

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner of Trade and Customs v. R. Bell & Company, Limited, from the Court of Appeal of New Zealand; delivered the 23rd July 1902.

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

[Delivered by Sir Ford North.]

The Respondents carry on the business of manufacturers of matches in New Zealand and also in London. In London they make match boxes as well as matches and as occasion requires they send over empty match boxes stamped with the words "New Zealand" for use in their Colonial business.

In 1900 several packages of match boxes consigned by the Respondents to their agents in New Zealand were seized on arrival by the Officers of Customs as contraband. The boxes were stamped "New Zealand" but filled with London matches. It is not disputed that having regard to their contents these boxes bore a false trade description. On the other hand it is conceded that neither the Respondents nor their agents or servants had any fraudulent intention or any intention of transgressing the law of the Colony. The mistake was the work of a subordinate in the packing department of the London factory who acted in the matter without

instructions from his superiors and merely with a view of economising space in transit.

The Respondents as they were entitled to do challenged the legality of the seizure by bringing an action against the Appellant the Commissioner of Trade and Customs. And so far they have been successful in the contest. The Judge of First Instance holding that the Respondents "had acted innocently" made a declaration that the goods seized were not liable to forfeiture. The Court of Appeal by a majority of four to one has affirmed the order.

The question depends upon the true construction of Part IV. of the Patents Designs and Trade Marks Act 1889 which reproduces the provisions of the Imperial Statute known as the Merchandise Marks Act 1887.

The most important sections in the Colonial Act are Sections 89 and 104 corresponding with Sections 2 and 16 of the Imperial Act.

Sub-section 1 of Section 89 deals with the forgery of trade marks and the application to goods of any false trade description. It declares that subject to the provisions of the Act an offence against the Act is committed by such forgery or application unless the party charged "proves that he acted without intention to defraud." Sub-section 2 enacts that every person who sells any goods to which any false trade description is applied is guilty of an offence against the Act unless he proves (a) that "having taken all reasonable precautions against committing an offence" against the Act he had no reason to suspect the genuineness of the trade description, and (b) that on demand duly made he gave all information in his power with respect to the persons from whom he obtained such goods or (c) "that otherwise he had acted innocently." Sub-section 3 enacts that every person guilty of an offence against this part of the Act is liable on conviction to imprisonment

or fine or to both and “in any case to forfeit to Her Majesty every chattel article instrument or thing by means of or in relation to which the offence has been committed.”

Section 104 so far as material is in the following terms:—

“104. Whereas it is expedient to make further provision for prohibiting the importation of goods which if sold would be liable to forfeiture under this part of the Act—

“Be it therefore enacted as follows :

“(1.) All such goods” [and also all foreign goods bearing the name or trade mark of a British trader unless accompanied by a definite indication of origin] “are hereby prohibited to be imported into the Colony and subject to the provisions of this Section shall be included among goods prohibited to be imported as if they were specified in Section 66 of the Customs Laws Consolidation Act 1882.”

* * * * *

“(8.) This Section shall have effect as if it were part of the Customs Laws Consolidation Act 1882.”

The Act of 1882 authorises the seizure and forfeiture of all goods the importation of which is prohibited by law.

The contention of the Respondents throughout has been that their innocence protects their goods. The argument is that no goods are liable to forfeiture unless an offence against the Act has been committed and that there can be no offence against the Act where the party charged is in a position to prove that he has “acted innocently.”

Their Lordships do not stop to enquire whether in a case like the present where the false trade description is stamped on the goods or the boxes containing the goods it is competent for the party charged to give the go-by to the specific

requirements of (a) and (b) and to shelter himself under the looser and more general language of (c) or whether as seems to have been held in *Coppen v. Moore* (1898 2 Q.B. 306)—a case of great importance and no little authority—the person charged can only resort to (c) when the false trade description is not affixed to the goods themselves but has been used upon the occasion and as part of the terms of sale. Whatever may be the true view on this point their Lordships assume for the purposes of this Judgment that if the goods in question in the present case had been sold on arrival the Respondents could not have been convicted of an offence against the Act.

What then is the meaning of Section 104? It is certainly awkwardly expressed. It follows the language of Section 89 but not so closely as necessarily to confine prohibition to the case in which liability to forfeiture is declared in the earlier section. There is at any rate one difference between the two sections not without significance. Section 104 deals with things not with persons. It speaks of goods liable to forfeiture not of traders liable to have their goods forfeited. Still no doubt on a narrow and literal construction of the words of the preamble if the scope and object of the Act be disregarded it is possible to arrive at the conclusion that no goods are to be treated as contraband unless an offence against the Act has been committed and has been followed by conviction. But this construction obviously makes the scheme of prohibition unworkable and the enactment itself little better than nonsense.

It seems to their Lordships that the proper mode of dealing with the Act is to construe it—as indeed it was construed in *Coppen v. Moore*—in accordance with the intent and meaning of the Legislature. Clearly it was the intention of the Legislature to exclude goods bearing a

forged trade mark or a false trade description as well as all foreign goods bearing the name or trade mark of a British trader without a definite indication of origin. The latter class of goods is excluded absolutely. It seems absurd to suppose that the Legislature could have meant that the admission or exclusion of the former should depend on the state of mind of the importer. Goods bearing a forged trade mark or a false trade description may be mischievous even in the hands of an innocent or ignorant owner. The owner's innocence cannot affect the character of the goods. It is difficult to see why it should be allowed to interfere with the policy of the Legislature.

Section 98 dealing with goods obnoxious to the Act where the owner is unknown or cannot be found speaks of goods "which if the owner thereof were convicted would be liable to forfeiture." There the language is perfectly accurate. The passage seems to suggest what must be supplied in the preamble of Section 104. Their Lordships think that the words "goods which if sold would be liable to forfeiture" must be read as meaning "goods which if sold would be liable to forfeiture *on conviction of the seller,*" or what comes to the same thing as equivalent to the expression "goods the sale of which would expose the seller to the liability of having the goods forfeited by due process of law." That gives a reasonable meaning to the words. Goods falsely marked are liable to forfeiture in a very intelligible sense. There is an inchoate liability although the seller may escape conviction and its consequences by proving facts which the Act treats as a sufficient excuse.

The learned Counsel for the Respondents dwelt upon the hardship inflicted on an innocent owner by the forfeiture of valuable goods when

the mischief could be remedied so simply by emptying and refilling the boxes which have been seized as contraband. But the hardship such as it is is really due to the action of the Respondents themselves. They have mistaken their remedy. The case seems to be met by Section 267 of the Act of 1882 which provides that whenever any seizure is made for any offence under the Customs Acts the Governor may direct restoration or may waive proceedings on any terms and conditions he shall think fit. Had an application been made to the Governor supported by proper evidence it can hardly be doubted that the goods would have been released on a proper undertaking.

In the result their Lordships will humbly advise His Majesty that the Appeal should be allowed, and that the action should be dismissed with costs in the Courts below to be taxed on the same scale as the costs awarded in the Courts below were directed to be taxed.

The Respondents will pay the costs of the Appeal.
