In the Privy Council.

No. 104 of 1930.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN:

THE CARLING EXPORT BREWING AND MALTING COMPANY LIMITED - - - - - (*Defendant*) *Appellant*

AND

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA - - - (*Plaintiff*) *Respondent.*

CASE FOR THE RESPONDENT.

RESPONDENTS' CASE.

RECORD.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada, dated the fourth day of February, 1930, allowing the present Respondent's appeal from a judgment of The Honourable Mr. Justice Audette of the Exchequer Court of Canada, dated the 29th day of April, 1929, in so far as it was against the Respondent, and dismissing the Appellant's cross appeal from the said judgment. p. 684 J. p. 684 h. p. 673.

2. This action was brought by the Respondent against the Appellant to recover the sum of $260,662.21 for gallonage tax payable by the Appellant under the provisions of The Special War Revenue Act (1915) 5 George V. Chapter 8 and amendments thereto, in respect of beer manufactured and sold by the Appellant between the 1st day of April, 1924, and the 1st day of May, 1927; and to recover the sum of $163,828.07 for sales tax payable by the Appellant under the said Statute and amendments in respect of beer sold by the Appellant between the same dates; and for interest on the said taxes. p. 1.

3. The Appellant disputed liability contending that the beer in respect of which the said taxes were claimed was manufactured for export and exported, and that under the provisions of the said Act and amendments thereto, the Appellant was not liable to pay the said taxes. p. 3.

* P 30028 75 10/30 E & S

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4. At the trial the learned Trial Judge held that the Respondent was entitled to payment from the Appellant of sales tax on certain cash sales of strong beer sold and delivered by the Appellant to purchasers in London and the vicinity; and of sales and gallonage taxes on sales by the Appellant to one Bannon, in Windsor. As to the balance of the Respondent's claim the learned Trial Judge held that the production at the trial of export entries presented to and received by the Canadian Customs in respect of beer entered for export to the United States was proof of export of the beer covered by such entries, and that the Appellant was not liable for sales or gallonage taxes on the sales in respect of which such entries were produced. He held that there was no proof of export of the goods in respect of which such entries were not produced and that the Appellant was liable to pay

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gallonage and sales tax in respect thereof. The learned Trial Judge also held that the Respondent was entitled to interest at five per centum per annum until paid on all unpaid taxes in respect of transactions prior to April 14th, 1927, and to interest at the rate of two-thirds of one per centum per month until paid on unpaid taxes in respect of transactions subsequent to April 14th, 1927, but was not entitled to interest at the increased rate from April 14th, 1927, on transactions prior to the said date.

5. This Respondent appealed to the Supreme Court of Canada from the said judgment in so far as it was against the Respondent, and the Appellant cross-appealed from the said judgment in so far as it was against

p. 684 h.

the Appellant. The Supreme Court of Canada allowed the appeal of this Respondent and dismissed the cross appeal of the Appellant, holding that the Appellant was liable for gallonage and sales tax on all sales covered by this action and for interest at five per centum per annum upon such sales in respect of all sales prior to April 14th, 1927, from the due date thereof until April 14th, 1927, and a penalty thereafter until paid at the rate of two-thirds of one per centum per month, and a penalty upon such taxes in respect of all sales subsequent to April 14th, 1927 from the due date thereof until paid at the rate of two-thirds of one per centum, per month.

6. The section of The Special War Revenue Act, 1915, under which the Respondent claims gallonage tax is as follows:

> 19B 1.—(*b*) "There shall be imposed, levied and collected upon all goods enumerated in Schedule II to this Part, when such goods are imported into Canada or taken out of warehouse or when any such goods are manufactured or produced in Canada and sold on and after the twenty-fourth day of May, one thousand nine hundred and twenty-two, in addition to any duty or tax that may be payable under this Act or any other statute or law, the rate of excise tax set opposite to each item in said Schedule II.
>
> (*c*) "Where the goods are imported such excise tax shall be paid by the importer and where the goods are manufactured or produced and sold in Canada such excise tax shall be paid by the manufacturer or producer; provided that if an automobile is, on

the twenty-fourth day of May, one thousand nine hundred and twenty-two, in the hands of a dealer and not sold to a *bona fide* user the tax shall be paid by such dealer when such automobile is sold. RECORD.

(*d*) " The Minister may require every manufacturer or producer to take out an annual license for the purposes aforesaid, and may prescribe a fee therefor, not exceeding two dollars, and the penalty for neglect or refusal shall be a sum not exceeding one thousand dollars. Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise."

Schedule II. " Ale, beer, porter and stout, per gallon . . . . twelve and one-half cents."

No regulations were prescribed by the Minister of Customs and Excise under this Section relating to the manufacture of beer for export. p. 402, ll. 11–14.

7. The section of the said Statute under which the Respondent claims sales tax is as follows :—

" 19BBB.—(1) In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent. on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

" For the purpose of calculating the amount of the consumption or sales tax, ' sale price ' shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto.

" Provided that the consumption or sales tax specified in this section shall not be payable on goods exported. . . .

" (10) A refund of the consumption or sales tax may be granted on imported goods on which customs duties have been refunded on exportation; and a refund of the said tax may be granted on domestic goods exported, under regulations prescribed by the Minister of Customs and Excise."

By the amendment of 1927, 16-17 George V, Chap. 36, Sec. 3, the rate of tax was changed from five per cent. to four per cent. as from the 18th day of February 1927.

8. By an amendment to the said Statute, 17 George V, Chap. 69, Sec. 4, it is provided :

" 19 CC.—(3) In default of payment of the tax or any portion thereof within the time prescribed by this Act or by regulations

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established thereunder, there shall be paid in addition to the amount in default a penalty of two-thirds of one per centum of the amount in default in respect of each month or fraction thereof during which such default continues after the coming into force of this section."

The said amendment came into force on the 14th day of April 1927.

9. Under Section 19 D(2) of the said Statute the records and books of all manufacturers are required to be open to the inspection of officers authorised by the Minister to inspect them, and by Section 19E of the Statute the Minister may require manufacturers to keep such records and accounts as he may prescribe.

