HIGH COURT OF AUSTRALIA

Peterswald

Vs.

Bartley

(Griffith, C.J., Barton and O'Connor, JJ.)

31st August 1904

Griffth, C.J.

This appeal raises a question which is important from many points of view, viz., whether the power of a State legislature to impose licence fees upon persons carrying on within the State the business of manufacturing particular articles is restricted by the provision in the Constitution that after the imposition of uniform duties of customs throughout the Commonwealth, the power of the Commonwealth Parliament to impose duties of excise shall become exclusive. Before the establishment of the Commonwealth an Act had been passed by the legislature of New South Wales, called the *Liquor Act 1898*, which provided, amongst other things, for licence fees being paid to the State by persons carrying on the business of manufacturing beer for sale. This was done by sec. 71, which is a re-enactment of a section in an earlier Act, and provides that "every person who desires to carry on the business of a brewer, or of a spirit merchant, shall apply for a brewer's or spirit merchant's licence to some quarterly licensing Court," &c. The Act then goes on to provide for the carrying on of the business in licensed premises. Sec. 72 provides that "a brewer's licence under this Part shall be deemed to authorize the holder to carry on the trade of a brewer as defined in this Act, and to sell any liquor which he is by law authorized to make (but no other liquor), in quantities of not less than two reputed gallons, at any one time, of the same kind of liquor," &c. The business of a brewer is defined by the Act as that of "making, for purposes of sale, beer, ale, porter, or stout," &c. The licence is transferable, and is granted to a particular person in respect of particular premises, being transferable by application to the licensing Court. Sec. 75 provides that any person who carries on the trade or business of a brewer without holding a proper licence under the Act shall be liable to a penalty. That Act was passed in 1898. The respondent was charged with having carried on the trade or business of a brewer without holding a proper licence under the *Liquor Act* (No. 18 of 1898). The proceedings were taken under sec. 75. The defence was that the licence fee was in effect a duty of excise, which it was not in the power of the State to impose, but was a matter within the exclusive power of the Commonwealth Parliament. Respondent also said that he had a licence under the *Commonwealth Beer Excise Act*. The real question is whether such a licence fee is a duty of excise within the meaning of sec. 90 of the *Constitution*. The term "duties of excise," is used in several sections of the Constitution. Section 86 provides that, on the establishment of the Commonwealth, the collection and control of duties of customs and of excise shall pass to the Executive Government of the Commonwealth. Sec. 90 provides that on the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise shall become exclusive, and that thereupon all laws of the several States imposing duties of customs or of excise shall cease to have effect. Then there is sec. 93 which provides, amongst other things, that during the first 5 years after the imposition of uniform duties of customs by the Commonwealth "the duties of customs chargeable on goods imported into a State, and afterwards passing into another

State for consumption, and the duties of excise paid on goods produced or manufactured in a State, and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State." Sec. 55 also makes use of the term, providing that "laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only." It will be noticed that whenever in the Constitution the expression "duties of excise" is used, it is used in close juxtaposition with the expression "duties of customs," as being a term relating to things of the same nature, and governed by the same rules. They are indeed in every respect analogous. The first thing that occurs to one on reading the words "duties of excise" in sec. 93, is that they are qualified by the addition of the words "paid on goods produced or manufactured in a State." There the term is evidently limited to duties of excise in the sense stated, and is not used in the larger sense contended for by the respondent. The majority of the learned Judges of the Supreme Court appears to have been of the opinion that the term should be construed in the larger sense, so as to include almost all kinds of inland revenue imposts, as it is used in a number of the more recent English Statutes. I will take as an example the last of the Statutes referred to, 43 & 44 Vict. c. 20, which uses the expression to include duties, drawbacks, and licences, payable in respect of the business of brewing for sale. The same Act also enacts that the licence, which is to be in a prescribed form, shall be granted only when the duties of excise on the licence have been paid. No doubt, in England in modern times there is a tendency to use the word as including all kinds of inland revenue taxation which come under the control of the Commissioners for Inland Revenue. But it also appears that by a Statute 23 & 24 Vict. c. 27 it was expressly declared that the licence fees specified in the Act, which included, amongst others, publicans' licences, should be deemed to be duties of excise for the purposes of that Act, and from that time onward we find the term has been used in England to include all these different classes of imposts. That argument seems to have prevailed in the Supreme Court, which held that, as the licence fee clearly came within the meaning of the term "excise duty," as used in England, it must, therefore, be taken that it was a duty of excise within the meaning of section 90, which conferred on the Commonwealth Parliament exclusive power to impose duties of customs and excise. Of course, the consequences of such a decision are very serious, for, if it is correct, the power to impose licence fees on publicans, for instance, has passed to the Commonwealth, as well as a large number of other fees, which, up to this time, have been thought to be within the power of the State to impose.

