THE ATTORNEY GENERAL OF BRITISH COLUMBIA ..... } PLAINTIFF;

1922
February 25.

VS.

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA, } DEFENDANT.

Constitutional law—Construction of Statutes—Importation of alcoholic liquors by a Province for sale—11 Geo. V (B.C.) c. 30—B.N.A. Act 1867, sec. 125.—"Taxation"—Customs duties—Exemption.

The Government of the Province of British Columbia in the exercise of its powers of control and sale of alcoholic liquors under the *Government Liquor Act*, 11 Geo. V (B.C.) c. 30 cannot import such liquors into the Province for the purposes of sale without paying customs duties thereon to the Dominion of Canada.

2. The provisions of sec. 125 of the *British North America Act, 1867* exempting the lands or property of a Province from "taxation" do not enable any Province to import into Canada goods for the purpose of carrying on a business or trade free of any customs duty chargeable on such goods.

ACTION by the Crown in right of the Province of British Columbia to have it declared that it could import liquors into Canada for purpose of sale pursuant to the provisions of Government Liquor Act, 11 Geo. V c. 30 (B.C.) without paying the customs dues imposed by the Crown in right of the Dominion of Canada upon the importation thereof.

December 19th, 1921.

Case now heard before the Honourable The President at Ottawa.

The Honourable *John Wallace de Beque Farris*, K.C., and *Eugène Lafleur*, K.C., for plaintiff;

E. L. Newcombe, K.C., and *C. P. Plaxton* for defendant.

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The questions of law raised in this action are stated in the reasons for judgment.

THE PRESIDENT now, this 25th February, 1922, delivered judgment.

This case was argued before me on the 19th December, 1921. The Honourable John Wallace de Beque Farris, K.C., Attorney-General for the Province of British Columbia, and Eugene Lafleur, K.C., appeared for the plaintiff, and E. L. Newcombe, K.C., and Mr. Plaxton for the defendant.

There was no evidence adduced. It was stated by Mr. Lafleur that the question was one of law. Mr. Lafleur states: "It is a test case to decide whether the importation of liquors by the Province of British Columbia are liable to customs and excise duties."

On the opening of the case I suggested that the other Provinces should be represented on the hearing, Mr. Lafleur informed me that he had communicated with the Attorney-General's office in Quebec, and the reply was that while he, the Attorney-General, was very much interested in the question and considered the advisability of intervening in the case, subsequently a telegram was received from him stating that on consideration the Quebec Government had determined not to intervene at this stage of the case.

There seems to be little dispute in regard to the facts as stated in the pleadings. Counsel for British Columbia objected to one statement which is given at the top of page 2 of the defence, and which reads as follows:

" * * that in pursuance of the requirements of the said Act as amended, and in particular of section 25 thereof there was delivered to the Collector of Customs and Excise at Victoria, B.C., by His Majesty as represented

by the Province of British Columbia, or by the Liquor Control Board at Victoria, B.C., or by an officer of the Government of the Province of British Columbia acting for or on behalf of His Majesty, as so represented as consignee of the said case of whisky (hereinafter referred to as "the importer") an invoice of the said case of whisky, containing the information required by paragraph (a) of said section 25 of the Customs Act, and thereupon a bill of entry on Customs form "B 16—Amended" covering "Entry of small collections for home consumption" was made out in conformity with paragraph (b) etc.,

Mr. Lafleur stated that this was not quite an accurate statement of what occurred, that in fact there was no such invoice at all delivered in pursuance of the Act. There was an invoice delivered when a claim was made for the delivery of the goods, and this invoice was attached to the claim in order to identify the goods.

Whether this difference is material or not, the statement of the facts as stated by Mr. Lafleur was conceded by Mr. Newcombe.

The case was very fully and ably argued by counsel for both sides, and if I err in the conclusions that I have arrived at it certainly is not attributable to any lack of assistance on the part of counsel.

As stated by Mr. Lafleur in the quotation which I have referred to, the case before me is brought as a test action, and on the argument it was argued both by Mr. Newcombe, and by Mr. Lafleur in reply, on broad grounds, namely, the right of the Province of British Columbia to import spirits from Great Britain and to become practically the sole vendors of the spirits in the Province of British Columbia.

