think to be inferred that they were cattle which they desired to keep in Canada in connection with their Canadian business. It is true that all of these cattle, or nearly all, were found on public lands and not on lands leased by the suppliants, but nothing turns on that, as it is true also of the other cattle collected at the time. The lands under lease were not fenced and the public lands were open to anyone who wished to let his cattle run on them. The Minister's decision, however, was based, in part at least, upon other grounds than those already mentioned. It was part of the case against the suppliants that a number of their Montana cattle that had not been entered at the Customs had been branded with the suppliants' Canadian brand, and it is admitted that if that happened an offence against the statute was committed.

Mr. Bourinot and Captain Deane, with the outfit they had engaged, collected some 2,000 head of cattle, from which they separated 1,384 head belonging to

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the suppliants, and bearing either their American brands only, or both their American and Canadian brands. In this number calves or yearlings that were suckling were not included. Then 398 head of cows with calves and 26 steers, that is 424 head in all, were cut out of the herd and handed over to Mr. Taylor. These were thought to be three years old and upwards at the time, and according to Mr Bourinot's and Captain Deane's view were all that the suppliants were entitled to have of that age, having regard to the entries that had been made. Mr. Taylor took exception to 7 of the 424 head, and then 7 cows with calves were cut out of the herd and handed over to him, and as to that he was it appears satisfied. Then 347 head of cattle that were thought to be under three years of age were cut out of the herd and handed over to him. That left 606 head in the herd. Then Mr. Taylor's men cut out some 100 or 150 head that they claimed to be under three years of age; but the claim was not allowed except in respect of 19 head. The latter were handed over to Mr. Taylor and the balance turned back into the herd. That left in the herd the 587 cattle that were seized. In the receipt that Mr. Taylor gave for them they are described as being "of three years of age and upwards"; and after the nineteen head that have been mentioned had been handed over to him he expressed himself as satisfied with respect to the ages of the rest of the herd, that is of the cattle seized. It appears, however, that in order to determine the ages of cattle accurately their mouths should be examined to see what teeth they have, and that there is always more or less difficulty in ascertaining an animal's age by its horns and general appearance. To men of experience these afford, within limits, a means of ascertaining the ages of cattle, but not such a sure one as the former method. When the

dispute as to the ages arose Mr. Taylor asked Mr. Bourinot to have the cattle seized taken to the sup-
 pliants' ranch and put through the "shute", and their
 mouths examined. This request was refused on the
 ground of expense, and that it was unnecessary. Of
 course Mr. Taylor might himself have had an exami-
 nation of this kind after the cattle were released and
 handed over to him had he cared to do so. It does
 not seem to me that it was necessary for the Customs
 authorities to go to the trouble and expense, especially
 in view of Mr. Taylor's admissions. He says, and it
 is not denied, that he told Mr. Bourinot that his say-
 ing the cattle were three years old and over would not
 make them so, and that he made the deposit men-
 tioned to save the cattle from the sale that Mr.
 Bourinot threatened to make of them. He was no
 doubt in a difficult position. But if he really thought
 his admissions to be unfounded, he ought, I think,
 himself to have taken the necessary steps to ascertain
 the facts beyond any question. He knew, I think,
 better than anyone else what had happened, and what
 the ages of the cattle seized were; and I am not able,
 in view of the other evidence and of his admissions,
 to find that any of the 587 head of cattle seized were
 less than three years old. Then, with regard to the
 entries at the Customs, they should, I think, be taken
 to be true. The first one mentioned was made by Mr.
 Samuel Spencer, and the other two by Mr. Taylor.
 No doubt there would be some difficulty in giving
 the exact age of the cattle entered. The descriptions
 used in the declarations made in the entries show
 that. In the first entry 224 calves are described as
 being "under six months old," and 303 as being "over
 six and under twelve months old." That was Mr.
 Spencer's declaration made under oath in April, 1900;
 and the suppliant cannot complain if it be taken to be

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true, as indeed I assume it to have been. Of the 303 calves described as being over six and under twelve months old, Mr. Bourinot and Captain Deane estimated that seventy-nine head would in June, 1902, be three years old and upwards. The Commissioner of Customs thought that this estimate was probably correct. "But," he adds, "if the whole of the 303 be taken as three years old in June, 1902, there would still remain 360 head of Spencers' cattle in Canada valued at over \$10,000 without duty paid thereon." The exact number in that case would be 363. But of these it appears that 135 head bore American brands only; and that would leave only 228 head of American cattle that had not been entered for duty, but which bore Canadian as well as American brands. It is argued that this number should be further reduced by some allowance for cattle with American brands only that would probably have been found among the 778 head handed over to Mr. Taylor. As to that I would expect to find very few of such cattle among the 347 head of young cattle so handed over, as the suppliants' object had been to enter and brand these young cattle. But among the other 431 head of older cattle handed over there may of course have been instances of this kind. But the number cannot now be ascertained. And when we come to take averages and make estimates we must not overlook the fact that of the 1,230 head of cattle imported into Canada by the suppliants 1,064 head had in June, 1902 been exposed to two winters, and the remaining 166 head to one winter; and it would be an extraordinary thing if there had not been some loss. Again there is the probability that all the cattle on which duty had been paid were not collected. No doubt those engaged in collecting them did their best, but even so the chances, it seems to me, would be that some at least of these cattle would not be found. So in

disposing of the case I do not see that I can do more than set off one of those unknown quantities against the other. And if that is fair, and I think it is fair, it would appear that in June, 1902, there were among the cattle that were seized 135 head bearing American brands only, and at least 228 head bearing both American and Canadian brands. With regard to the latter there is another consideration that ought in fairness to be mentioned. Mr. Taylor and those of his men who were examined deny ever having branded, or exercised any control to their knowledge over, any cattle other than those duly entered at the Customs; and it did appear to be important to enquire and see if there was any occasion on which this branding could have been done either wittingly or unwittingly. From a declaration made by Mr. Taylor on the 25th of June, 1902, and filed with the Commissioner of Customs, it appears that the 537 head of cattle entered on the 7th of December, 1900 were not branded until the spring of 1901, the cattle having been scattered by a storm after entry and before they could be branded. But there is nothing to show what means Mr. Taylor adopted to see that at that time he branded only the cattle that were entered in December, 1900, and no others; or whether it was possible to gather together in the spring the same cattle that had been scattered in December, or whether any of these cattle had died or been lost during the winter. Here, however, was an occasion when without attracting notice a number of the cattle that had been driven north in the previous year and not entered for duty, might have been collected and branded with others on which duty had been paid. Whether that happened or not does not appear. But there was opportunity, and that is all that can be said as to that.

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But on the case as a whole it is not, I think, possible to come to the conclusion that no infraction of the revenue laws occurred. If there were nothing more than the facts about the cattle found with American brands only, it would be difficult to acquit the suppliants of a contravention of the statute. The importer cannot excuse himself from a compliance with the Customs Act by saying that he intended to export the goods or cattle brought into Canada. He must comply with the law on that subject. But there is no occasion to base one's opinion on that aspect of the case. There appears to be no reasonable doubt that a number of the suppliants' cattle on which no duty had been paid were found bearing Canadian brands, and making every allowance that seems admissible, I am not able to bring the number under two hundred or the value below the six thousand dollars for which the petition is brought.

There will be judgment for the respondent, and a declaration that the suppliants are not entitled to any part of the relief sought by their petition.

Judgment accordingly.

Solicitors for suppliants: *Philps & Kilgour.*

Solicitor for respondent: *E. L. Newcombe.*