In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of its provisions compel us to do so.

Now the term "duties of excise" does not appear to have been used in the larger sense in any of the legislative instruments cited before us except in certain English Statutes. The word "excise" is,

however, often used in America with that signification. What then does the term "duties of excise" mean in the Constitution in the collocation in which we find it? On this point there is an interesting passage in the *Annotated Constitution of the Australian Commonwealth*, by Messrs. Quick and Garran. It is interesting as giving an historical account of the origin and use of the term. The passage, which is at p. 837, is as follows:�"Excise duties were first introduced into England in the year 1643, as part of a scheme of revenue and taxation devised by Pym and approved by the Long Parliament. These duties consisted of charges on beer, ale, cider, cherry wine and tobacco, to which list were afterwards added paper, soap, candles, malt, hops, and sweets. The only excise duties now surviving in England similar to those of the original list, are duties on beer, spirits, chicory, imitations and substitutes of chicory and coffee, and chicory mixture. The basic principle of excise duties was that they were taxes on the production and manufacture of articles which could not be taxed through the Customs House, and revenue derived from that source is called excise revenue proper. In the course of time licences were required from the makers of and the dealers in excisable commodities, and these licence fees acquired the name of duties of excise. The next step was to require persons to take out licences, who neither produced nor manufactured nor disposed of excisable commodities, and these licence fees became known as duties of excise. Thus the list ...... was expanded by English usage until it embraced auctioneers, owners of armorial bearings, owners of dogs, owners of game, gun dealers, persons entitled to carry guns, hawkers, house agents, patent medicine sellers, owners of carriages, pawnbrokers, plate dealers, refiners of gold and silver, refreshment house keepers, and carriers. Such was the primary meaning of excise, and such the secondary and enlarged use of the term. The fundamental conception of the term is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury as spirits, beer, tobacco, and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and," the learned authors go on to add, "in which the expression was intended to be used in the Constitution of the Commonwealth." That is, as far as we know, a correct historical statement of the use and growth of the term in England. With respect to the Australian use of the term, we are entitled to take notice of the sense in which it has been understood and used in the legislation of the various States. We know that in some of them there were in existence for many years "duties of excise," properly so called, imposed upon beer, spirits and tobacco. There were other charges which were never spoken of as excise duties, such as fees for publicans' licences, and for various other businesses, such as slaughtermen's, auctioneers', and so forth, but these were not commonly understood in Australia as included under the head of excise duties. Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word "excise" had a distinct meaning in the popular mind, and that there were in the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words "on goods produced or manufactured in the States," the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax. Reading the Constitution alone, that seems to be the proper construction to be put upon the term. That being so, the judgment of the Supreme Court, if it is to be supported at all, must be supported on some other ground than this.

Mr. Lamb contended that, even if the grounds of the decision of the Supreme Court were incorrect, nevertheless this particular duty operates in effect as a tax upon articles manufactured in the country, *i.e.*, on beer manufactured in New South Wales. Very likely a tax may be imposed in the form of a licence fee, which would be, in effect, a tax upon goods produced by the holder of the licence. As to