Under regulations prescribed by the Minister it was provided :

"5. *Books and Records.*

p. 720, l. 38. "(*b*) Such books or accounts shall show the details of every transaction of the licensee and shall be preserved by him available for inspection for a period of two years."

p. 132, l. 34 to p. 133, l. 26. The Appellant kept books of account at its London office in which it purported to show the details of all transactions.

p. 253, ll. 13–18. p. 566, ll. 19–27. p. 547, ll. 13–14. p. 799, Exhibit 2. 10. The Appellant was licensed as a brewer under the Excise Act, R.S.C. (1906) Chap. 34, and manufactured beer at the City of London in Ontario. The owners of all the capital stock in the Appellant Company, other than qualifying shares, were Charles Burns, the President, Harry Low, the Vice-President and Marco Leon, the Secretary-Treasurer. From April 1st, 1924 to August 1st, 1925, the Appellant (subject only to certain errors in calculation) paid gallonage tax on all beer manufactured and sold by it, but paid sales tax only on certain of its sales, and disputed liability in respect of the remaining sales, claiming that the goods were exported. From August 1st, 1925 to May 1st, 1927, the Appellant paid sales and gallonage taxes on certain only of its sales, and disputed liability in respect of the remaining sales, claiming that the goods were manufactured for export, and were exported.

p. 308, l. 31 to p. 309, l. 12. p. 316, l. 1– p. 317, l. 4. p. 317, ll. 25–30. p. 572, ll. 12–16. p. 259, l. 28. 11. The general method of handling the beer covered by the sales in question in this action, was as follows :—With few exceptions the beer was entered in the Appellant's books as being sold to one purchaser. Prior to September 1st, 1925, such sales were recorded in the name of C. B. Grandi, Detroit, Michigan. From September 1st, 1925 to January 1927, such sales were recorded in the name of F. Savard, Detroit, Michigan, and from January 1927 to the end of the period covered by this action, in the name of B. Syringe, Detroit, Michigan. The Appellant's officers at the trial admitted that B. Syringe was the same person as F. Savard, and that this was merely a change of name. The debit balance in Grandi's account in September 1925 was transferred to Savard's account, and the Grandi account was thus closed.

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12. During the Grandi period, namely from April 1st, 1924 to September 1st, 1925, the beer was shipped from London by rail in car-load lots to border points in Ontario, consigned to Grandi in care of a resident of Ontario, who took delivery for Grandi in Ontario and stored the beer in warehouses or on docks at the border until it was resold by Grandi or his agents to American or Canadian purchasers who, with few exceptions, paid the purchase money and took delivery of the beer at the docks in Ontario. The re-sales at the docks were made at varying intervals from several days to several weeks, and in some cases several months after the arrival of the beer at the docks. Where the sales were entered in the books in the names of other persons, they were dealt with in substantially the same way.

p. 651, ll. 16–23.
p. 621, ll. 10–40.
p. 458, l. 34; p. 459, l. 34.
p. 460, ll. 20–22.
p. 462, ll. 11–17.
p. 463, ll. 3–4.
p. 473, l. 33 to p. 476, l. 41.
p. 479, l. 23 to p. 481, l. 14.
Exhibit 120 pp. 821 to 826.
p. 641, l. 22 to p. 642, l. 11.

13. On May 15th, 1924 the Appellant and other Ontario breweries entered into an agreement with one Fitzgerald as trustee, whereby they bound themselves under heavy penalties to sell all beer covered by the agreement at the prices fixed by the agreement, which were on the basis of $4.00 per case of two dozen pints to be paid before delivery of the beer at the docks. Pursuant to the said agreement Fitzgerald, as trustee, stationed men at the docks who collected the specified price from purchasers of the beer. The evidence of Harry Low, Vice-President and Sales Manager of the Appellant Company, is that the Appellant never intended to carry out, and did not in fact, carry out the said agreement, but on the contrary continued to sell to Grandi at prices substantially less than the amounts collected by Fitzgerald at the docks, and that Low paid to Grandi the difference between such prices and the amounts so collected. By reason of violations of the agreement Fitzgerald resigned as trustee on September 20th, 1924, and the agreement came to an end.

p. 725, Exhibit 74.
p. 341, l. 4 to p. 342, l. 21.
p. 345, ll. 1–42.
p. 593, l. 24 to p. 594, l. 27.
p. 595, ll. 19–23.
p. 347, l. 40 to p. 349, l. 16.

14. According to the evidence all sales at the border, during the Grandi period, were re-sales by Grandi, and the monies collected at the docks represented the price at which Grandi had re-sold the beer. There were no entries in the Appellant's books at London of these re-sales at the border and no record was produced of such sales. The export entries made out at the border during this period were made out not at the price at which the Appellant sold to Grandi, but at the price at which Grandi re-sold the beer.

p. 621, l. 10–p. 622, l. 6.
p. 630, ll. 11–26.

15. During the Savard period, namely from September 1925 to May 1927, Low, Vice-President of the Appellant Company, stated that the entire out-put of the brewery was purchased by F. Savard at $1.75 per carton up to January 1st, 1927 and at $2.00 per carton thereafter; that it was agreed between Low and Savard that the profit on the re-sale of the

p. 570, l. 40–p. 571, l. 21.
p. 572, ll. 12–30.
p. 619, ll. 24–29.
p. 611, ll. 30–40.

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beer by Savard would be divided equally between them, and that Low agreed to divide his share of such profits equally with Burns, the President, and Leon, the Treasurer of the Appellant Company. No agreement in writing between Savard and the Appellant, or between Savard and Low or between Savard and Low, Leon and Burns, was produced, and the evidence is that none was in existence. But during the period covered by these transactions Low, Leon and Burns were carrying on a liquor business at the border, and an agreement dated April 3rd, 1926 between Consolidated Exporters Corporation Limited of Vancouver and Low, Leon and Burns, relating to such liquor business, was produced. Low's evidence was that the liquor business was carried on in the same way as the beer business, Savard being the consignee of both beer and liquor, and the profits being divided in the same way in both cases.

p. 620, ll. 10–12.
Exhibit 125 p. 1054.
p. 599, l. 19–p. 602, l. 9.

