BETWEEN

1909
March 15.

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

LORENZO ROBITAILLE AND THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED..... DEFENDANTS.

Revenue—Excise—Distillery—Method of assessing duty—Grain in mash-tubs—Liability of distiller—Construction of Statutes.

Revenue statutes are not to be construed strictly against the Crown and in favour of the subject, but are to be interpreted the same way as other statutes; and if on a proper construction of the statute the defendant in a proceeding by the Crown is liable, the court has nothing to do with the hardship of the case.

Sec. 155, sub-sec. (*a*) of the *Inland Revenue Act*, R. S. 1906, c. 51, enacts as follows, respecting the distilling of spirits :

" Upon the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds, or, in a distillery where malt only is used, upon the malt used for its production at the rate of one gallon of proof spirits for every twenty-four pounds."

Section 156, sub-sec. (*a*) provides that the quantity of grain for the purpose of computing the duty shall be the quantity actually weighed into the mash-tubs and recorded in the proper books kept therefor, except when there appears to be cause to doubt the correctness of the quantity so entered, when the inspecting officer is empowered to determine the actual quantity of grain consumed in the distillery. The duty must be assessed and levied on the quantity of grain so determined, in the proportion of one gallon of proof spirits to every twenty and four-tenths pounds of grain.

Held, that defendant R., having accepted his license with a knowledge of these provisions, was not entitled to relief from the method of assessment fixed thereby.

INFORMATION for the recovery of excise duties on the manufacture of spirits.

The facts of the case are stated in the reasons for judgment.

February 22nd and 25th, 1909.

The case was heard at Quebec.

F. X. Drouin, K.C., for the plaintiff.

A. Rivard, for the defendants.

Mr. *Drouin* contended that the defendants were clearly liable to pay the duty upon the malt used in the production of spirits at the rate of one gallon of proof spirits for every twenty-four pounds. This was the minimum rate. This duty was payable on the first day of each month for the quantities produced during the preceding month, (Sec. 57.) Returns have to be made monthly. (Sec. 49.) The Act makes the duty payable on the grain or malt used.

Mr. *Rivard* argued that the intention of the Act was to impose duty on spirits and not on malt or grain. (Sec. 154.) Section 154 shows that it is on the spirits distilled and not on the malt that the duty is primarily imposed. When the distiller can show how much he has distilled, the duty is payable on that amount. It is inequitable to charge the distiller duty upon spirits which may never be distilled. Suppose that no spirit at all is produced, through a break in the machinery, for instance, would it be reasonable for the distiller to be required to pay under such circumstances?—Cites *Attorney-General* v. *Halliday*. (1) If whiskey never comes out of the tail of the worm it is not distilled, and you cannot exact duty on it. Section 154 provides for the payment of duty on spirits *distilled*, and sec. 155 must be read in harmony with it. Section 156 emphasizes the intention of Parliament to impose the duty on the spirits distilled.

Mr. *Drouin* replied, contending that the Government officers had no discretion in respect of collecting the duty on the grain or malt under section 155. Section 156 also contemplates the imposition of the duty on the quantity of grain used.

(1) 26 U. C. Q. B., 397.

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CASSELS, J., now (March 15, 1909) delivered judgment.

This case was tried at Quebec, the defendant Robitaille being represented by Counsel. The defendant The Employers (Liability Assurance corporation, Ltd.) although duly served with notice of trial, was not represented by Counsel.

The information filed in this case alleges that the defendant Robitaille is the owner of and operates a distillery at Beauport in the Province of Quebec. On the 29th August, 1906, Robitaille was granted a distillery license. This license terminated on the 31stMarch, 1907, the end of the fiscal year.

It is further alleged in the information that during the months of October, November and December, 1906, there was a deficiency in the production of proof spirits in Robitaille's distillery as compared with the grain used therein, such deficiency amounting to 6,395·67 proof gallons calculated and computed on the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds. The defendant Robitaille in his defence admits the deficiency, but states that it took place during the months of October and December, 1906, and January, 1907.

It is conceded that the months should be November, December and January, and the information should be amended accordingly.

During the months of February and March, 1907, there was an excess over and above the minimum quantity of spirits which the grain used should produce on the basis of one gallon of proof spirits for every 20·4 pounds of grain used, and the Crown has credited Robitaille with this excess as against the previous deficiency, thereby reducing the number of gallons upon which at the rate of $1.90 for each proof gallon would leave the defendant Robitaille indebted to the Crown in the sum of $5,116.15, if his defence fails.

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It was set up in the defence of Robitaille that the fiscal year should be treated as ending on the 30th June, 1907, in which event if credit were given for the excess during the months of April, May and June, 1907, the whole deficiency would be wiped out. This defence was not pressed before me, and could hardly be so in view of the fact that the license terminated on the 31st March, 1907, the end of the fiscal year.

On the 8th of May, 1907, the following report was approved by the Governor-General in Council:—

"INLAND REVENUE.

