THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA (PLAINTIFF)..... APPELLANT;

1922

*May 11, 12.
*Oct. 10.

AND

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional law—Statutes—Construction—Importation of liquor by province for sale—"Taxation" on "property"—Customs duties—Exemption—B.N.A. Act, [1867] s. 125—(B.C.) 11 Geo. V. c. 30.

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 to the Dominion of Canada. Brodeur J. dissenting.

The levying of customs duties on the goods in question is not "taxation" on "property" belonging to a province within the purview of section 125 of the B.N.A. Act. Brodeur J. dissenting.

Judgment of the Exchequer Court (21 Ex. C.R. 281) affirmed, Brodeur J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing appellant's action.

This action has been taken by the Crown in right of the province of British Columbia to have it declared that it could import liquors into Canada for purposes

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 21 Ex. C.R. 281.

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of sale pursuant to the provisions of the "Government Liquor Act" ([B.C.] 11 Geo. V. c. 30) without paying the customs duties imposed by the Crown in right of the Dominion of Canada upon the importation thereof.

Eug. Lafleur K.C. for the appellant: The word "taxation" in section 125 of the B.N.A. Act includes the imposition of customs duties. *Bank of Toronto* v. *Lambe* (1); *Cotton* v. *The King* (2).

The word "property" in section 125 includes moveable property, is not restricted to property within the province and is not limited to such property as may be incident to the administration of the provincial government.

The taxation in question is imposed upon the property by the terms of the taxing statutes.

Bayly K.C. for the Attorney-General for the province of Ontario, intervenant.

Newcombe K.C. and *Plaxton* for the respondent. The customs duties imposed in respect of the importation of liquors by the province do not violate either the letter or the spirit of section 125 of the B.N.A. Act.

These duties do not constitute "taxation" in the sense in which that term is used in section 125, but are merely in the nature of regulations of trade and commerce.

These duties, even supposing them to be in the nature of "taxation" do not constitute taxation on "property" within the meaning of section 125. *Attorney General of New South Wales* v. *Collector of Customs* (3).

(1) [1887] 12 App. Cas. 582. (2) [1914] A.C. 176 at pp. 192, 193.
(3) 5 Com. L.R. 818.

The case of liquor which has been imported by the province is not within the connotation of the word "property" in section 125.

The exemption from taxation provided by section 125 does not extend to goods which, though belonging to the province, are not intended to be used in the execution of the ordinary functions of government or for the purposes of the provincial government as these were understood at the time of the Union.

The word "taxation" in section 125 was not intended to comprehend customs duties, for the reason that the prohibition enacted by this section was intended to be a reciprocal prohibition and therefore does not extend as regards the Dominion to indirect taxation.

The word "property" must be held to be limited, in accordance with the *episdem generis* or *noscitur a sociis* rule of construction, to species of property of the same nature or description as "lands", that is to say, to things arising out of, or incident or appurtenant to lands.

IDINGTON J.—The government of the province of British Columbia having embarked in the business of dealing in intoxicating liquors and thereby found istelf under the necessity of importing "Johnnie Walker Black Label" whiskey, claims that it is exempt from the payment of the usual customs duties imposed by the Dominion Parliament upon such like importations, and rests its claim upon section 125 of the British North America Act, 1867, which reads as follows:—

No lands or property belonging to Canada or any province shall be liable to taxation.

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Idington J.

This section falls under the caption "VIII.—Revenues; Debts; Assets; Taxation"; in that Act, and is the last but one of the twenty-five sections thereunder devoted to the said several subject matters—the last one dealing with a subject which does not concern us herein.

I am of the opinion that this exemption only relates to such lands and property as fall within the purview of some one or other of the sections preceding it under said caption and of those specifically set forth in the third and fourth schedule of the Act or by implication resting upon those or other provisions of the said B.N.A. Act and which may thereby reasonably be held to have been within the contemplation of the framers of the Act.

The Intercolonial Railway agreed by the terms of the said Act to be built by the Dominion Government would seem to me to be of such lastly suggested character.

The mere mention of the possibility of any province embarking upon such an enterprise as the province of British Columbia has done, and is now in question, I venture to think would have surprised any one in the far off day when the B.N.A. Act was enacted after much public discussion.

Hence it seems to me that the said section 125, above quoted, cannot reasonably be extended to cover any such case as now presented.

Indeed if any regard is had to the nature of the legislation in the immediate context where the section is found, and to the exclusive powers given by the items 2 and 3 of the 91st section of the Act, and the implication therein, the appellant's contention seems to me hardly arguable.

I do not propose dealing with the over refinements put forward in regard to the meaning of taxation.

