IN THE MATTER OF

JOSEPH BURM,

CLAIMANT;

and

HIS MAJESTY THE KING,

RESPONDENT.

1914
March 28.

Revenue—Customs—Smuggling—Goods belonging to another seized along with smuggler's property—Release.

Upon an appeal from the decision of the Minister of Customs under section 179 of *The Customs Act* confirming the seizure of certain jewellery smuggled by the claimant through the Customs at the port of Montreal, it was shewn that four of the articles seized were part of the personal belongings of the claimant's wife, having been given to her by her father as a wedding present and entrusted to the husband for safe-keeping merely. On the other hand it was shewn that certain articles not dutiable personally owned by the claimant had been mixed with similar articles owned by him which should have been declared for duty.

Held, that in view of the provisions of sec. 180 of *The Customs Act* requiring the Court to decide "according to the right of the matter", and inasmuch as the claimant had not declared the dutiable articles, all the jewelry owned by him and smuggled into Canada was liable to forfeiture; but that such of the smuggled articles as clearly belonged to the claimant's wife and were not duitable should be released from seizure and restored to her.

Reg. v. *Six Barrels of Ham*, 3 N.B. R. 387 considered and distinguished.

The Dominion Bag Co v. *The Queen*, 4 Ex. C.R. 311, referred to.

THIS was a reference by the Minister of Customs, under section 179 of *The Customs Act* (R.S. 1906, c. 48) of a claim for the release of certain goods seized for an alleged infraction of *The Customs Act.*

The facts are stated in the reasons for judgment.

The case was heard by the Honourable Mr. Justice Audette at Montreal on the 12th day of February, 1914.

L. C. Meunier, for the claimant, contended that there was no intention on the part of the claimant to evade the law. He was under the impression that personal belongings such as rings were not dutiable.

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To shew how far his mind was from the offence of smuggling we must regard the fact that the claimant consulted an officer on board the ship he came by to ascertain his views on the matter. Claimant took his advice. This is clear evidence of an innocent mind. If Burm had wanted to dispose of the jewels he could have done so when he was in Canada before. The Court is required to decide "according to the right of the matter," and the demands of justice would not be regarded if the Court ordered the forfeiture of articles that were not dutiable simply because they were mixed with articles upon which certain duties were payable. As to the jewels belonging to the claimant's wife they clearly must be released. She merely entrusted them for safe-keeping to her husband, and was in no way guilty of the offence of smuggling.

He cited *Mignault's Droit Civ. Can.* (1); *Audette's Prac. Exchequer Court* (2); 12 *Cyclopedia of Law and Procedure, verbo "Customs Duties"* (3); 24 *American and English Encyclopedia of Law, verbo "Revenue Laws"* (4); *R.S.C. 1906, c. 48, sec. 23.*

H. J. Trihey, for the respondent, contended that the evidence shewed a clear intent on the part of the claimant to defraud the revenue by evading the payment of duty. It was established that he attempted to sell the articles in question, or some of them, in Montreal, after he had clandestinely introduced them into Canada. The evidence also rebuts the contention put forward by the claimant that the articles had been worn for some time by him; the expert evidence offered on behalf of the Crown is against that being found by the court. Then there was no proof that claimant was an immigrant when he brought the

(1) p. 110.
(2) 2nd ed. p. 347.
(3) p. 1186.
(4) p. 888.

goods in question into Canada, nor that they were really personal effects. In these circumstances the seizure must be maintained.

AUDETTE, J., now (March 28th, 1914) delivered judgment.

This matter comes before this Court on a reference by the Minister of Customs, under section 179 of *The Customs Act* (R.S.C. 1906, c. 48), the claimant having declined to accept the Minister's decision maintaining a seizure made, at the port of Montreal, of twenty-six articles of jewellery "for having been offered for sale " without report or entry at Customs or payment of " the duties lawfully payable thereon."

The claimant, who is an ebonist by trade, first came to Canada in June, 1908, and settled in Winnipeg with his family. During December, 1911, he left Canada for Antwerp, where he wanted to have his wife undergo a surgical operation. While in Belgium he tried to start a furniture factory, but found he had not enough money. He then came back to Canada and arrived in Montreal some time around the 12th September, 1912. Being in need of money he offered for sale, at three different places, jewels he brought with him from Belgium. Judging his social standing both from his own walk in life and his associations, as set forth in the evidence, one is somewhat astonished at the quantity of jewellery he possesses. However, that may be explained both from the fact that his father-in-law was, besides being a saloon-keeper, a diamond cutter; and further that in Belgium, where banks are in the hands of private individuals and do not command the same security as in Canada, it is customary to invest one's money in jewels, and sell them whenever one wants to realize. This will be again hereafter referred to.