16. During the first part of the Savard period, namely from September 1st, 1925 until July 15th, 1926, the beer was shipped from London by rail in car-load lots to border points in Ontario, consigned to Savard in care of a resident of Ontario, who took delivery for Savard in Ontario and stored the beer in warehouses or in docks at the border until it was re-sold by Savard or his agents to American or Canadian purchasers, who took delivery at the docks in Ontario. The re-sales at the docks took place at various intervals from several days to several weeks, and in some cases several months after the arrival of the beer at the docks.

p. 259, l. 18–p. 260, l. 4.
p. 461, ll. 25–29.
p. 475, ll. 11–28.
p. 641, l. 22 to p. 642, l. 11.
Exhibit 120 pp. 827–843.
Exhibit 94 p. 903.

17. During the remainder of the Savard period the general method of handling the beer covered by the sales in question was as follows :—In June 1926 the Appellant and other Ontario breweries caused a company to be incorporated under the name of Bermuda Export Company Limited, and entered into an agreement with one G. U. Stiff as trustee, whereby they bound themselves under heavy penalties to export or sell for export only to or through the Bermuda Export Company Limited, and at prices fixed in the agreement which were at the rate of $3.25 per carton of two dozen pints. By a further agreement between the Appellant and the Bermuda Export Company Limited, dated June 15th, 1926, the Appellant bound itself under heavy penalties that none of its malt products should be "shipped by it from any of the places aforesaid for export or by it sold for export from any of the said places to any person, firm, association or corporation" other than the Bermuda Export Company Limited, and that they would not, during the currency of the agreement, sell for export at less than the prices specified in the agreement, which were on the basis of $3.25 per carton. By this agreement the Bermuda Company was obliged to collect the specified price of $3.25 per carton at the time of delivery of the beer to the purchasers at the docks, and of this amount to remit forthwith to the Appellant $2.50 per carton. The balance, after deducting the Bermuda

Exhibit 22 p. 743.
Exhibit 27 p. 749.

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Company expenses, was remitted to the trustee, Mr. Stiff who, after deducting his expenses, distributed the balance among the breweries, parties to the agreement, in the manner provided by the agreement. The beer was shipped from London by carload lots to the border consigned to Savard at docks in Canada, and the Bermuda Export Company took delivery of the beer and resold it collecting the resale price at the agreed rates before making delivery at the docks. The resales at the docks took place at varying intervals from several days to several weeks, and in some cases several months after the arrival of the beer at the docks. The Bermuda Export Company agreements continued in force from July 15th 1926 throughout the period covered by this action.

Exhibit 120 pp. 835–843.
p. 116, l. 34–p. 117, l. 3; p. 118, l. 21–p. 119, l. 26; p. 123, l. 24–p. 125, l. 5.

18. The moneys collected at the docks, other than the Bermuda Company docks, and the greater part of the moneys paid by the Bermuda Export Company Limited to the Appellant, were deposited in the Dominion Bank at Windsor in an account in the name of the Appellant. Sums representing $1.75 per case, being the price charged in the Appellant's books to Savard, were from time to time transferred by the Appellant from this account to London, and credited in the Appellant's books to the account of Savard. The balance to the credit of this account, amounting to more than $640,000, was withdrawn by Low, and, according to his evidence, was divided equally between Savard and Low, after deducting expenses of re-sale and handling at the border, and Low's share was divided between Low, Leon and Burns. No entries were made in the Appellant's books of these sales at the border, and no books or records were produced with reference to the amounts collected at the docks, or with reference to the amounts withdrawn from such bank account, other than the records in the Appellant's books at London of the amounts from time to time transferred there and credited to Savard's account. Low testified at the trial that the Appellant kept no record of the transactions at the border, but that Savard kept books in Windsor, which were in charge of one Kennedy. These records were not produced, and Kennedy, who was subpoenaed by the Respondent for the trial, met his death before the trial.

p. 582, ll. 15–37.
p. 584, l. 27–p. 586, l. 8.
p. 599, ll. 19–37.
p. 142, ll. 26–31.
Exhibit 124 pp. 1084 and 1085.

19. Stiff, the trustee under the Bermuda Export Company agreement, disbursed the Appellant's share of the monies received by him by seven cheques payable to the Appellant. Two of these cheques were deposited in the Appellant's Windsor bank account; one was deposited in the bank account of Low, Leon and Burns, and three were carried into the Appellant's books at London but were not credited to sales. They were credited in an account under the name of " F. Savard Expenses re Windsor Dock Account." According to Low's evidence the monies so paid by the trustee to the Appellant were monies belonging to Savard subject to the division with Low in accordance with the agreement referred to in paragraph 15 above.

p. 108, l. 16–p. 111, l. 30.
p. 173, l. 28–p. 174, l. 4.
p. 542, l. 38–p. 543, l. 4.
p. 599, l. 38–p. 600, l. 24.
p. 608, ll. 1–10.

20. Low was one of the active executive officers of the Bermuda Export Company, Limited, but notwithstanding the agreement between the

p. 596, ll. 11–17.
p. 194, ll. 15–19.

Exhibit 27 p. 749. p. 597, ll. 15–17. p. 607, l. 30–p. 608, l. 18. p. 599, ll. 19–23. p. 575, ll. 1–12. p. 584, ll. 19–26.

Appellant and the Bermuda Company the Appellant, according to Low's evidence, sold all its products to Savard at $1.75 per case. Low stated that Savard was the real purchaser at the prices entered in the Appellant's books, that the sales made and the prices collected by the Bermuda Company were in reality sales for Savard, and the prices at which Savard re-sold the goods and that Savard was entitled to the entire proceeds of the re-sale subject to payment of the invoice price to the Appellant and to a division of the net profits on the re-sale with Low. All moneys collected at the docks during the Savard period represented the price at which Savard re-sold the beer.

p. 308, ll. 14–26. p. 299, l. 34–p. 300, l. 12.