The consideration of this instrument of government presented to us to interpret, should be approached and construed in the wide comprehensive spirit in which it was framed and the means of destroying its efficacy should not be furnished by such a new departure as we are invited to take.

It is in that regard that the language of the late Mr. Justice Brewer in the case of *South Carolina* v. *United States* (1), quoted in respondent's factum, may help our range of vision herein; though of course, the decision of the courts of that country upon a constitution fundamentally different from the conception embodied in the B.N.A. Act in reserving for the Dominion what is not expressly given exclusively to the provinces, instead of the converse conception found in the said constitution, cannot help us very much.

I think this appeal should be dismissed with costs if asked.

DUFF J.—The second of the enumerated heads of sec. 91 "Regulation of Trade and Commerce" has been the subject of much controversy, but there has not been I think any difference of opinion upon the point that the amplest authority in relation to the subject of external trade is vested in the Dominion. By sec. 91 to the Dominion is committed exclusive authority over the "regulation of trade and commerce" over navigation and shipping, over the postal service and external communications as well as over aliens and naturalization; and by section 132 full authority is given to the Dominion in relation to the enforcement of treaty obligations. The statute itself, I think, gives abundant evidence that control over external trade by the central authority is an integral part of the confederation scheme.

(1) 199 U.S. R. 437.

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Duff J.

The importance of the customs duties as an instrument for the regulation of external trade is too obvious to require comment. At the date of confederation there was probably only one country—The United Kingdom—in which such duties were resorted to for the exclusive purpose of raising a revenue and *prima facie* plenary authority in respect of them would seem to be an adjunct of exclusive authority to regulate foreign trade.

I have no difficulty in point of legal construction in holding that this authority is given by sec. 91 (2), that is to say that the authority to levy customs duties for trade purposes is embraced in the authority thereby conferred, "the regulation of trade and commerce". Mr. Newcombe in his valuable argument has collected a mass of evidence which conclusively establishes that it is strictly in accordance with legislative as well as judicial usage so to read the words of the second head of section 91. It is unnecessary to review that evidence. The language used for defining the authority of the Dominion on the subject of taxation—the "raising of money by any mode or system of taxation"— seems to distinguish between taxation for trade purposes and taxation for the purpose of raising money. Since the imposition of customs duties (as being indirect taxation) is excluded from the provincial jurisdiction, the words of the last mentioned heading suggest that such duties except where imposed primarily at all events for purposes of revenue are treated as falling within the "ambit" of the power given to the Dominion in relation to "Trade and Commerce".

The effect of the contention of the province is that by force of section 125 the control over foreign trade entrusted to the Dominion is subject to the limitation

that goods imported by a provincial government are not subject to customs duties. It requires little reflection to enable one to realize that this would be a restriction upon the Dominion authority of wide scope and of the greatest importance and it cannot be assumed, if the unrestricted right of free importation is given to the provinces, that it is a right which the provinces are not entitled (without incurring the reproach of abusing a constitutional power) to exercise to the fullest extent which the interests of the province may demand; and the proposition stated above as to the place which the constitutional scheme accords to the Dominion control of foreign trade must receive very serious qualification. Indeed the theory of Dominion primacy must on such a construction of section 125 postulate a theoretical application of the power of disallowance with a freedom which could hardly have been contemplated by the founders of a permanent federal system.

Of course, if the language of section 125 is quite unequivocal effect must be given to its plain meaning. But on the other hand the Act does, in my opinion (sec. 125 apart) contemplate so clearly the existence of this primacy of Dominion authority in the matter of external trade and control of customs as so clearly essential to the maintenance of this primacy that I must, I think, reject a construction of that section which would obviously render that control insecure, unless the language is too inflexible to enable me to do so.

It is indubitable that the word "taxation" in itself denotes a class of operations which includes the raising of moneys for public purposes by the imposition of customs duties. But that is not of much assistance.

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Duff J.

Our first duty in construing the section is, of course, to ascertain the ordinary and grammatical meaning of the words but it is with the ordinary and grammatical meaning of the words in the setting in which they are found and as applied to the subject matter that we are concerned. What the section is dealing with is not taxation in general but the liability of "property" to "taxation" and the word taxation when used in this association has, I think, *prima facie* a much less comprehensive import than that which would be ascribed to it standing by itself or in some other connections. Customs duties when levied for the purpose of raising a revenue are, speaking broadly and in the general view of them, taxes on consumable commodities, taxes on consumption; while the taxation of capital, of assets, of property is a very different matter. And I think the distinction affects the use of language to this extent at least that neither in popular speech nor in more deliberate discussion would the phrase taxation used in connection with capital or property, "taxation of property", for example, suggest the operation of levying customs duties. It is quite true that such a use of the phrase "taxation of property" if anybody chose to employ it in that sense might be justified because the levying of customs duties is "taxation" and customs duties are commonly spoken of as levied on goods (see e.g. sec. 123 B.N.A. Act) that is to say on property, and therefore such a use of the phrase would be capable of logical defence. But "taxation" when used in such a context has not, I think, *prima facie* so broad a significance.