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Bringing this quantity of jewellery across with him, the claimant seemed anxious to avoid the law and smuggle the goods, if possible; and he therefore sought legal advice from, among others, one of the nautical officers on board of the steamer in which he was coming across, and, as may well be expected, the result did prove fatal to him. There are many cases in fiction as well as in real life where the danger of consulting a "sea-lawyer" is exemplified—so it was with the claimant, who following that officer's advice with the obvious object to avoid the law, says he distributed his jewels among several members of his family. His conscience further allowed him to swear to the ownership of such goods according to this distribution, as appears by his affidavit of the 12th October, 1912, and Exhibit "6" attached thereto, both forming part of the Customs file.

His evidence is also unsatisfactory, unreliable and conflicting. A few instances may he here related. In his affidavit he states he possessed this jewellery on his first arrival in Canada. Then in his evidence before this Court he states he bought some jewellery in Belgium on his return there (p. 20) His wife states some of the jewels were bought in Belgium and in France before their return to Canada, and further that the last time they went to Belgium her husband has (une occasion) the chance of a bargain and bought diamonds (pierres) which he had made up in these horse-shoe pins.

It is unnecessary to review the evidence any longer, it will suffice to give the result. It is, however, well to state at this stage that the claimant is not a British subject, and that he did not get naturalized before he left Winnipeg in December, 1911, where he had been since June, 1908. He was still a Belgian when he came

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to Canada in 1912. Therefore, in view of that fact and of the further fact that quite a quantity of jewellery was bought by him in Belgium on his return thereto, which latter fact brings him within the principle of the case of *The Queen* v. *Six Barrels of Hams*, hereafter referred to, it is obvious that Item 705 of Schedule A of 6-7 Ed. VII cannot apply. Since any of the goods owned by the claimant himself were smuggled by him through the Customs, all of them should be declared forfeited.

In the result it appears quite clear that the six diamond pins were bought in Belgium on his last journey and were brought therefrom by him with the settled idea of selling them, and that they were smuggled through the Customs. The same may also be said with respect to a very large proportion of the jewellery seized with, however, some exception. The six horse-shoe shaped diamond pins were not bought for his own use—a certain variety would have been resorted to if it had been the case. These, then, were offered for sale to the public. However, it appears to this tribunal that some of the jewellery did belong to his wife, but from the loose and conflicting manner in which the evidence is presented, it is impossible to ascertain with any degree of certainty which of the said jewels belong to her and which do not. There is, however, enough evidence to find that the brooch or pendant, a marquise-ring with baroque pearls, and the ear-rings which go with this set, did belong to his wife, coming to her from her father as a wedding present, and the Court so finds for the purposes of this case.

Great stress has been laid in adducing the evidence to show that some of the jewels were not new and had been worn. That is not of great importance,—they might very well be new and be worn temporarily, with

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still the ultimate object on behalf of the owner of selling them. And it must be borne in mind that they were really merchandise investments, as above explained, and this being so, made them subject to duty.

Being satisfied on the question of fact, can the case of *The Queen* v. *Six Barrels of Hams* (1) be overlooked? Indeed this case as above mentioned goes as far as deciding that where a seizure of goods is made, and that among such goods there are some which are not subject to duty, the seizure is good for the whole. However, that case may be distinguished from the present one in that here all the jewellery did not belong to the one and the same individual, permitting thereby this Court to actually "decide according to the right of the matter" as provided by section 180 of *The Customs Act*. These words "decide according to the right of the matter" were commented upon in the case of *The Dominion Bag Co.* v. *The Queen* (2) where it was questioned as to whether or not they were really intended in any way or case to free the Court from following the strict letter of the law and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the Court, work an injustice.

Under the evidence as adduced before the Minister of Customs, no other decision than the one arrived at could have been given, and his finding was most justifiable under the circumstances. However, under the further evidence adduced at the trial read with the evidence before the Minister, and for the reasons above mentioned, this Court has come to the conclusion to somewhat vary that decision.

(1) 3 N.B.R. 387.

(2) 4 Ex. C. R. 311.

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There will be judgment maintaining the seizure of the goods herein, with the exception of the above mentioned pieces of jewellery belonging to the claimant's wife, viz.:—the brooch or pendant, a marquise-ring with baroque pearls and the ear-rings which go with the set, of which said last articles of jewellery release, or *mainlevée*, is hereby ordered with directions to deliver the same to the claimant's wife upon her giving a receipt for them.

The Crown will have the costs of the action after taxation thereof.

Judgment accordingly.

Solicitor for the claimant: *L. C. Meunier.*

Solicitor for the defendant: *H. J. Trihey.*