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The legislation of the Legislative Assembly of British Columbia is contained in the statute of 1921, Cap. 30. This legislation has been held to be *intra vires* by the Board of the Privy Council in the case of the *Canadian Pacific Wine Co.* v. *Tuley* (1), (July 21st, 1921). It also had been held to be within the powers of the legislature by Mr. Justice Clement in the case of *Little* v. *Attorney-General of British Columbia* (2). These cases set out the provisions of the statute of British Columbia which, as I have stated practically give to the Province the sole right to import for sale, and to sell spirits, etc., within the Province of British Columbia.

As I have mentioned the case was argued before me on broad lines. On reading over the statement of claim the allegation is that James Patterson, the duly appointed purchasing agent under the Government Liquor Act, acting in pursuance of the provisions of the said Act, and in the name and on behalf of His Majesty the King in the right of the said Province, purchased in Great Britain one case of Johnnie Walker Black Label Whiskey, which was shipped from Glasgow and consigned to the purchaser His Majesty King George Fifth, in the right of the Province of British Columbia, etc.

While, as I have stated, the broad question as to the right of the Province to import for the purposes of sale, as provided by the statute, is intended for the consideration of the court, it is open to the contention that the pleadings only deal with one case of whiskey imported for governmental purposes. I therefore directed a notice to be served on counsel for both parties suggesting that either the pleadings should be

(1) [1921] 2 A.C., 417. (2) [1921] 60 D.L.R. 335.

amended so as to cover the broader question, namely, whether British Columbia importing wholesale for the purpose of becoming the sole vendors as provided by the statute could so enter into the trade and procure the whiskey from Great Britain free of customs as contended by the Province.

Pursuant to my suggestion, the following admission of facts has been filed, signed by counsel for both parties.

"It is hereby admitted, for all purposes of this action, that the case of Johnnie Walker 'Black Label' Whiskey which was purchased and consigned to His Majesty King George the Fifth in the right of the Province of British Columbia, care of Liquor Control Board, Victoria, B.C., as alleged in par. 1 of the Statement of Claim filed herein, was so purchased and consigned to meet the requirements of the Government liquor stores established in British Columbia under the Government Liquor Act, chapter 30 of the Statutes of British Columbia, 1921, and for the purpose of sale at said Government liquor stores pursuant to the provisions of the said Act."

The contention of counsel for British Columbia is that under section 125 of the B.N.A. Act, 1867, [which reads: "No lands or property belonging to Canada or any Province shall be liable to taxation,"] notwithstanding the fact that the whiskey and other liquors were imported by the Province, not for their own governmental purposes but for the purposes of trade, they are entitled to import them without payment of the Customs dues imposed by the Dominion. The question is one of very grave importance.

If the decision is in favour of the Province, and any Province is to be at liberty to import any goods without payment of custom dues, then the Provinces

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can enter upon trade of any description. They might import, for illustration, harvesting machinery from the United States, and escaping payment of customs dues undersell Canadian manufacturers. The practical effect would be, if the Provinces chose to avail themselves of this alleged right, that the revenues of the Dominion requisite for the purpose of carrying on the Government of the Dominion might be depleted to such an extent as to render it impossible for the Dominion to meet the heavy obligations cast upon them under the terms of the Confederation Act. It certainly is a startling proposition put forward for the first time since Confederation, 1867.

The distribution of legislative powers between the parliament of the Dominion and Provincial legislatures are set out in sections 91 and 92 of the B.N.A. Act, 1867. By sub-sec. 2 of sec. 91, of said Act, the Dominion, is assigned exclusively: "The Regulation of Trade and Commerce"; and by sub-sec. 3: "The raising of money by any mode or system of taxation."

To the Provincial Legislatures, by section 92, subsection 2, "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

Section 118 provides for large sums to be paid yearly by Canada to the several Provinces for the support of their governments and legislatures, and it is unnecessary to repeat that the Dominion has to raise very large sums of money.

The sections 122, 123 and 124 of the B.N.A. Act of 1867, are important, more particularly sec. 124 which provides that: "Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues, * * * *."

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Section 146 of the B.N.A. Act provides for the admission of other Colonies, and amongst those named is the Province of British Columbia. "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies * * * (including British Columbia) to admit those Colonies or Provinces, or any of them, into the Union, * * * on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve * * * ".

On the 16th May, 1871, an Order of Her Majesty in Council admitting British Columbia into the Union was passed, "and from and after the 20th July, 1871, the Colony of British Columbia shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore Addresses."