21. Morrison, the Appellant's accountant, stated that where sales were charged in the Appellant's books to accounts in the names of other than Savard or Syringe, such names were the names of Savard's customers, and that amounts credited to such accounts in excess of $1.75 per carton represented the difference between $1.75 and Savard's re-sale prices. This surplus was transferred to an account known as the "F. Savard Commission Account" of which Savard got the benefit.

Exhibit 20 p. 687. Exhibit 19 p. 690. p. 371, l. 40–p. 372, l. 8. p. 372, ll. 14–31. p. 255, ll. 16–26. p. 476, ll. 12–35. Exhibit 21B p. 723. p. 372, ll. 9–31.

22. Under the provisions of the Customs Act, R.S.C. (1906) Chap. 48, Sections 99, 100, 104 (1) and 298, all shippers of goods consigned to a port or place out of Canada are required to complete an export entry, commonly known as a B.13. In the case of goods laden at an inland port, such export entries are to accompany the goods and to be delivered by the carrier to the collector at the port of exit from Canada. The manner in which the export entries produced at the trial were made, according to the evidence was as follows:—Prior to March 13th, 1926, one export entry was made out by the Appellant in London for each car of beer shipped from London. As the beer was sold at the border and taken from the warehouses and loaded on boats ostensibly clearing for places in the United States, new export entries were made out by the purchaser's agent at the border in the name of the Appellant for each lot so sold and these export entries were presented to the Customs Officer in respect of such shipments. After March 13th, 1926 the practice of accepting at the port of exit the export entries made out at the border in respect of beer shipped from inland ports, was prohibited, and thereafter the Appellant made out at London a number of export entries for each shipment in various denominations of from 1 to 100 cases sufficient to cover the carload, and each bearing the date of the shipment from London. As the beer was resold and loaded on boats at the border a sufficient number of these export entries to make up the cargo of the boat were presented to the Customs Officer as export entries.

Exhibit 19 p. 690. Exhibit 20A p. 694. p. 669, l. 36–p. 670, l. 8.

23. In accordance with the regulations under The Customs Act, one copy of the export entry presented to the Customs Officer at the port of exit from Canada was transmitted to the Statistics Branch of the Department of Customs and Excise at Ottawa, and there filed. The total quantity of beer covered by all the export entries filed in the Statistics Branch aforesaid in respect of beer shipped by the Appellant during the period in question

was approximately eighty-three per cent. of the beer which the Appellant claimed was exported and in respect of which taxes were not paid.

24. While it is a requirement of The Customs Act that there shall be an export entry for all goods exported, there is no provision in The Special War Revenue Act making such entries proof of export. Export entries are not referred to in The Special War Revenue Act and the only reference made to them in the regulations under the Act is in Section 4 which provides :—

" 4. *Refunds and Deductions.*

" (*c*) Claims for refund of the tax paid on domestic goods exported shall be accompanied by a certified copy of Customs Export Entry and proof of payment of the tax. Claims shall not be allowed on goods sold and used for domestic consumption and subsequently exported." p. 720, l. 27.

The evidence is clear and uncontradicted that where the application was for a refund of sales tax in respect of intoxicating liquors exported, the Department required, in addition to the export entry, the production of a foreign landing certificate showing that the goods had been actually landed and left in a foreign country, and that no refunds were ever granted without the production of such a certificate. Exhibit 79 p. 706. p. 366, l. 21–p. 367, l. 15.

25. By section 116 (*b*) of The Customs Act it is provided :—

" 116. For the purpose of the levying of any duty, or for any other purpose of this Act, or any other law relating to the Customs,—

" (*b*) The exportation of any goods from Canada shall be deemed to have been commenced from the time of the legal shipment of such goods for exportation after due entry outwards in any decked vessel, or, if the exportation is by land or in any undecked vessel, from the time the goods were carried beyond the limits of Canada ; "

In so far as there is any evidence of the loading or shipment of the beer after it was resold, it was in small, open boats, all being undecked vessels within the meaning of the above section, ostensibly clearing for places in the United States. p. 354, l. 37–p. 355, l. 4. Exhibit V-3 p. 1071.

26. According to the evidence the Railway Company in order to avoid difficulty in the operation of its lines crossing the boundary into the United States, with the United States authorities concerned in the enforcement of their liquor prohibition laws, required the shipper of intoxicating liquors on and after March 15th, 1926, to have endorsed on the Bill of Lading " for export from Canada, deliver only under supervision of Collector of Customs." Thereafter the Railway, before it would permit the consignee to break the Railway seals on the car and take delivery of the goods, required a Customs officer to be present and to witness the delivery of the goods to the consignee on the Canadian side. The beer never at any time passed into the custody or control of the Customs authorities. p. 667, ll. 10–17. p. 665, ll. 8–34. p, 666, l. 32-p. 667, l. 28 p. 642, ll. 22–40.

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p. 420, ll. 37–38. p. 203, l. 7–p. 204, l. 28.

27. The Appellant did not apply for or obtain from the United States consular officers in Canada, consular certification of any of the invoices of the beer shipped in the manner above outlined, as is required by the United States Custom law in the case of goods to be exported to the United States, although it did apply for and obtain such certification in respect of invoices of other goods which it shipped to the United States. None of the beer was shipped from London on a through Bill of Lading to a purchaser in a foreign country.

28. As further evidence of export in fact the Respondent relied on :

(*a*) Evidence that the beer in question was placed on board vessels which obtained clearance from the Canadian Customs for ports in the United States.

(*b*) Evidence that subsequent to January 1926, the Appellant manufactured rice beer, and that rice beer was a preferred beverage of the United States.

(*c*) Evidence as to the return through Canadian customs of some of the special bottles which it was claimed by the Appellant were used by it for rice beer, and of second-hand kegs.

(*d*) Evidence of one witness that he saw beer labelled as the Appellant's beer in roadhouses in American towns.