"That at the distillery of Mr. Lorenzo Robitaille at Beauport, Que., deficiencies in production have arisen during the months of October, November and December, 1906, aggregating 6,395·67 proof gallons which, under the provisions of the Inland Revenue Act, require that duty shall be collected thereon at the rate of $1.90 per proof gallon or on the quantity named $12,151.78; that the most thorough enquiries that could be made have established no evidence of irregularity but the deficiency is reported to be due to defective apparatus, and it is believed that the spirit if produced has been run off in the refuse from the stills; that under section 155 of chaper 51 of the Revised Statutes of 1906 it is provided that the duty upon spirits shall be charged and computed by certain methods, one of which is that the duty shall be charged upon the quantity of grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths (20·4-10) pounds of grain. It further provides that the method of computation which yields the greatest amount of revenue shall in all cases be the one upon which distillers shall pay the duty; that in this distillery the quantity subject to duty has been determined upon the basis of one gallon of proof spirits for every twenty and four-tenths (20·4-10) pounds of

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grain as above quoted; that under section 56 it is provided that all duties of Excise imposed by this Act shall accrue and be levied on the quantities made or manufactured, ascertained in the manner by this Act provided, or otherwise proved, and section 57 provides that such duties shall be due and payable on the first day of each month; that in the past the Department has required distillers to pay the duty on any deficiency in production, each month, but as the law does not expressly state that this must be done, and as the Department has every reason to believe that the short production was due to defective apparatus and unforseen difficulties, the Minister of Inland Revenue recommends that under the circumstances stated the production in this distillery be computed on the whole quantity of grain used up to the end of the fiscal year in connection with the sprits produced therefrom, and that the duty be exacted upon the deficiency for the period above recommended.

"From the report submitted to the Treasury Board it appears that every distiller taking out a license does so under the conditions provided by the Act and in the case of spirits as well as malt, tobacco, cigars, &c., definite standards of production are fixed, and that it cannot be claimed that in the course suggested any deviation is being made, except favourably to the distiller, from the conditions under which his license was obtained.

"The Treasury Board concur in the above recommendation and submit the same for favourable consideration.

"(Sgd.) RODOLPHE BOUDREAU,
"*Clerk of the Privy Council.*"

The Crown has taken a liberal view of the *Inland Revenue Act*, cap. 51, Revised Statutes of Canada, 1906, in calculating the deficiency at the end of the fiscal year instead of monthly.

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The contention of counsel for the defendant Robitaille is that there being no fraud and the spirits in question, which should represent the grain used, not having been produced owing to defective apparatus and unforseen difficulties, or if produced run off in the refuse from the still, a proper construction of the statute would relieve him from liability.

It is apparent that the basis of production, one gallon of proof spirits for every twenty and four-tenths pounds, is a minimum basis. This appears from the excess during the months of February and March.

It was argued that the statute should be construed strictly against the Crown and in favour of the defendant.

I have to construe the statute as any other statute should be construed, and if on a proper construction of the statute the defendant is liable, I have nothing to do with any question of hardship. *The King* v. *Algoma Central Ry.* (1), affirmed on appeal (2); *Canada Sugar Refining Co.* v. *The King* (3), *Attorney-General* v. *Carlton Bank* (4), See also *Maxwell on Statutes* (5) :—

"The American revenue laws are not regarded as penal laws in the sense that requires them to be construed with strictness in favour of the defendant. They are regarded rather in their remedial character, as intended to prevent fraud, suppress public wrong and promote the public good; and are so construed as to most effectually accomplish those objects."

See section 15 of the *Interpretation Act*, R.S. C. 1906.

The *Inland Revenue Act* Cap. 51 R. S. C. (1906) contains various provisions designed to prevent fraud and insure the payment of the proper excise dues.

Section 48 provides for an accurate record of the grain.

Section 49 for monthly returns.

Section 57 provides that the several duties shall be due and payable on the first of each month.

(1) 32 S. C. R. 277.
(2) [1903] A. C. 478.
(3) [1898] A. C. 741.
(4) [1899] 2 Q. B. 164.
(5) [1905] 4th ed. p. 434.

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Sections 55, 155 and 156 are the sections upon which mainly the question of the liability of the defendant depends.

Section 55 : " The amount of duty shall be calculated on the measurements, weights, accounts, statements, and returns, taken, kept or made, as herein provided, subject to correction and approval by the collector or other officer thereunto duly authorized ; and when two or more methods for determining quantities or the amount of duty to be paid are provided for, that method which yields the largest quantities or the greatest amount of duty shall be the standard ".

* * * * *

3. " Such computation may be based on any reliable evidence respecting the quantity of material brought into the distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, or as to the quantity of the manufactured article therefrom, or as to the quantity or strength of any articles used in any of the processes of manufacture ".

Section 155 : The duty upon spirits shall be charged and computed as follows, &c. Then follow various methods of computation.

The method adopted by the Crown is that provided by sub-section (*a*) :

" Upon the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds, or, in a distillery where malt only is used, upon the malt used for its production at the rate of one gallon of proof spirits for every twenty-four pounds ".