Referring to the Address of British Columbia, Section 7 provides:

"It is agreed that the existing Customs tariff and Excise duties shall continue in force in British Columbia until the railway from the Pacific Coast and the system of railways in Canada are connected, unless the Legislature of British Columbia should sooner decide to accept the Tariff and Excise Laws of Canada. When Customs and Excise duties are, at the time of the union of British Columbia with Canada, leviable on any goods, wares or merchandizes, in British Columbia, or in the other Provinces of the Dominion, those goods, wares and merchandizes may, from and after the Union, be imported into British Columbia from the Provinces now composing the Dominion, or into either of those Provinces from British Columbia, on proof of payment of the Customs or Excise duties leviable

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thereon in the Province of exportation, and on payment of such further amount (if any) of Customs or Excise duties as are leviable thereon in the Province of importation. This arrangement to have no force or effect after the assimilation of the Tariff and Excise Duties of British Columbia with those of the Dominion"

Sub-sec. 3 of sec. 2 of the Customs Act, as enacted by Cap. 15 of the Statutes of Canada, 1917 (7-8 George V.), reads as follows:

"The rates and duties of custom imposed by this Act, or the Customs Tariff or any other law relating to the Customs, as well as the rates and duties of customs heretofore imposed by any Customs Act or Customs Tariff or any law relating to the Customs enacted and in force at any time since the first day of July, one thousand eight hundred and sixty-seven, shall be binding, and are declared and shall be deemed to have been always binding upon and payable by His Majesty, in respect of any goods which may be hereafter or having been heretofore imported by or for His Majesty, whether in the right of His Majesty's Government of Canada or His Majesty's Government of any province of Canada, and whether or not the goods so imported belonged at the time of importation to His Majesty: and any and all such Acts as aforesaid shall be construed and interpreted as if the rates and duties of Customs aforesaid were and are by express words charged upon and made payable by His Majesty:"

Then comes the proviso:

"Provided, however, that nothing herein contained is intended to impose or to declare the imposition of any tax upon, or to make or to declare liable to taxation, any property belonging to His Majesty either in the right of Canada or of a Province."

While it may be true that customs duties may be described as taxes in a broad sense, I do not think that at the time of Confederation it was ever considered or intended under the words contained in sec. 125, "No lands or property belonging to Canada or any Province shall be liable to taxation," that a Province should be at liberty to procure spirits, etc., for the purpose of sale, without payment of the customs dues.

Elmes, on the Law of Customs, at page 4, states, as follows: "There is a distinction to be observed between taxes and duties although both taxes and duties as commonly understood are embraced in the generic term 'taxes.' "

In *Bank of Toronto* v. *Lambe* (1) Lord Hobhouse, pronouncing the judgment of the Board of the Privy Council, in discussing the frame of the Quebec Act, uses the following language, referring to the tax imposed in the case before the Board:

"It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded."

(1) [1887] 12 A.C. 575 at p. 583.

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There are very strong cases in the Supreme Court of the United States, and also in the Commonwealth of Australia cited by counsel on the argument before me. In the case of *Brown* v. *Maryland* (1) Chief Justice Marshall at page 437, uses the following language:

"An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed."

In *United States* v. *Perkins* (2), Mr. Justice Brown was dealing with a case in which the facts were that one Merriam had devised and bequeathed all his estate both real and personal to the United States Government, and the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax. On page 628 he quotes from the Court of Appeals in Maryland the following language:

"Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are, consequently, wholly within the discretion of the General Assembly. The Act we

(1) [1827] 12 Wheaton (25 U.S.) 419. (2) [1896] 163 U.S. 625.

are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment, in other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

And at page 630:

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

South Carolina v. *United States* (1). In the head note of this case it is stated as follows:

"The State may control the sale of liquor by the dispensary system adopted in South Carolina, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing power of the National Government."

(1) [1905] 199 U.S. 437.

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While it may be that the decisions of the Supreme Court of the United States are not binding upon this court, they are entitled to very great weight, and Mr. Justice Brewer, who delivered the judgment in this case (South Carolina v. United States) had a high reputation as a judge. On page 454, he states as follows:

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercock Co.* (No. 1) (1). The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

"More than this. There is a large and growing movement in the country in favour of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government? We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to

(1) [1898] 170 U.S. 438.

the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the State is carried to the extent suggested, and with it relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*. (Supra p. 431) for a complete answer."