As to the vessel clearances the Respondent contends that such clearances are only proof of entry of the beer for Export and that the vessels received a clearance for some place in the United States and are no proof of export in fact. As to the rice beer the Respondent submits that evidence that rice beer was a preferred beverage in the United States is not proof that the beer in question was exported and further that rice beer was sold in Canada and even after the Appellant commenced the manufacture of rice beer it constituted only a small part of the beer on which the Appellant failed to pay taxes. The Respondent contends that no evidence was given of the actual export of any of the goods covered by any particular sale in question in this action.

p. 395, ll. 34, 35. Exhibit 117 p. 815.

p. 376, l. 7 to p. 377, l. 13. p. 435, l. 28–p. 436, l. 3. p. 539, ll. 29–40. p. 540, l. 37–p. 541, l. 8.

29. There was evidence of a limited number of sales which were not carried out in the manner outlined above :

(*a*) Cash sales at the brewery of strong beer, which the Appellant delivered to customers in and around London.

p. 210, l. 26–p. 211, l. 26. p. 215, l. 38–p. 217, l. 15.

(*b*) Shipments by rail from London where the car containing the beer was billed as a car of some commodity other than beer. Three of such cars were billed for shipment to Buffalo, U.S.A., as canned milk and were seized in London. Two cars were billed for shipment to Windsor, Ontario, as oil and were seized in Windsor.

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The Respondent has no means of knowing how many cars were so shipped. Low stated that the false billing was not done by the Appellant, and that the Appellant had no control over the beer after it was loaded on cars at the brewery. p. 625, l. 10–p. 626, l. 6. p. 627, l. 40–p. 628, l. 7.

(*c*) Certain sales and deliveries of beer from the docks at Windsor to one Basil Bannon of Windsor who resold the beer in Ontario. Bannon testified he bought the beer from Savard. p. 222, l. 29–p. 224, l. 27.

(*d*) Certain sales of beer recorded in the Appellant's books as having been made to one Smith of Detroit, which according to the evidence, represented beer delivered to purchasers at the brewery in London. The Appellant paid the unpaid taxes on these sales while the trial of the action was pending. p. 300, l. 22–p. 302, l. 9. p. 174, ll. 12–34.

30. By the regulations made under the Statute, the Appellant was required to make sworn monthly returns showing the total amount of its taxable sales, and the tax payable thereon. The Appellant from time to time filed such sworn returns, the affidavit on which was in the following form :— p. 717, l. 36. p. 719, l. 23.

"I, ... do solemnly swear that the above amount correctly represents all the tax accruing upon sales of merchandise sold, as imposed by law." Exhibit A p. 1044.

The Appellant omitted from the sworn returns of sales tax, and from the sworn returns of gallonage tax filed after July 1925, not only the goods claimed to have been exported, but also the sales referred to in paragraph 29 hereof. No explanation was given by the Appellant at the trial, of these false tax returns. Mr. Burns, the President of the Appellant, who was in charge at the brewery, and made many of the returns, was not called as a witness. All the beer covered by the sales referred to in the preceding paragraph hereof was entered in the books of the Appellant as having been sold for export. p. 435, l. 28–p. 436, l. 29. Exhibit A p. 1044.

31. By the 18th Amendment to the Constitution of the United States of America, which came into force on the 17th day of January, 1920, and is still in force, the importation of intoxicating liquors into the United States for beverage purposes was prohibited. The National Prohibition Act, enacted by the United States Congress, to give force and effect to the provisions of the 18th Amendment likewise prohibits, under heavy penalties, the importation of intoxicating liquors for beverage purposes. This law is one of the Criminal Laws of the United States. Section 37 of the Criminal Code of the United States provides as follows : p. 175, l. 5–p. 176, l. 34. Exhibit 33 p. 778. p. 483, ll. 22–27. p. 485, l. 38–p. 486, l. 23.

"That if two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any other purpose and one or more of such p. 178, ll. 16–36.

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parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy will be subject to a fine of not more than $10,000.00 or to imprisonment for not more than two years or both."

p. 179, ll. 18–31. Exhibit 35 p. 789, l. 29.

32. Under the United States Tariff Act, no merchandise valued at over $100.00 was permitted entry into the United States without the production of an invoice therefor certified by the Consular Officer of the United States for the Consular district in which the merchandise was manufactured or delivered for shipment.

Exhibit 45A p. 790.

33. On the 6th day of June, 1924, a treaty was entered into between Canada and the United States for the suppression of smuggling operations along the boundary between Canada and the United States as set out in exhibit 45A. The treaty went into effect in 1925.

p. 182, ll. 22–26. p. 233, ll. 20–24.

34. The United States maintained officers and patrols at the border to secure the enforcement of the prohibition laws and to prevent the landing of intoxicating liquors in the United States.

35. The Respondent contends:—

(1) That the Judgment of The Supreme Court is correct and should be affirmed.

(2) Where a tax is imposed by Statute, and an exception or exemption is granted by way of proviso, as in this case, the Defendant must set up such exception or exemption and prove it as a defence. The Appellant has failed to prove such a defence as the Supreme Court has held.

(3) There can be no exemption from Gallonage tax in respect of beer manufactured for export or exported, unless regulations have been prescribed by the Minister of Customs and Excise, as provided in the Special War Revenue Act, Section 19B. No regulations were prescribed by the Minister, and there can be, therefore, no exemption, as the Supreme Court has held.

(4) There can be no exemption from sales tax unless the goods were actually exported by the Appellant. The Appellant did not export any of the goods in question, as the Supreme Court has held. The Appellant sold the goods to purchasers in Ontario, who re-sold the goods to sub-purchasers, who took delivery of the goods in Ontario.

(5) The meaning to be given to the words "export" and "exported," as used in the provisoes is actual transportation from Canada to a foreign country, and the Appellant did not prove that the beer covered by any particular sale was so transported, and the Supreme Court has so held.

(6) That the production of export entries, commonly called B13's, duly stamped by the Customs officials at the border is not proof of export but only of entry for export.

(7) The words "export" and "exported" as used in the said provisoes mean export through the normal and lawful channels

of trade, and do not cover transactions entered into in Canada having as their object the performance in a foreign and friendly country of acts in violation of the fundamental and criminal laws of that country.