that the observation of Lord *Herschell* in the *Brewers' and Maltsters' Association of Ontario v. The Attorney-General for Ontario*, (1897) A.C., 231, seems to be applicable. I shall refer to it again presently. But in considering whether a duty, which is not *prim� facie* within the prohibition contained in the Constitution, comes within it in substance, it is important to consider, first of all, what is the substance. Mr. Lamb relied mainly on the case of *Brown v. Maryland*, [1827] USSC 36; 12 Wheat., 419, a well known decision of the Supreme Court of the United States, in which it was decided that a tax upon importers was in substance a tax upon the goods imported, and therefore was a violation of the provision in the *United States Constitution* which prohibited the States from imposing any duties upon imports or exports. He contended that, as it was held by the Supreme Court in that case that the tax in question, which was in form a tax on the importer, was a tax upon imports, so in this case the licence fee, being a tax upon the manufacturer, is a tax upon the manufacture and the articles manufactured. But there appears to be really a very great difference between the two cases. In the American case the State had no power or authority to prohibit the carrying on of the business of an importer by virtue of what is known in America as the police power. Freedom of trade and commerce could not be interfered with by any State. No State could impose any restriction upon importing, and therefore it could not do what was practically to prohibit it. The only effect of the tax that was considered in that case was to impose a tax upon importation. But, if a particular industry is one which exists only by the permission of the State, the forbidding of the carrying on of that industry in that State is within the power of its legislature, and they may impose upon it any condition or restriction they think fit. Therefore, such a tax is not, *prim� facie*, a tax upon particular goods, but a condition imposed by Statute upon persons who are engaged in producing them. That, I think, is enough to distinguish the cases of *Brown v. Maryland* and *Welton v. Missouri* from the present case. Upon this point I will read a passage from the report of *Brewers' and Maltsters' Association of Ontario v. Attorney-General of Ontario*, in the judgment delivered by Lord *Herschell*. He says, at p. 237�"It was argued that the provincial legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might then seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise." In considering the validity of laws of this kind we must look at the substance and not the form. If the Statute is good in substance, the Court will regard the substance, and hold the law to be valid, whatever the form may be. The case of *Brown v. Maryland*, therefore, does not affect this case. In this instance the subject matter is one which the legislature of New South Wales has power to regulate,�that is to say the carrying on of any business�in the exercise of the police power of the State. It is not disputed that it can regulate the manufacture of an article, though it has no power to impose a tax upon the thing itself. From that point of view we look at the Statute in question to see whether it was passed for the purpose of regulating or controlling the manufacture of this particular article, beer. The Act provides in substance that a person who proposes to carry on the business of manufacturing beer must give the name and place where he intends to carry it on, and pay a licence fee. Whether there is also a federal excise duty upon the manufactured beer is quite immaterial. Further, the licence not only empowers the licensee to manufacture beer, but entails the liability to have the premises entered by an inspector for the purpose of taking samples of the beer made there, in order to ascertain whether there is any adulteration or not. The provision, therefore, is one of several conditions imposed upon the manufacturer for regulating the trade, which is one of the primary functions of a State legislature. It was contended for the respondent that the tax is in substance an indirect tax, and therefore obnoxious to the restrictive provision in the Constitution.

But, as was pointed out by Mr. Wise, the amount of the tax in no way depends upon the quantity of beer manufactured. Nobody disputes that an excise duty imposed upon goods during the process of manufacture, by quantity or value, is an indirect tax, *i.e.* that the person primarily liable, having paid it, adds it to the selling price and so passes it on to be ultimately paid by the consumer. The Privy Council, in the case I have just quoted, adopted the definition of J. S. Mill, which had been also adopted in the previous case *Bank of Toronto v. Lambe*, 12 App. Cas., 575, at p. 582:�"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs."

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

Mill was evidently using the word in the ordinary sense, and their Lordships of the Privy Council expressed the opinion that the tax in question was a direct tax, to be paid by the person made primarily liable. There was neither an expectation nor an intention that the person who paid it should indemnify himself by passing it on. In short, it was intended to be a direct tax. That case is an authority for saying that, *prim� facie*, a licence fee of this sort is not a tax on the goods themselves. Their Lordships then go on to discuss the possibility of its being so in effect. In such a case the Court has power to inquire into the matter in order to see whether it really is so.

Rejecting, then, the larger view as to the meaning of the term "duties of excise," which found favour with the majority of the Supreme Court, and regarding the term as it is used in the Constitution, where it is limited to taxes imposed upon goods in process of manufacture, we find nothing in the State Act to show that this licence fee was other than a direct tax upon the manufacturer.

It is right to advert to one argument used by Mr. Lamb, viz., that the effect of the tax might be to discriminate between locally manufactured goods and those produced in other States, to the prejudice of the former. He said that a spirit merchant, on taking out a single licence, is entitled to sell beer, wherever produced, whereas a licensed brewer cannot sell any beer not of his own manufacture, nor any spirits, without taking out another licence, so that he requires two licences. That, however, is an incident to all regulation of trade. The person subject to restrictions is at a disadvantage as compared with others who are not subject to those restrictions. That is incidental to freedom of trade and commerce within the Commonwealth, but it is not in any way an objection to the validity of a law regulating the manufacture.

For all these reasons we are of opinion that this licence fee is not a duty of excise within the meaning of sec. 90 of the *Constitution*, and that the Statute is not affected by the imposition of uniform duties of Customs throughout the Commonwealth, and that the respondent was guilty of the offence with which he was charged, and should have been convicted.

Appeal allowed. Order of the Supreme Court discharged. Case remitted to the Police Magistrate with a direction to convict. Respondent to pay the costs in the Supreme Court and of the appeal.

Solicitor, for the appellant, The Crown Solicitor of New South Wales.

Solicitor, for the respondent, R. H. Matthews, by E. R. M. Newton.

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