BETWEEN

1907
April 2.

LORENZO G. CROSBY.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Customs law—Importation in original packages—False entry—Burden of proof.

Where a seizure is made of goods imported into Canada, on the ground that while the goods were stated in the entry papers to be imported in the original packages, they were not so imported in fact, if the claimant declines to accept the Minister's decision confirming the seizure and obtains a reference of his claim to the court, the burden of proof is upon the claimant to show the *bona fides* of the entry in dispute.

THIS was a claim for the return of moneys deposited with the Department of Customs for Canada to obtain the release of certain packages of molasses seized for an alleged infraction of the Customs laws.

The facts are stated in the reasons for judgment.

January 15th, 1907.

The case was heard at St. John, N.B.

Dr. Pugsley, K.C. (Attorney-General of New Brunswick) and *Trueman, K.C.*, for the claimant;

E. H. McAlpine, K.C., for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1907) delivered judgment.

On the 19th day of May, 1904, the claimant entered for warehouse at the Port of St. John, New Brunswick, 221 puncheons of molasses alleged to have been purchased in Porto Rico and imported *viâ* New York. This consignment was entered for consumption ex-warehouse as

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follows: 100 puncheons on May 31st, 100 puncheons on June 2nd, and the balance of 21 puncheons on the 15th day of June following. In all the entries the molasses was described as being produced in the process of the manufacture of cane sugar from the juice of the cane without any admixture with any other ingredient, and as being imported in the original packages in which it was placed at the point of production, and that it had not thereafter been subjected to any process of treating or mixing. Molasses of that description imported in that way, which tested by polariscope forty degrees or over, was, under item 441 of the Customs tariff, dutiable at the rate of one and three-fourth cents per gallon. If it tested less than forty per cent by polariscope a higher duty was exacted, while other molasses was, under item 440 of the said tariff, liable to duty at the rate of three-fourths of one cent per pound. This molasses was entered for duty under item 441 of the Customs tariff, and as it tested more than forty degrees by polariscope the duty as stated was one and three-fourth cents per gallon. Owing to representations emanating from a rival firm the entry as made by the claimant fell under suspicion, and on the 7th day of June following 116 puncheons of this molasses was seized on the ground that the statements made in the entry papers that the molasses was in the original packages in which it was placed at the point of production, and that it had not been mixed, were not true. The molasses, pending the decision of the Minister of Customs, was released upon a deposit of $1,308.44 being made. That sum represents, it is said, the duty at the rate of three-fourths of one cent per pound on the molasses contained in the 116 puncheons. The facts applicable to the other 105 puncheons were exactly the same, but no deposit was exacted as to the latter and no higher duty collected thereon than that at which the claimant entered them. On the 5th day of

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September, 1901, the Minister of Customs by his decision made on the report of the Commissioner of Customs maintained the seizure and declared that the deposit mentioned should be retained and the case closed. The claimant having declined to accept the Minister's decision the matter has been referred to this court.

The case turns upon two questions of fact, namely:

First, was the molasses that the claimant entered for duty on the 19th day of May, 1904, contained in the original packages in which it was placed at Porto Rico, the place of production? and

Secondly, had this molasses, after being placed in such packages at the place of production, been treated or mixed?

The burden of proof is on the claimant. Unless the court can answer the first question in the affirmative and the second in the negative, its judgment should be entered for the respondent.

A large part of the evidence was given under commission and it has taken a wide range dealing with a number of matters and questions that are not in any way relevant to the two issues that have to be decided. All the evidence that really bears on such issues is contained within a narrow compass.

The claimant was not the real owner of the molasses. It was owned by the N. W. Taussig Company of New York, who in respect of this transaction used the name of a company they controlled known as the Porto Rico Commercial Company. Under that name they exported the molasses to St. John, N.B., consigned to the claimant, who sold it for them on commission. On May 4th, 1904, the Taussigs purchased from L. W. & P. Armstrong, the New York agents of Bird & Son, of Fajardo, Porto Rico, 200 puncheons and 21 casks of molasses then lately shipped by Bird & Son from Porto Rico to New York. The bill of lading of the 200 puncheons bears