(8) The Appellant's defence is based on the proof of transactions which involve the violation of the fundamental and criminal laws of a foreign and friendly country, and as such are illegal by the law of this country and the Court should not give effect to a defence based on such transactions.

(9) The Respondent is entitled to interest and penalties in accordance with the judgment of the Supreme Court.

36. At the trial the learned Trial Judge held that the Appellant was not liable for gallonage or sales tax on those sales in respect of which export entries were produced, holding that the export entries were " the manner and the forms provided by law to show that the goods were duly exported according to the usual practice." Before the Supreme Court the Appellant contended that the intention of the Act was to exempt all goods which were in fact exported, and that the production of the export entry received and stamped by the Customs officer at the border was proof of export. The judgment of the Supreme Court, delivered by the Rt. Hon. Mr. Justice Duff and concurred in by Mr. Justice Newcombe, Mr. Justice Rinfret, Mr. Justice Lamont and Mr. Justice Smith reversed the judgment of the Trial Judge in this respect and held that the transactions as outlined in the evidence did not bring the Appellant within the exempting provisoes; that the proviso only applied to export by the manufacturer in execution of a contract of sale; that the goods in question were not exported by the Appellant, the manufacturer, and that there was no proof that the goods covered by any particular sale were in fact exported. Mr. Justice Duff, referring to Section 19BBB of the Statute, said :— p. 671, ll. 16–22.

" The statute seems clearly enough to assume that the liability to pay is completely ascertainable, as well as completely constituted, at the time of the sale. And this seems to be the cardinal thing, for the purpose in hand. In terms, the taxes are payable in respect of all sales of goods produced or manufactured in Canada, and the phrase ' tax . . . . on the sale price ' is employed by the principal clause. The proviso employs a different turn of expression and seems to treat the impost as a tax ' payable on goods '; and declares that it shall not be payable upon a designated class of goods, namely, ' goods exported,' but there is absolutely nothing in the proviso to indicate any qualification of the enactment in the principal clause that the tax is payable at the time of sale. On the contrary, the proviso explicitly and exclusively legislates for ' the tax specified in this section.' What it seems to effect is a qualification of the general terms of the principal clause, which literally embraces all sales of goods produced or manufactured in Canada (or all such goods when sold) and it does so by excluding from that p. 684e, ll. 2–24.

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comprehensive category 'goods exported'; that is to say the seller, by force of it, is not to come under the liability declared by the principal clause if he sells, not goods manufactured or produced in Canada simply, but such goods 'exported.' In other words, the proviso seems to exempt from the operation of the tax cases in which the goods are exported by the vendor in execution of the contract of sale. That seems to be the fair and reasonable meaning of the language, and there is no context by which the natural construction of the language is controlled." . . . .

p. 684f, ll. 6–10.

"It is not seriously open to dispute, in view of the repeated admissions of Low, that the sales proved were sales completed in Canada; nor indeed was this denied on the argument. Neither is it possible to argue, assuming there was export in fact, that such export was effected by the Respondents in execution of the contract of sale." . . . .

p. 684f, ll. 22–29.

"The contract for sale was completed by delivery in Ontario. The export, on any assumption, was a subsequent fact, in respect of which the Respondents assumed no responsibility. In the view above stated as to the effect of the Statute, the liability thereupon attached, and there is nothing in the Statute to indicate that export effected a defeasance of the obligation to pay the duty. The remedy of the Respondents in such circumstances would be by way of the procedure laid down in sub-section 10." . . . .

Mr. Justice Duff, in dealing with the question of export in fact, said:

p. 684g, l. 25– p. 684h, l. 6.

"There is, moreover, another state of facts of decisive import. The persons concerned in the export of these goods were engaged in a trade which involved the introduction into the United States and the sale there, of things which could neither be lawfully introduced nor sold there, nor, except in circumstances not here at all relevant, could be the subject of property or juridical possession there. The boundary waters were patrolled by police whose duty it was to prevent the entry of such goods into the United States and to capture and confiscate craft endeavouring to effect such entry. The evidence abounds in indications that this is by no means a theoretical consideration. One witness, Dunford, says that in one month six craft owned by him personally, were captured and confiscated. It is also clear from the evidence that there was an extensive trade carried on in Ontario in beer of all kinds. In view of the nonproduction of the export entries, in relation to 17 per cent. of the goods in question, I do not think we can accept the suggestion that there was no market for lager beer in Ontario. The learned trial judge dwells upon the fact that rice beer is peculiarly an American taste, and infers that it is not sold in Ontario. The evidence in support of this does not proceed from disinterested sources and I wonder whether the boundary line so sharply affects the taste in illicit liquor. In truth, it is stated by Low that it was

not until some time in 1926 that the Respondents began the manufacture of rice beer, and we are not told at what date, if ever, in their brewery, rice beer wholly superseded malt beer. My conclusion is that, while there is some evidence of export, while no doubt beer was exported in large quantities, it is impossible to say judicially with regard to any particular shipment that that shipment reached the United States side and was landed there, or that it was captured by the United States preventive officers, or that it was returned to the Canadian side and sold there. I may add, that I hope, as a judge of fact, I shall not be supposed to have divested myself of all knowledge of human habits and modes of thinking."

37. The learned Trial Judge held that the beer claimed to have been exported, but in respect of which no B. 13's were produced, was not in fact exported, and that the Appellant was liable for taxes in respect thereof. The Supreme Court of Canada concurred in this finding, and dismissed the Appellant's cross-appeal against this part of the judgment. The Respondent submits that these concurrent findings of fact, which are abundantly supported by the evidence, should not be reversed.

p. 672, ll. 1–4.

p. 684i, ll. 24–28.

38. At the trial the learned Trial Judge held that the beer covered by the cash sales and the beer sold to Bannon was not in fact exported, and that the Appellant was liable for taxes in respect thereof. In the Supreme Court the Appellant disputed liability for taxes on these sales on the ground that the sales were illegal under the provisions of The Ontario Temperance Act and that the Crown could not recover. If it had been the intention of the Appellant to raise such a defence, it should have been pleaded. Rule 93 under The Exchequer Court Act provides :—

p. 672, ll. 4–7.

