

1931

JOHN F. PENTZCLAIMANT;

April 29.
May 20.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Customs—Aeroplane—Forced landing—Reporting to Customs

The aeroplane in question was seized by the Customs authorities on the ground that it had landed at a place other than an airport and for not reporting to a Customs Officer.

Held, that where the evidence establishes that an aeroplane was forced to land on account of engine trouble and to avoid a crash, she is justified in so doing at any place that such landing can be safely made and for the same reasons that a vessel in distress may enter a port for shelter.

REFERENCE by the Minister of National Revenue under the provisions of section 176 of the Customs Act.

The action was tried before the Honourable Mr. Justice Audette at Windsor, Ontario.

E. C. Awrey, K.C., for claimant.

N. L. Spencer for respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

AUDETTE J., now (May 20, 1931), delivered the following judgment.

This is a Reference, by the Minister of National Revenue, under the provisions of section 176 of the Customs Act, of the claim of the said John F. Pentz, from the decision of the Minister maintaining the seizure of a Waco Biplane and that the deposit, made by him for the release of the same, do remain forfeited.

The claimant is a machinist who operates a school of aviation at the City of Lorraine, in the State of Ohio, one of the United States of America. On the 23rd day of November, 1929, while on a trip from Lorraine to Detroit, on a visit to some of his relatives, without any intention to land in Canada, he was forced to avoid crash to land at or near Kingsville, Ontario, on account of trouble with the throttle control of his Biplane. He was accompanied by his employee Voet who was actually flying the plane at the time of trouble, after having followed practically the same course as the flying boats from Cleveland.

Pentz testified he perceived the trouble as the motor would not come up to the proper revolutions. The motor slowed up and would not reeve up to the proper revolutions. The pilot, Voet, choosing a landing place, then started down, because, he states, when there is trouble in an aeroplane, no matter where you are, the first thing to do is to make a landing. You do not take a chance of going on any further. If you do, you may have a crash.

They began to nose down, losing altitude, and after making a couple of circles, landed in a field, on a farm, just east of Kingsville. On landing, he got out and being a machinist, attended at once to repairing the throttle. He explained, in his evidence, the nature of the trouble and the repairs he attended to. That is also confirmed by the evidence of the pilot Voet. And in that respect, his testimony is further corroborated by the people of the locality. Witness Keith Wigle said he lives just across the road from where the plane landed. His attention was directed to the plane by the motor roaring at intervals. The plane did not make the same noise as when flying, when it is an even drone. It was making a lot of noise when idling. He saw Pentz actually working at the repairs.

After attending to the repairs, Pentz said he knew that after landing in a foreign country he had to report to the Custom, and enquired where he could find a Custom House where he could report and how far it was, and while making this enquiry a young boy drove up in a Ford truck and Mr. Wigle said this boy will take you to town and he then so arranged with the boy and both Pentz and Voet, the pilot, drove to town in the Ford. The boy, who was engaged on this butcher delivery wagon, drove them in front of the

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butcher shop, which was situate quite close to the Customs House, directed them to the Customs Office and said that if they did not find the Customs Officer there, they would probably find him at the docks.

Pentz and Voet then went to the Customs House and finding there was nobody in the office—a fact which was also established by the Officer himself—they directed their steps towards the docks. On their way to the docks, a man, driving a Ford sedan, pulled up to the curb, opened the door and wanted to know where they were going. Pentz answered they were going to the docks to find a Customs Officer, to report as they had come in a plane.

Then the Officer told them to get into his car. The Officer said I suppose you wonder who I am. Pentz answered I do not know, but I suppose you are an officer of the law. The Officer then pulled his coat back and showed his badge to them. They then, under Pentz's direction, drove to the field where the plane was and afterwards returned to town, when the Officer, Raymond Petrie by name, took them to the residence of Mr. Pearsall, the Sub-Collector of Inland Revenue, at Kingsville, to have a witness as to the conversation which was to take place between Pentz and Petrie. Voet—who was heard as a witness—is very very deaf and is very hard to understand, the conversation took place between Pentz and Petrie.

Witness Pearsall testified that Petrie suspected these men to be rum runners. From the residence of this witness they drove down to the Customs House. Witness Pearsall contends that Pentz said he had come to make arrangements to transport liquor by aeroplane, *but not on this trip*. Witnesses Petrie and Filion declared that Pentz had made that statement before them, that is, that Pentz had said he had come to make arrangements to transport liquor to the United States.

Pentz denies having made the statement that he had come to Kingsville to make arrangements to transport liquor, he testified he never made such statement to either Petrie or Filion; but he testified he had said that a friend of his in Lorraine had said that if he ever came to Kingsville, to call on a man by the name of Hoffman that he might make arrangements with him for transporting liquor from Canada.

Now, we are faced on this fact with conflicting evidence and in such a case the Court must be guided by the balance of probabilities arrived at by a careful analysis of the credible evidence as a whole and must endeavour to face all the facts at their true value, dismissing any preconceived ideas.

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Is it probable that after Petrie had shown his badge to Pentz, Pentz would tell him such stories as would unnecessarily be against himself. Furthermore, witness Pearsall, the Sub-Collector, testified that, in referring to all this conversation that took place in his presence, he said that there was no statement of Pentz going to say he intended to transport liquor *on this trip*.

However, be all this as it may, the seizure of the Waco Biplane, as shown by the Customs Seizure Report, is made "for having landed at a place other than a designated airport and for not reporting to Custom."

The evidence abundantly shows that there would have been no justification for the seizure and forfeiture of the plane on the ground that Pentz was a rum runner and the seizure was not indeed made on that ground.

The seizure was made upon the ground that Pentz landed at a place other than a designated airport and for not reporting to Custom. The Aeronautics Act, 1927, R.S.C., ch. 3, sec. 4 (g) and sec. 5.

The making of a landing with a plane on account of trouble and to avoid a *crash* is in the same position as a vessel in distress entering a port for shelter. It has been established by uncontroverted evidence that Pentz's plane was forced down on account of throttle trouble, that he repaired the same. After having done so, he decided immediately to report, he enquired where a Customs Officer could be found, he is driven to Kingsville where he is told he will find one, he goes to the Customs House and finds the office empty; but having been told that if the Customs Officer is not there he would find him at the docks and directing his steps towards the docks, after having walked quite a distance, he meets this Customs Officer who shows him his badge, reports and relates to the Officer his trouble and takes him to the field where his plane stands. Pentz could not, under the circumstances, do more than he did and the seizure made of his plane because he did not re-

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port cannot stand because he did report and at the earliest possible moment. The Customs Officer in question seemed to have lost all sense of responsibility and proportion in so blindly and arbitrarily abusing of the little power or authority confided unto him. He was decidedly over zealous. Was he actuated to act as such by the advantage he might derive under the provisions of section 5 of the Aeronautics Act?

Yet under all these circumstances, Pentz and his pilot Voet were furthermore submitted to the indignity of being placed in custody of the police from 5.30 to 9 p.m., notwithstanding that Petrie had already detained their plane.

There will be judgment allowing the appeal from the Minister's decision, maintaining Pentz's claim, ordering and adjudging the seizure of the plane in question null and void, releasing the said plane and declaring that the claimant is entitled to be refunded and paid by the respondent the amount of the deposit made by him to obtain the release and possession of his plane: but without interest because the Crown is not liable to pay interest on the amount of duty or penalty illegally enacted under a mistaken construction of the Act placed by the Customs Officer. *Ross v. The King* (1); *Algoma Central Railway v. The King* (2). The whole with costs against the respondent.

Judgment accordingly.