date of the 15th day of April, 1904, and gives the following as the marks upon the packages: "Arkadia Molasses, Porto Rico, Extra Choice." The bill of lading of the 21 casks is dated the 19th day of April, 1904. It describes the packages as puncheons and gives the marks thereon as "Arkadia Pto. Rico." As nothing turns on the use of the terms puncheons or casks it will be convenient to refer to them all as puncheons. On the 6th of May, that is two days after the purchase, the 221 puncheons were placed in the Atlantic Warehouse at Brooklyn. This warehouse is controlled by the Taussigs, and immediately adjacent thereto is a Refining or Sugar House belonging to them where molasses is mixed or treated. On the 10th day of May the Taussigs under the name of the Porto Rico Commercial Company shipped from New York to St. John, N.B., by the Metropolitan Steamship Company, 130 puncheons of molasses, the packages, according to the bill of lading bearing on one head the mark "Arkadia Pto. Rico, Molasses," and on the other head the mark "Extra Choice." And on the 11th of May there was a similar shipment of 91 puncheons, the packages bearing, according to the bill of lading, the marks "Arkadia Pto. Rico Molasses" and "Extra Choice."

In May, 1904, Maxwell T. Crompton was the receiving and delivery clerk at the Atlantic Warehouse, Brooklyn. He was employed by the Taussigs and paid by them, and had at the time exclusive charge of all goods in the warehouse. On or about the 6th of May he received into the warehouse the 221 puncheons purchased from the Armstrongs. On the 9th, 10th or 11th of May he delivered from the warehouse to lighters the 221 puncheons that were shipped to the claimant at St. John. On the 27th of June, 1904, he made an affidavit in which he states that the 200 puncheons and 21 casks received by him on the 6th of May were delivered to the lighters

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for shipment on the 10th or 11th of May. This affidavit was before the Minister of Customs when he gave his decision. In June, 1905, Crompton was examined at New York under a commission issued out of this court at the instance of the respondent. He produced his memorandum book in which he made his entries. From that he made some correction of the dates given in his affidavit. The goods, he said, were received on the 5th and 6th of May and delivered ex-warehouse on the 9th and 10th of May. He did not say directly that the packages he delivered on the latter dates were the identical packages received on the 5th or 6th, but that is, I think, the fair inference to be drawn from his evidence. He stated that he remembered the 221 puncheons particularly, that he saw them from day to day, and that they were never removed from the warehouse to the refinery. He states that the packages were branded "Arkadia." Now, if Crompton on the 9th, or 10th or 11th of May delivered from the Atlantic warehouse to lighters to be shipped the indentical 221 packages that he had received on the 5th and 6th for the Taussigs from the Armstrongs, the contents being in the same condition as when received, there would be, I think, an end of the question, and the claim should be maintained. If there was any change or substitution of packages, any treating or mixing, it was done during the four or five days that the goods were in the Atlantic warehouse. Both Mr. Noah W. Taussig and Mr. Isaac W. Taussig deny that anything of the kind happened, but both speak from what they know of the course of business and not from personal knowledge of what actually took place. Their evidence also goes to show that there was nothing to be gained by treating or mixing this particular molasses or by changing the packages in which it was received. Mr. I. W. Taussig states in his evidence that instructions were given to

have the wine guage that the Armstrongs had put on the puncheons obliterated and to substitute an Imperial guage. This Imperial guage was found on one head of the puncheons that arrived at St. John. These instructions it was said were given to the superintendent of the sugar house, who would in the course of business communicate them to Mr. Crompton. The changes would be made by one or more of the three gaugers employed by the Taussigs. Of two samples of the molasses that the Armstrongs sold to the Taussigs, one sample tested by polariscope 48-8/10 degrees and the other 49-2/10 degrees. The record of the test made in Canada of the molasses entered by the claimant is not before the court. But it was stated, and not denied, that it tested 48 degrees.

With regard to the first question stated, namely, whether the molasses in question was delivered at St. John in the packages in which it was shipped at Fajardo, Mr. Samuel Robinson, the chief gauger at St. John, on the 27th day of June, 1904, made a report to the collector of that port respecting the 221 puncheons mentioned, that "the packages were all old, second hand packages" and that the "custom at Fajardo is to export molasses in "new packages." That report is attached to the file of the Customs Department relating to this matter, and constituted, so far as I can see, the principal evidence on which the Commissioner and Minister of Customs came to the conclusion that the molasses was not delivered at St. John in the original packages in which it was placed at Fajardo. The evidence before the court on that point is much stronger against the claimant. While the molasses that the Armstrongs sold to the Taussigs was in the former's possession and before it was delivered to the latter it was guaged on behalf of the former by James F. Johnston, their gauger, and he was in June, 1905, examined as a witness under the commission issued

