

CASES
DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE
 AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

HIS MAJESTY THE KING.....PLAINTIFF;
 AND
 THE FIDELITY INSURANCE COM- }
 PANY OF CANADA } DEFENDANT.

1928
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 Oct. 8, 9.  
 Oct. 23.  
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*Revenue—Excise Act—Bond for exportation—Liability thereunder—  
 Limitation of action—Section 279, Customs Act—Substantial  
 compliance*

The B.C.D. Co. imported certain liquor into Canada, and warehoused it without paying duty. Later it made entry outwards of this liquor for exportation to G. The defendant gave a bond in double the amount of the duty, that the said liquor would be exported, and to the place mentioned in the entry, and if so exported, and proof thereof made, then the bond to be void; otherwise to remain in full force and virtue. This liquor never reached its declared destination, but was transhipped at sea; it was not re-landed in Canada.

*Held*, where the bond is one specifically required by a statute and the obligation of the bond is to secure the absolute exportation of specific goods to a fixed destination, which in this case admittedly was not done, and where the goods have not been lost or destroyed, the defendant is liable upon the bond.

2. The statutory provisions make it impossible for a Court to give effect to the defence that the goods not having been re-landed in Canada, there was an actual exportation and a substantial compliance with the statute. Relief upon this ground can come only from the Crown, and not from the courts.
3. That the limit of three years, mentioned in section 279 of the Customs Act, within which certain actions must be brought, does not apply to a speciality contract or to a suit upon a bond given under the Act. This limitation relates to penalties and forfeitures imposed by particular sections of the Act.

INFORMATION to recover upon bonds executed in favour of plaintiff under the provisions of the Excise Act.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*Hon. N. W. Rowell, K.C.*, and *Mr. Lindsay* for plaintiff.  
*W. L. Scott, K.C.*, and *Cuthbert Scott* for defendant.

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v.  
THEFIDELITY  
INSURANCE  
CO. OF  
CANADA.

THE PRESIDENT, now (October 23, 1928), delivered judgment.

This is an action upon a bond executed at Vancouver, B.C., by the defendant, for the payment to His Majesty of the sum of \$3,707. The cause was heard upon an agreed statement of facts.

On the 19th day of May, 1924, the British Columbia Distillery Company Limited, made entry outwards for exportation from Customs warehouse in the city of Vancouver, B.C., to one J. Hamilton, San Jose, Guatemala, of one hundred cases of Martel's Three Star Cognac. These liquors had been imported by the British Columbia Distillery Company Ltd., and warehoused by it without payment of duty. On the same day this company gave security by bond, made and executed by the defendant company in the form approved by the Minister of Customs and Excise, in the sum of \$3,707, being double the duties of importation on the goods referred to. These goods were placed on board the motorship *Principio*, and formed part of her cargo, when she reported outwards from Vancouver, for San Jose, Guatemala, on the 23rd day of May, 1924. On the 30th day of May, 1924, the British Columbia Distillery Company Ltd., the exporters, advised the Collector of Customs at Vancouver in writing, that this shipment of liquor had been diverted to the port of Ensenada, Mexico. Nothing however, turns upon this fact, as it is admitted that these goods were not in fact landed at that port.

On the 11th day of June, 1924, the exporting company delivered to the Collector of Customs and Excise at Vancouver, a written document, a landing certificate as it is usually termed, purporting to be signed on the 31st day of May, 1924, at Ensenada, Mexico, by officers of the Mexican Customs, and vided by a British Vice-Consul at that place, which certified that the goods in question had been landed at that place, and had been duly delivered over to the Customs authorities there.

Sections 101 and 102 of the Customs Act are as follows:

101. Upon the entry outwards of any goods to be exported from a Customs warehouse, either by sea or by land or by inland navigation, as the case may be, the person entering the same for such purpose shall, by and upon the making of such entry, whether so expressed in such entry or not, become bound, when the entry aforesaid is for exportation by sea, to the actual exportation of the said goods, and, when the entry aforesaid is for exportation by land or inland navigation, to the actual landing or

delivering of the goods at the place for which they are entered outwards, or, in either case, to otherwise account for the said goods to the satisfaction of the collector or other proper officer, and to produce, within a period to be named in such entry, such proof or certificate that such goods have been exported, landed or delivered or otherwise lawfully disposed of, as the case may be, as shall be required by any regulation of the Governor in Council, or by the collector or other proper officer.