In this view the words of sec. 125 are not apt words to express an intention to exempt the provincial governments from the operation of the customs laws, that is to say, such is not their necessary effect.

My opinion therefore is, in view of the considerations mentioned above, that the more limited construction for which Mr. Newcombe contends must be ascribed to that section. But there is one other consideration which I think has some bearing upon the point in dispute which it may be worth while to mention. The group of sections in which sec. 125 appears, beginning that is to say with sec. 102, deals principally with the distribution of Crown property between the provinces and the Dominion. The Crown property is distributed between the two authorities in the sense that in part it is delivered over to the custody of the Dominion and in part to the custody of the provinces. But it is a distribution of property as assets; the control thus acquired by the provinces in respect of the assets assigned to them is not a control which excludes the operation of Dominion laws made in exercise of competent authority affecting the use of such property; provincial public fisheries *e.g.* are subject to regulations enacted by Parliament in the execution of its legislative authority in relation to fisheries. *In re Provincial Fisheries* (1). The provinces are to keep the property assigned to them and enjoy the fruits oft hat property free from any right of the Dominion to assume it except for the purposes of defence (sec. 117) and they have the further protection of section 125; a provision suggested, it may well be, by Marshall's famous dictum adapted from Webster's argument "a power to tax is a power to destroy"; but there is nothing in any of these clauses suggesting that the legislator is aiming at a limitation of Dominion authority in such matters as *e.g.* shipping and external trade.

The appeal should be dismissed with costs.

(1) [1898] A.C. 700.

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ANGLIN J.—The case at bar is, in my opinion, not distinguishable in principle from that which came before the High Court of Australia in *Attorney General for N.S.W.* v. *Collector of Customs* (1). Section 114 of the Australian Constitution and s. 125 of the B.N.A. Act are substantially the same. The powers of the Commonwealth Parliament in regard to the regulation of trade and commerce and the raising of money by taxation are practically the same as those of the Parliament of Canada. In the Australian case customs duty was claimed upon the importation of steel rails by a state government for use upon a state railway; in the case at bar the importation by the provincial government of British Columbia is of a case of whiskey admittedly intended to be resold in the Government liquor stores of that province established under the authority of a provincial statute.

While, at first blush, we would seem to be confronted with a case of federal taxation of property belonging to a province in contravention of s. 125 of the B.N.A. Act, I am so thoroughly convinced that the exemption from customs duties claimed by the appellant was not intended to be given by that section that I am satisfied that some reasonably admissible construction which would exclude such exemption should be given to it.

The question at issue has been exhaustively considered and all aspects of it thoroughly discussed in the Australian case. Agreeing, as I do, with the result there reached, I shall merely indicate the ground on which, in my opinion, it should be held that the levying of customs duties on the goods in question is not taxation on property belonging to a province within the purview of s. 125 of the B.N.A. Act.

(1) N.S.W., 5 Com. L.R. 818.

Customs duties are, no doubt, in at least one aspect "taxation" within the meaning of that term as ordinarily used and, I think, as used in the B.N.A. Act, s. 91 (3). They are a mode or system of taxation for the raising of money and are a typical form of indirect tax. But they are, it seems to me, something more—they are tolls levied at the border as a condition of permission to import goods into the country being granted by the governmental authority clothed with jurisdiction either entirely to prohibit their entry, or to prescribe conditions on which such entry may be effected. In legislating for such prohibition or for permission to enter conditional upon payment of certain duties, Parliament is exercising its authority for "the regulation of trade and commerce" (s. 91 (2), as well as its right to provide for "the raising of money by any mode or system of taxation". In their aspect as tolls imposed in exercise of the power to regulate trade and commerce customs duties are not "taxation".

Although Australian customs duties, like those of Canada, are in terms imposed "on" or "upon" the goods imported, four of the eminent judges who sat in the High Court of Australia held that the subject of these tolls—the thing in respect to which they are levied—is rather the exercise of the right of importation—the movement of the goods over the border—their entry into the country—than the goods themselves in their character as property belonging to their owner. Another view is that they are a tax on the importer, whether owner or not of the goods, imposed in respect of the importation. In either veiw they do not constitute a tax on property belonging to the province in the sense in which that phrase is used in s. 125.