" Each party in any pleading, not being an information, petition of right, or statement of claim, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings."

No such defence was pleaded and no application for leave to amend to raise such a defence was made by the Appellant, and the Appellant in its petition for leave to appeal did not raise the question of the effect of The Ontario Temperance Act on these sales or on any other sales in question in this action.

p. 3.

The Respondent contends :

(1) The Appellant should not now be permitted to raise the defence of illegality under The Ontario Temperance Act.

(2) The Ontario Temperance Act does not prohibit all sales made within Ontario. Sales made to a person in another Province, or a foreign country or to a licensee under the Act do not come within the prohibition, and the Court should not, for fiscal purposes, inquire

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into the application and effect of a statute such as The Ontario Temperance Act.

(3) The beer was in fact sold by the Appellant, who received the purchase price which passed into and became part of its assets. The purchaser received the goods as purchaser, and the sales tax thereupon became payable.

(4) It was clearly the intention of Parliament in the Special War Revenue Act to tax on the same principle throughout the whole of Canada, and not to make taxation dependent on the varying and divergent laws of the particular Provinces.

(5) It was clearly within the power of Parliament to levy the tax upon all sales, and there is nothing in the language of the Act to suggest that it was intended to limit the tax to sales which would strictly conform to the laws of the Province in which the sales were made.

(6) The Appellant should not be permitted to escape taxation by setting up its own wrong.

39. The Supreme Court dismissed the Appellant's cross appeal against this part of the Judgment. Mr. Justice Duff deals with the Appellant's contention that The Ontario Temperance Act applies as follows—

p. 684c, ll. 9–22.

" The answer to the contention appears to be this. The Ontario Act did not apply to all sales within Ontario. Sales made in course of interprovincial or foreign trade, and sales made to the Ontario government were not affected. Where transactions have taken place which contain all the elements of a sale according to the ordinary language of business, which, but for such a prohibiting statute as the Ontario Temperance Act, would have legal effect as sales, and the parties have treated them as such, the purchaser receiving the goods as purchaser, and the vendor receiving the purchase price as vendor, then, the vendor having received the price, which has passed into and become a part of his assets, the court will not for fiscal purposes inquire into the application or effect of a statute such as the Ontario Temperance Act. The case is not precisely the same as, but is not easily distinguishable from, the decision of the Privy Council in *Minister of Finance* v. *Smith*, 1927 A.C. 193."

and after quoting from certain passages in Lord Haldane's Judgment in *Minister of Finance* v. *Smith*, says—

p. 684d, ll. 7, 8.

" I see no substantial ground for holding these considerations (held decisive in the circumstances of Smith's case) to be without application here."

40. On the question of interest and penalties the Respondent appealed to the Supreme Court from the decision of the Trial Judge that the amendment of 1927 did not apply to taxes in arrears on April 14th, 1927, and the Appellant cross appealed against the said judgment in so far as it allowed interest and penalties to the Respondent on taxes in respect of sales prior

p. 684.

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to April 14th, 1927. The Supreme Court allowed the Respondent's appeal and dismissed the Appellant's cross appeal. p. 684h.

41. In reference to the question of interest and penalties raised by the Appellant's cross appeal to the Supreme Court, the Respondent contends—

(1) That the Judgment of the Supreme Court is correct and should be affirmed.

(2) That the Respondent is entitled to interest at the rate of five per cent. per annum up to April 14th, 1927 on all arrears of taxes, for the following reasons :—

(*a*) That such interest is properly payable by law.

(*b*) That the said taxes constituted a just debt improperly withheld, and that interest is properly payable thereon.

(*c*) That Section 34 of The Ontario Judicature Act R.S.O. (1914) Chap. 56, applies as follows : " Interest shall be payable in all cases in which it is not payable by law, or in which it has been usual for a jury to allow it," and that interest is properly payable on the said taxes.

(*d*) That it is fair and equitable that the Appellant should pay such interest, and the Courts below have so held.

(*e*) That section 19 CCC. (1) of The Special War Revenue Act as enacted by 17 Geo. V, Chap. 69, Sec. 5, is a statutory recognition of the right of the Respondent to interest on said taxes.

(*f*) That it has been customary to allow interest on such taxes in arrears under The Special War Revenue Act.

(*g*) That the Appellant did not raise the question as to the correctness of the judgment of the Supreme Court on this point in its petition for leave to appeal.

(3) That on a proper construction of Sec. 19 CC (3) the interest or penalty of two-thirds of one per centum per month is properly applicable to unpaid taxes which were due and payable at the time that the section came into force.

42. The Appellant by its cross-appeal to the Supreme Court contended that in determining the amount (if any) payable by the Appellant, credit should be given for all payments made by it to the Crown for gallonage or sales taxes on goods now claimed by them to have been exported. The Supreme Court dismissed the Appellant's cross-appeal on this point. The Respondent contends— p. 684.

(1) That this issue was not raised by the Appellant in its pleadings; no evidence was directed to it at the trial, but on the contrary counsel for the Appellant stated at the trial that there was no question of refund in this case, that this question was not raised by the Appellant in its petition for leave to appeal, and that the Appellant's cross-appeal to the Supreme Court on this question was properly dismissed. p. 3. p. 363, ll. 23–29.

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(2) That all taxes paid by the Appellant were properly due and payable by it to the Respondent, and the Appellant is entitled to no credit in respect thereof.

(3) That the taxes paid by the Appellant were paid in respect of particular sales, and were not paid under any mistake either of law or of fact, and cannot be recovered.

(4) That the Appellant's claim is in effect a counterclaim against the Crown and cannot be raised in this action.

(5) That if the Appellant desired to claim repayment from the Crown of any taxes paid by it to the Crown the appropriate procedure was by petition of right and the Appellant has not adopted that procedure.

p. 684.