Provided, however, that upon the entry outwards of wines and spirituous liquors to be exported from a Customs warehouse either by sea or by land or inland navigation, as the case may be, the person entering the same for such purpose shall give security by bond of an incorporated guarantee company authorized to do business in Canada, and whose bonds are acceptable to the Dominion Government, such bond to be in form approved by the Minister, in double the duties of importation on such goods, that the same shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in the said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which they are entered outwards, unless in either case the said goods were after leaving Canada lost and destroyed, and that such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as shall be required by any regulation of the Minister, shall be produced to the collector or other proper officer within a period to be appointed in such bond. This proviso, however, shall not apply to wines and spirituous liquors in a Canadian port, without entry thereat for warehouse and for no other purpose than their transportation *in transitu* on a through bill of lading from a port outside of Canada to another port of destination outside of Canada via a Canadian port or ports.

102. If, within the period appointed in the entry for such exportation or in such bond there is produced to the collector or other proper officer the written certificate of some principal officer of Customs or of colonial revenue at the place to which the goods were exported, or, if such place is in a foreign country, of any proper officer of Customs therein or of any British or foreign consul or vice-consul resident there, showing that the goods named in the said entry were actually landed and left at some place, naming it, out of Canada, as provided for in the said entry, or, if it is proved to the satisfaction of the collector or other proper officer that the said goods were, after leaving Canada, lost and destroyed, the person making such export entry shall be deemed to have satisfied the obligation thereby imposed upon him and if security by bond has been given the said bond may be cancelled.

It was under the proviso to sec. 101 of the Customs Act, that the bond sued upon in this action was entered into by the defendant company, and it is to be observed that a bond is required only in the case of the exportation of wines and spirituous liquors.

The condition of the bond is as follows:—

NOW THE CONDITIONS OF THE ABOVE WRITTEN OBLIGATION are such that, if the said goods, shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which

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they are entered outwards, unless in either case the said goods are after leaving Canada lost and destroyed, and if such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as required by Regulations of the Minister of Customs and Excise, be produced to the Collector or other proper officer of Customs and Excise at the Port of Vancouver, B.C., within thirty (30) days from the date hereof, then this obligation shall be void; but otherwise shall be and remain in full force and virtue.

The regulations respecting the entry outwards of wines and spirituous liquors to be exported from a customs warehouse, provide that:—

3. If, within the period appointed in such bond, there is produced to the Collector or other proper officer the written certificate of some principal officer of Customs or of colonial revenue at the place to which the goods were exported, or, if such place is in a foreign country, of any proper officer of Customs therein, or of any British or foreign Consul or Vice-Consul resident there, showing that the goods named in the said bond were actually landed and left at some place, naming it, out of Canada as provided for in the said bond, or, if within the said period appointed, it is proved to the satisfaction of the Collector or other proper officer that the said goods were, after leaving Canada, lost and destroyed, the said bond may be cancelled.

In the agreed statements of facts, relative to the export of the goods here in question, is the following:—

That the goods referred to in paragraph 1 hereof were not exported to the place provided for in the said entries nor to Ensenada, Mexico, nor were they landed or delivered over to Customs at either of the said places, but that they were taken out of the port of Vancouver and out of the territorial waters of the Dominion of Canada and discharged from the *Principio* at sea into a small boat or small boats off the coast of the United States of America and were not lost or destroyed or brought back to Canada.

It is clear therefore from the agreed statement of facts, that the goods in question were not exported or landed in Guatemala, or in Mexico, and they were not lost or destroyed. Consequently no proof could be furnished within the period of thirty days, that such goods had been actually landed at the place mentioned in the export entry, or that they were lost or destroyed. It is indisputably clear from the agreed statement of facts, that the landing certificate purporting to come from an officer of the Customs at San Jose, Guatemala, and vided by a British Vice-Consul there, was not bona fide. I do not apprehend that if evidence were taken upon this point, that this conclusion would at all be disturbed.

It was contended on behalf of the defendant, that, it being agreed that the goods in question had not in any

event been relanded in Canada, that no loss of revenue to the Crown could possibly have occurred, and that the purpose of the bond and the requirements of the Customs Act had in spirit been carried out, in that there was in fact an export from Canada of goods which were not relanded in Canada, and that the defendant should therefore be discharged from any liability under the bond.