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There is also something to be said for the contention that, inasmuch as taxation can be levied only on goods subject to the jurisdiction of the authority which imposes them, "property" in s. 125 of the B.N.A. Act must mean property within Canada and does not include property about to be brought into the country which is, theoretically at least, held at the border until payment has been made of the customs duties.

Other reasons indicated in *Attorney General of N.S.W.* v. *Collector of Customs for N.S.W.* (1), for holding that the imposition of customs duties in respect of importations belonging to a provincial government is not taxation of property belonging to a province within the meaning of s. 125 were urged by Mr. Newcombe. I prefer, however, to rest my opinion upholding the judgment of the Exchequer Court on the grounds that customs duties are not "taxation" and that they are not imposed upon "property" within the meaning of those terms as used in s. 125 of the B.N.A. Act.

BRODEUR J. (dissenting).—The question in this case is whether the imposition by Dominion legislation of customs duties on goods imported by a province is constitutionally valid.

The Exchequer Court has pronounced such legislation *intra vires* and this is an appeal from the Exchequer Court's judgment.

The question is a new one as far as Canada is concerned but it has been raised in the United States and in Australia; and it was decided in those two countries that such legislation by the central authority did not violate the provisions of the constitution of the United States nor of the Commonwealth of Australia.

(1) N.S.W., 5 Com. L.R. 818.

The facts are very simple: The government of British Columbia purchased in Great Britain and imported a certain quantity of liquor for the purpose of re-sale under their "Government Liquor Act".

When the liquor arrived in Canada it was taken possession of by the Collector of Customs in the ordinary course of business. The provincial authorities then made a written demand on the Collector for delivery of the goods, but he refused to do so unless customs duties were paid.

The present action, which is a test case, was instituted to have a declaration that the Province was entitled to delivery or possession of that liquor free from the payment of any customs duty.

The Province relies on section 125 of the B.N.A. Act which is as follows:—

> No lands or property belonging to Canada or any province shall be liable to taxation.

The Dominion authorities claim that they are entitled to the possession of the goods until the customs duties are paid and that the Dominion laws authorizing them to claim these duties are not in violation of this section 125 of the B.N.A. Act.

There is no question in this case as to the validity of the power of British Columbia to pass their Government Liquor Act. It was the subject of controversy in the case of *Canadian Pacific Wine Co.* v. *Tuley* (1), and the Privy Council decided that such legislation was *intra vires*. We are then concerned only with the question as to whether liquor belonging to a province is free from customs duties.

(1) [1921] 2 A.C. 417.

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Brodeur J.

It is contended first on the part of the Dominion authorities that the customs duties do not constitute taxation but are merely in the nature of regulation of trade and commerce under the provisions of art. 91-2 of the B.N.A. Act. I may say that the imposition of customs duties might be in some respect considered as regulation of the trade of the country, and that the imposition of import duty may be resorted to to regulate commercial intercourse with foreign countries. Discriminating duties, prohibitory duties, protecting duties are so many commercial regulations. But I am strongly of the view that our customs duties are also imposed for the purpose of revenue in the exercise of the power of the federal authorities to raise money by taxation. Nobody will deny that the customs duties in the case of liquor are mainly imposed for revenue purposes. They then constitute the raising of money by taxation and should not be considered as merely in the nature of regulations of trade and commerce.

I may quote in support of my contention the declaration of *Attorney General of New South Wales* v. *Collector of Customs* (1), where the Australian High Court stated that the imposition of customs duties is a mode of regulating trade and commerce as well as an exercise of the taxing power.

The court below relied on a decision of the United States Supreme Court in a case of *South Carolina* v. *United States* (2), where it was stated that the exemption of state agencies from federal taxation should be 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.

(1) N.S.W. 5 Com. L.R. 818. (2) 199 U.S.R. 438.

The legislation of the province of British Columbia is passed with the evident purpose of dealing with this very serious evil of intemperance. Several laws, federal and provincial, have been passed since Confederation for the purpose of remedying this evil. The licensing system was tried and found wanting. The local option was resorted to by provincial and federal legislation but did not bring about all the good results that were expected. During the great war attempts were made to enact total prohibition laws but the results in the opinion of a great many were not satisfactory. Then some provinces, amongst which was British Columbia, decided to put the sale of liquor under their direct control. In doing so nobody can deny that they exercised functions which are of a governmental character. I cannot then accept the view to the contrary expressed in that American case.