Section 156, sub-section (*a*) is important. It reads as follows :

" The quantity of grain shall be the quantity actually weighed into the mash-tubs and recorded in the books kept under the requirements of this Act ; except that

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whenever there appears to be cause to doubt the correctness of the quantity so entered on the said books, an inquiry may be made by an inspecting officer of Inland Revenue, who may swear and examine witnesses under oath, and inquire as to the quantity of grain taken to the distillery in which such books are kept, and as to the quantity of grain removed therefrom, and generally into the matters referred to, and shall determine, as nearly as may be, the actual quantity of grain consumed in the distillery; and the duty may be assessed and levied on the quantity of grain so determined, in the proportion of one gallon of proof spirits to every twenty and four-tenths pounds of grain."

The defendant accepted his license with a knowledge of these provisions. It has to be borne in mind also that this is not the case of no spirits having been distilled from the grain used. A large quantity has been distilled.

The only authority cited to me at the trial was the case of the *Atty.-Gen.* v. *Halliday* (1), cited by Mr. *Rivard*, but this case does not assist the defendant.

I have endeavored to find Canadian or English authority but have failed to find any in point.

Some American authorities by eminent judges are of great assistance.

In the United States there are provisions in their Internal Revenue Act somewhat of a similar nature to the Canadian statute.

There are provisions for ascertaining the capacity of a distillery.

By section 20 of the Act of July 29th, 1868 (15 Statutes at Large,125), provision was made for a return of the quantity of spirits distilled, and the statute provided that the "quantity of spirits returned together with the defi-

(1) 26 U. C. Q. B. 397.

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"ciency assessed shall in no case be less than 80% of the "producing capacity of the distillery," etc.

In *United States* v. *Nissley* (1), it was determined that a distiller is bound to pay taxes on 80% of the producing capacity of his distillery although this be on more than the amount of spirits actually produced.

No reasoning is given in this case for the judgment.

In *United States* v. *Singer* (1872) (2), Mr. Justice Field deals with the question as follows:—

"Upon the construction which should be given to the twentieth section of the Act of July, 1868, there appears to have been some conflict of opinion among Circuit Judges. The real or supposed hardship in particular cases of imposing a tax upon an amount of spirits equal to eighty per cent. of the producing capacity of the distillery, where a less quantity has been in fact manufactured by the distiller, has undoubtedly had much to do in inducing a construction leading to a different result. But the hardship of the operation of particular provisions of a statute has properly no place for consideration where the language is unambiguous and the legislative intent is clear. And reading the section in question by itself there does not appear to us to be any ambiguity in its language, or any doubt as to its meaning. Its meaning is that in no case shall the distiller be assessed for a less amount of spirits than eighty per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this eighty per cent. he shall also be assessed upon the excess".

After dealing with the provision of the statute the learned judge states as follows, at p. 120:—

"The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. And it seems well suited to accomplish this purpose; it at least reduces the limits within

(1) 1 Dillon, Cir. Ct. Rep. 586 (1871). (2) 15 Wall. at p. 118.

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which fraud can be practised to twenty per cent. of the capacity of the distillery. In view of the enormous frauds previously practised upon the government in rendering accounts, this system cannot be justly charged with unnecessary harshness. Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distil at all, he is not entitled to much consideration".

United States v. *Ferrary*, (1); *Stoll* v. *Pepper*, (2).

The American law was amended providing for a remission of assessments for deficient production under certain circumstances. The amendment is to be found in United States compiled Statutes, 1901, Vol. 2, p. 2158, sec. 3,309.

In "The Laws of Excise" by Bell and revised by. Dwelly (1873) p. 394, section 89 of 23 & 24 Vict. cap 114 is cited.

Section 89 reads as follows :—

"The distiller shall in respect of all wort, wash, and bub in his distillery be charged according to the highest gauge of quantity at any time taken thereof, and according to the highest amount of gravity thereof at any time declared by him, or ascertained by any officer, without any allowance for waste, bub, dregs, yeast, or other matter whatever; and when any decrease shall take place in the quantity of wort, wash, and bub in a distillery, the amount of such decrease shall be deemed to have been distilled, and the distiller shall be charged accordingly with a quantity of spirits in proportion to the decrease of such wort, wash, and bub".

I find on reference to the *Century Dictionary* that the meaning of the words 'wort", "wash" and "bub" as used here, is as follows :—

(1) 93 U.S. 625 (1876). (2) 97 U.S. 438.

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"Wash" means the fermented wort from which the spirit is extracted.

"Wort" means the infusion of malt which after fermentation becomes beer.

"Bub" means a substitute for yeast, made by mixing a little meal or flour in a quantity of warm wort or water. There is a provision in this statute 23 & 24 Vict. cap. 114 for remission of duties in certain cases (1).

In my opinion the defendant Robitaille is liable for the duties claimed. The defendants The Employers Liability Assurance Corporation, Ltd., by the third paragraph of their defence admit their liability in the event of the defendant Robitaille being liable.

There will be judgment against both defendants for the amount claimed by the plaintiff, and interest from the 1st April, 1907. The defendants must pay the plaintiff's costs of the action.

Solicitors for the plaintiff: *Turgeon, Roy & Langlois.*

Solicitors for the defendants: *Casgrain, Lavery, Rivard & Chauveau.*

(1) [1873] See Bell's *Laws of Excise*, p. 406.