The bond being one specifically required by statute, the obligation of the bond being to secure the absolute exportation of specific goods to a fixed destination which admittedly was not done, and it being admitted the goods were not lost or destroyed, it seems to me there is no power in a Court upon such a state of facts, but to hold the defendant liable upon the bond for the amount there mentioned and here sued upon. The duty on goods imported and entered for consumption, if dutiable, must be paid immediately. The law provides however, in order to facilitate trade, that imported goods may be placed in a bonded warehouse to be later removed for domestic consumption or for export. In the latter case, if the goods are wines or liquors, security must be given that the goods will be actually exported to the place mentioned in the export entry. The bond stipulated that this would be done, the two cases of the goods being lost or destroyed excepted, and if this were not done, the bond should remain in full force and effect.

The amount stated in the bond is fixed by statute, being double the duties of importation on the goods to be exported from a bonded warehouse, and might be regarded as liquidated damages for the non-performance of a statutory provision which requires that when wines or spirituous liquors are to be exported from a customs warehouse, the exporter making the entry shall give security by bond of an incorporated guarantee company authorized to do business in Canada, that the specific goods shall be actually exported to the place provided for in the entry outwards, exemption of liability being provided for where it is established that the goods had been lost or destroyed. To escape liability upon the bond, the exporter must produce a certificate within a stated period that the goods were actually landed at the place mentioned in the entry. That was not done, and the condition upon which the export was

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permitted from a customs warehouse was broken. The language of the bond here in question means, I think, that if the goods fail to reach Guatemala, and excepting a proven loss or destruction of the goods, the defendant shall pay and forfeit the sum therein mentioned. The goods in fact have not been shown to have been landed in any country. The rigidity of the statutory provisions make impossible a consideration of the defence urged upon me, that the goods not having been relanded in Canada there was an actual export and a substantial compliance with the statute. Relief upon this ground can come only from the Crown, and not from the courts.

The case of the *United States v. Zerbey et al* (1), was cited as an authority in support of the defendant's contention. That case is clearly distinguishable from the one under consideration. There a permit was issued to sell wines and distilled spirits for other than beverage purposes, and the bond was given to secure compliance with the requirements of the laws of the United States. The security in question was a collateral bond, and United States Government Bonds were pledged as security, this being permissible under the statute, for any liabilities arising under the bond. The bond contained the provision that

the said principle expressly agrees that the said bonds so deposited may be sold . . . and the proceeds applied to the payment of any internal revenue taxes, interest, and penalties which may be due and in satisfaction of any liabilities incurred hereunder, and the expenses of such sale, if any; and the residue, if any, paid to the said principal.

It was held by the Supreme Court of the United States that the bond was not a bond for a penalty forfeitable in its entire amount upon a breach of condition, but was a bond for indemnity securing the payment of the internal revenue taxes, interest penalties and liabilities accruing to the United States by reason of the breach. That case is entirely different from the one presently under consideration, in fact it has no resemblance to it whatever. Here the bond executed to the plaintiff was in the specified sum prescribed by statute, and is forfeitable in its full amount, for a breach of its condition.

(1) (1926) 271 U.S.R. 332.

There is a distinction, as one text writer puts it, between a bond intended as an indemnity between private persons, and those transactions in which a bond is given in pursuance of a statute, as indemnity against a violation of a statute or some policy of the law. In the latter case, the condition of the bond is for a due compliance with the statute. The damages for the breach not being ascertainable, and if there is to be any recovery upon the bond, it must be upon the theory that the sum named in the bond is presumed to be in the nature of liquidated damages.

It may appear strange, where as in this case, the goods were not relanded in Canada, to hold that by virtue of a literal breach of the bond, the defendant must be condemned in the amount of the bond. That however is what, in my opinion, the statute says. As was stated by one of the learned judges in *The King v. Dixon* (1), a great body of Excise and Customs laws are not confined to the inflicting of penalties on persons for actual breaches of the law, but a great many are enacted to prevent people putting themselves into a situation making it possible for them to infringe important provisions of the laws, and when these irregularities take place, as here, the law is put in motion, in order that others in the same situation, who may not be innocent of an intention or will to violate the revenue laws of the country, may be restrained from doing so.

It is also claimed by the defendant that this action is barred by sec. 279 of the Customs Act, which enacts that all seizures, prosecutions or suits for the recovery or enforcement of any of the penalties or forfeiture imposed by the Act, may be commenced at any time within three years after the offence was committed, or the cause of prosecution or suit arose, but not afterwards. I do not think this section was intended to apply to a specialty contract or to a suit upon a bond given under the Act; it relates I think to penalties and forfeitures imposed by particular sections of the Act.

Altogether, I am of the opinion that the plaintiff should have judgment for the amount sued upon together with his costs of action.

*Judgment accordingly.*

(1) (1822) 11 Prices Rep. 204.