I may add that this American decision was not a unanimous one and that Mr. Justice White, who became later on Chief Justice, was dissenting with two of his colleagues, and his reasoning seems to me a very strong one.

It is contended also by the federal authorities that the duties claimed do not constitute taxation of "property" within the meaning of section 125 of the B.N.A. Act, and that the tax is levied in respect of the importation of goods and not upon the goods themselves; and they rely on the *Steel Rails Case* (1) decided by the Australian courts.

There is no doubt that what the Imperial Parliament had in mind to prohibit by that section 125 is taxation upon the beneficial ownership, possession or enjoyment of land or property. Then customs duties

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on liquor are certainly intended by Parliament to constitute taxation of property. Besides, the provisions of the Customs Act declare formally that the duties are "on or upon" imported goods; that these goods might be seized and sold for the payment of these duties. Consequently the beneficial ownership or enjoyment of these goods by the owner is affected, and I cannot agree with the respondent's proposition that customs duties do not constitute a tax.

The decision of the Australian courts in the *Steel Rails Case* (1) has been rendered under a constitution and under customs laws which differ to a certain extent from our own constitutions and our own customs law. There is however such a similitude in the principles of these constitutions and of these laws that we should not ignore the importance of this decision of the Australian court.

The authority of this Australian case is affected by the fact that the judges do not agree in their reasons. Two of them Justices Isaacs and Higgins made a distinction between the words *tax* and *taxation* and give to the word *taxation* a wider meaning than to the word *tax*. Their opinions support the view that when the word *taxation* is used it can cover customs duties.

The word *taxation* is the one used in our constitution. Moreover, section 125 of the B.N.A. Act is placed under the heading of the 8th paragraph which is titled "Revenues, debts, assets and taxation" and is in the group of sections having reference to taxation; and section 123, which deals with customs duties as being leviable on goods, belongs to the group of sections dealing with taxation.

(1) 5 Com. L.R. 818.

In Clements' Constitution of Canada, p. 643, section 125 is examined and it is stated that this section

> would operate no doubt to exempt from Customs duties goods purchased abroad by a provincial government, though there is no reported case on this point.

It has been contended also that the word "property" in section 125 of the B.N.A. Act does not include moveable property.

It seems that such a contention is erroneous. The word *property* is used there in the same sense as it is used in the section 91 (1) and 108 and the third schedule where the word *property* cannot clearly be restricted to lands or immoveable property.

For these reasons I am of the opinion that the government of British Columbia is entitled to a declaration that the goods in question were free of duty.

The appeal should be allowed.

MIGNAULT J.—The broad question involved in this appeal is whether the importation into Canada of goods belonging to the government of a province, and imported for purposes of trade, is subject to the usual custom duties imposed on similar goods by the Parliament of Canada.

By section 125 of the British North America Act, 1867, which applies to the province of British Columbia as well as to the other provinces of the Dominion, it is provided that

> no lands or property belonging to Canada or any province shall be liable to taxation.

And it is argued that custom duties are taxation and therefore no such duties can be imposed on any goods belonging to a province when imported into Canada. It is contended that the authority of

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Mignault J.

Parliament to levy custom duties is conferred by subsection 3 of section 91 of the British North America Act, which grants the power to raise money by any mode or system of taxation, and that custom duties must therefore be considered as taxation, otherwise the authority to levy them would not belong to the Parliament of the Dominion.

No doubt duties of this description are often referred to as being indirect taxation, but the respondent argues that it is not necessary to go to subsection 3 of section 91 to find the authority for their imposition, but that they could equally be exacted under the power of Parliament to regulate trade and commerce conferred by subsection 2.

The ground on which, I think, the judgment appealed from can be sustained, is that the custom duties are not a tax imposed upon property as such but are levied on the importation of certain goods into Canada, or as a condition of their importation. The authority of Parliament to regulate importation for purposes of trade or otherwise cannot be doubted, and it follows that it can exact the payment of a duty or rate as a condition of the importation of goods into the Dominion. That the amount of the duty or rate may be based on the value of the goods, and it is not necessarily so based, appears to me immaterial. The property belonging to a province while within or without Canada is not subjected to any tax. What the province contends is that it can bring its property into Canada from other countries without paying the duties charged on the importation of similar goods when brought into Canada by other persons. I cannot agree with this contention and I think it cannot be based on the clause exempting from taxation the lands or property belonging to a province.

I would dismiss the appeal, but without costs, the controversy being between the Dominion and a province on a matter of public interest. No costs should be payable on the intervention of the attorney general of Ontario.

Appeal dismissed without costs.

Solicitor for the appellant: *A. V. Pineo.*

Solicitor for the respondent: *E. L. Newcombe.*