I quote this language as I think it is pregnant with common sense, and very applicable to the present case.

At page 457, he uses the following language quoting Chief Justice Nott:

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"Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. * * * * * Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'legion of mercenaries', had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's Amendments."

"Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it."

At page 461 Mr. Justice Brewer uses the following language:

"These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

At page 463 he again states:

"It is reasonable to hold that while the former (the national government) may do nothing by taxation in any form to prevent the full discharge by the

latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation."

The Board of the Privy Council have used very similar language in two cases: *Farnell* v. *Bowman* (1), and *The Attorney-General of Straits Settlement* v. *Wemyss* (2),—in which the Board indicate their views, viz., that if a State chooses to embark upon private business in competition with other traders, they should be liable just as other persons engaging in trade.

The case of *New South Wales* v. *The Collector of Customs* (3), and the case of *The King* v. *Sutton* (4), deserve very close consideration. They are powerful pronouncements by able judges. I agree with the Attorney-General for British Columbia in his statement before me as to the difference between taxation and a tax. As the Attorney-General states, "I am not relying very strongly upon that phase of the argument." He thinks the distinction is rather subtle and thin; so do I.

After very carefully considering all the cases referred to by counsel, and a good many others, I have formed the opinion that if the Province of British Columbia import goods for the purpose of carrying on a business or trade, they must pay the custom dues charged by the Dominion for the privilege of importing such goods. I think it would startle anyone who has any knowledge of the manner in which business has been carried on in the Dominion and the Provinces for the last fifty odd years, if such a claim as that put forward could be sustained.

(1) [1887] 12 A.C. 643 at p. 648;
(2) [1888] 13 A.C. 192.
(3) [1908] 5 C.L.R. 818.
(4) [1908] 5 C.L.R. 789.

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The Attorney-General suggested that the customs dues might still be imposed on the purchases from the Government of British Columbia. I fail to see how that is feasible. If the goods are admitted duty free, they are duty free in the hands of the purchaser from the importer. It would practically be impossible to collect customs dues from each individual purchaser of a bottle of whiskey.

Another question strongly pressed upon me by Mr. Newcombe was that under the rule applied of *ejusdem generis*, the word "property" in section 125 of the B.N.A. Act should be limited to property of a kind similar to lands. I was referred by Mr. Newcombe to the cases set out in Maxwell on the Interpretation of Statutes, 6th ed., p. 574. There are a large number of cases cited some of which come very near supporting his contention. The words of section 125 are, "Lands or Property." The word "lands" embrace the whole genus, and the word "property" has a much more extensive meaning than the word "lands."

The case of the *Sun Fire Office* v. *Hart et al.*, (1), was an appeal from the Court of Appeal for the Windward Islands. The condition in the policy of insurance was that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change, or from any other cause whatever," they should desire to do so. Lord Watson, who delivered the judgment of the Board used the following language, at page 103:

(1) [1889] 14 A.C. 98.

"It is a well known canon of construction, that where particular enumeration is followed by such words as "or other", the latter expression ought, if not enlarged by the context, to be limited to matters *ejusdem generis* with those specially enumerated. The canon is attended with no difficulty, except in its application, Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction. In the present case there appears to their Lordships to be no room for its application. The theory upon which the ruling of the presiding judge and its affirmance by the majority of the Court of Appeal, proceeds, appears to be this, that the words "by reason of such change" are equivalent to an enumeration of certain particular changes or causes specified in the preceding condition; and that the following words "or from any cause whatever", must be confined to causes *ejusdem generis* with these. The antecedent context does not contain a mere specification of particulars, but the description of a complete genus, if not of two genera. The first of these is any and every act done to the insured property whereby the risk of fire is increased."

The Judgment of the Court below was reversed.

In Beal on Legal Interpretation, second ed. pp. 311 and 312, it is stated, if the particular words exhaust the whole genus, the general words must refer to some larger genus.

It was also argued before me by Mr. Newcombe that if the Province of Alberta owned lands, say situate in the Province of Saskatchewan, the Province of Saskatchewan would have the right to tax these lands. It is not necessary to determine this point, and I prefer not to pass any opinion upon it until the case arises.

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I think under the circumstances of this case, it being a test case, there should be no costs to either party.

Judgment Accordingly.