43. The Appellant by its cross appeal to the Supreme Court further contended that in determining the amount payable by the Appellant, account should be taken of any further export entries produced, which were not produced and put in as exhibits at the trial. The Respondent submits that the Appellant had full liberty at the trial to prove its case, and to produce all the export entries which it claimed related to the sales in respect of which tax is claimed in this action. The action first came on for trial in May 1928, and was adjourned and later continued in April 1929. The Trial Judge refused the Appellant's request that any export entries other than those produced at the trial should be taken into consideration. The Appellant did not raise this question in its petition for leave to appeal. The Supreme Court has dismissed the Appellant's cross-appeal on this point, and it is submitted that the concurrent findings of these Courts should not be reversed, and that there is no ground for permitting the Appellant to introduce further evidence.

p. 672, ll. 8–11.

44. The learned Trial Judge held that the Appellant's invoices did not show the true sale price and that the sales tax for which he found the Appellant liable should be computed on the advanced prices. The Respondent's contention was and is that there was a real sale by the Appellant Company at London as recorded on the Appellant's books and invoices and a re-sale by the purchaser at the border and consequently the sales tax should be computed at the price shown on the Appellant's books and invoices. The Appellant also made this contention and cross-appealed from the judgment of the Trial Judge, that the sales tax should be computed not on the invoice price, but on the advanced price. The Supreme Court accepted this view and held that the sales tax should be computed on the invoice price, although the point is not expressly mentioned in the judgment, and the Registrar of the Supreme Court in settling the judgment did not strike out paragraph 5 of the formal judgment of the Exchequer Court that sales tax should be computed on the higher price, as should have been done in order to carry out the real intention of the Court.

p. 684.

The Respondent humbly submits that the appeal from the judgment of the Supreme Court of Canada should be dismissed for the following, among other

REASONS.

1. The onus of proving that any beer manufactured and sold by the Appellant is exempt from gallonage and sales taxes imposed by The Special War Revenue Act is on the Appellant, and the Appellant has failed to discharge that onus.

2. The exemption from gallonage tax under Sec. 19B of the said Act is not in favour of goods manufactured for export, or exported, but of goods manufactured for export "under regulations prescribed by the Minister of Customs and Excise."

3. No regulations were prescribed by the Minister under Sec. 19B of The Special War Revenue Act in respect of the manufacture of beer for export, and there can be no exemption from gallonage tax in the absence of such regulations.

4. An examination of the provisoes of The Special War Revenue Act shows that where "export" is the condition of exemption it is clearly stated in the Statute, and no regulations are required, but where "manufactured for export" is the test, it is clearly stated, and regulations are required.

5. Even if proof of actual export would entitle the Appellant to exemption from gallonage tax the Appellant has failed to prove such export.

6. Under Sec. 19BBB the sales tax is imposed on the sale price of all goods produced or manufactured in Canada, payable by the manufacturer at the time of the sale of the goods by him. The liability to sales tax attaches immediately the sale is made. The exemption is enacted in favour of the manufacturer, and he only is entitled to the benefit of it.

7. The facts which give rise to the exemption from sales tax must be in existence at the time of sale, and the exportation which brings the exemption into effect must be by the manufacturer, and be an integral part of the sale itself. No such export by the manufacturer was proved by the Appellant.

8. If export in fact by the Appellant, although not in execution of a contract of sale, would entitle the Appellant to exemption from sales tax, the Appellant has failed to prove such export.

9. If export in fact by other than the Appellant would entitle the Appellant to exemption from sales tax, there is no proof that the goods were in fact exported.

10. The words " export " and " exported " as used in the provisoes involve actual transportation from Canada to a foreign country, and the Appellant did not prove that the beer in question was so transported.

11. Under The Customs Act R.S.C. (1906) Chap. 48, Sec. 116, subsection (*b*), export does not commence until the goods are carried beyond the limits of Canada, and there is no proof that the goods covered by any sale in question were so carried.

12. The production of export entries, commonly known as B.13's is not proof of export. It is only proof of entry for export.

13. The Special War Revenue Act does not make the export entry proof that the beer in question was exported, nor do the regulations or practice thereunder respecting refunds of taxes paid on the sale of beer claimed to have been exported.

14. Proof that the vessels were granted clearance by the Customs Officers is not proof of export. It is only proof of entry of the goods for export, and that the vessel received a clearance for a foreign destination.

15. Under the laws of the United States the actual transportation of the beer in question to the United States would be a violation of the fundamental and criminal laws of the United States.

16. The words " goods exported " as used in the proviso should be interpreted as meaning goods exported through the normal and lawful channels of trade, and not the transportation of goods in violation of the fundamental and criminal laws of a friendly state.

17. If the Appellant has established that any of the goods in question were in fact landed in the United States pursuant to an agreement between the Appellant and any citizen of the United States, such an agreement and the acts pursuant thereto are illegal as being contrary to the fundamental and criminal laws of a foreign and friendly nation.

18. The Appellant's defence is based on the proof of transactions which involve the violation of the fundamental and criminal laws of a foreign and friendly nation, and as such are illegal by the law of this country, and the Court should not give effect to a defence based on the proof of such illegal acts.

19. In any event there is no proof of export of the goods covered by the cash sales, the Bannon sales and those in respect of which no B.13's were produced.

20. The concurrent findings of fact of the Trial Judge and of the Supreme Court that the cash sales, the Bannon sales and the goods in respect of which B.13's were not produced, were not exported, should not be reversed.

21. The Appellant should not escape liability in respect of the cash sales, the Bannon sales or any other sales in question on the ground that they were in violation of The Ontario Temperance Act, for the reasons set out in paragraph 38 above.

22. The Respondent is entitled to the interest and penalties awarded by the Supreme Court for the reasons set forth in paragraph 41 hereof.

N. W. ROWELL.
G. C. LINDSAY.

In the Privy Council.

No. 104 of 1930.

On Appeal from the Supreme Court of Canada.

BETWEEN

THE CARLING EXPORT BREWING AND MALTING COMPANY, LIMITED
(*Defendant*) *Appellant*

AND

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (*Plaintiff*) *Respondent.*

CASE FOR THE RESPONDENT.

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