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on behalf of the respondent. He states that he commenced the guaging of this molasses on the 6th of May and finished it on the 7th. If he is right as to this, some of the puncheons must have been delivered at the Atlantic Warehouse on a day later than that given by Crompton. But nothing, so far as I can see, turns on that. He states further that all the packages were new, that he did not see any guage marks on them before he put his marks thereon; that his guage was made in wine measure and that he inscribed the guage on the chime or quarter of the puncheons. The packages which contained the molasses that the claimant entered at St. John on the 19th day of May, some twelve days later, were old and weather worn. Samuel Robinson, the chief guager at St. John, and his assistant guagers Frank R. Connor and Henry P. Allingham, all agree as to that. Their evidence is in this respect, in part corroborated by that of Frank Trainor, a cooper, who was employed by the claimant to do some work on the puncheons mentioned. He says they were rather old and weather beaten on top where they were exposed to the weather; but that when they were rolled over they were bright and new underneath. He also adds that the puncheons showed no signs of recooperage, from which fact the inference is to be drawn that they had not been used for molasses before. I am, however, quite unable to accept the suggestion that the re-shipment of these packages from New York to St. John can account for such a marked change in their appearance as that described. For a part of the twelve or thirteen days that intervened between the time that Johnson guaged the molasses and the claimant entered it at St. John, the puncheons were in the Atlantic Warehouse where there would be no exposure to the weather. If Johnston is right about the packages being "new" or "brand new" as he states, the conclusion is, I think, a fair one that those which

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were delivered at St. John were not the packages that contained the molasses which the Armstrongs sold to the Taussigs. But that is not all. Johnston says that he put his guage marks on the chime or quarter of the puncheons. Those which contained the molasses entered for duty by the claimant, as mentioned, had no signs or indications of any such marks on the quarters or chimes of the puncheons. There were indications, however, of guage marks having been placed on the bilge of such puncheons and afterwards obliterated. At first I thought that perhaps Johnston had through some inadvertence used the term "chime" when he really meant "bilge." But later in his evidence in explaining how he made his measurements he again used the word "chime" in a way that showed that he understood the proper use of the term and knew what he was speaking about. Of course it is possible that Johnston may be mistaken both as to the appearance of the packages he guaged, and as to where on the puncheons he placed his guage marks. If he is mistaken Crompton may on the 9th, 10th or 11th of May, have delivered ex-warehouse for shipment to St. John the identical packages that had been received into warehouse from the Armstrongs on the 5th or 6th of May. But if Johnston is right Crompton must be mistaken. Neither witness was examined before me. The evidence of both was taken in June, 1905, under the commission issued at the instance of the respondent. I had of course no opportunity of observing the demeanour of either witness. Crompton is in the employ of the Taussigs, the parties really interested in maintaining this claim. Johnston is in every way a disinterested witness. There was a later commission issued at the instance of the claimant and executed at New York in October, 1905. The case did not come on for trial until January of this year. If Johnston was in error in his evidence as to the packages being new when he guaged them, or as

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to the marks he put thereon, and the position of such marks, the claimant had ample time and opportunity to show it. With regard to the obliteration of the wine gallon guage marks and the substitution of the Imperial gallon guage marks which has been mentioned, that was done while the puncheons were in the Atlantic Warehouse It appears that the change would not be made without the superintendent of the sugar house and Crompton knowing of it. But the latter makes no mention of the change, and the former was not called as a witness. Neither was the guager or guagers who made the changes called. All of those might, and some of them would, no doubt, have known where on the puncheons these wine gallon guage marks were placed, and whether the puncheons were new or old at the time. But no attempt has been made to show by their evidence or otherwise that Johnston was mistaken in what he stated, and I see no good reason for disregarding his testimony. The claimant's case is not, I think, strong enough to justify me in doing that, and in coming to a conclusion opposite to that to which the Commissioner and Minister of Customs came. As has been shown, the evidence before me relating to the question of original packages is stronger against the claimant than that with which they dealt in arriving at the decision to which the Minister came.

The burden of proof as stated, is on the claimant. That burden, as it affects the question as to whether the molasses in question as entered for duty at St. John, N.B., was in the original packages in which it was placed at Fajardo, Porto Rico, has not, I think, been discharged. To answer the question in the affirmative is to disregard Johnston's evidence, and I do not think that I would, on the case presented, be justified in doing that. As the affirmative is not established the question must be answered in the negative. In that view of the

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case it is unnecessary to discuss the other question as to treating and mixing. The claimant's case fails if either of the two questions is answered adversely to him.

There will be judgment for the respondent, and the costs will, as usual, follow the event.

Judgment accordingly.

Solicitor for the claimant: *A. J. Trueman.*

Solicitor for the respondent: *E. H. McAlpine.*