1924

ANITOBA
v.
AN. NOR.
RY. CO.

ewcombe J

THE CANADIAN DRUG COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE BOARD OF THE LIEUTENANT-GOVERNOR IN COUNCIL (DEFENDANT) ..... } RESPONDENT.

1924
Nov. 6.
*Dec. 30.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Intoxicating Liquor Act of N.B.—Sale by licensees—Amending Act—Sale by Crown—Taking over licensees' stock—Time of valuation—Increase in Customs duty—Sales tax—Interest—6 Geo. V, c. 20; 9 Geo. V, c. 53 (N.B.)

By the Intoxicating Liquor Act of New Brunswick, 1916, liquor was sold by licensed vendors; by an amendment in 1919 control of the business by the Crown through a board was authorized, such board being permitted to take over the stock of liquor held by the licensees of whom the Canadian Drug Co. was one, who were required, on request, to furnish a statement of the stock in hand or in transit with the prices paid and other particulars, the value to be based on such statement or, if that could not be done, to be determined by a method agreed upon. Upon payment therefor the liquor should become the property of the Crown. The Amending Act came into force on April 18, 1921, and the operating board was appointed on the same day; on May 10 the Customs duty on liquor was increased; the parties agreed on the value of the liquor of the Canadian Drug Co. except on the point as to whether or not the increased duty should be added to the value and the amount of the sales tax or any interest should be allowed; the liquor was delivered to the board in June and July and paid for in October subject to the above mentioned rights as to value.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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Held, that the value of the liquor should be determined as of the date at which delivery was made and the Drug Co. was entitled to the increased duty.

Held also, that the case must be treated as one of purchase and sale in which the vendor is entitled to be paid the amount of the sales tax on the price.

Held further, that the vendor was not entitled to interest either on the purchase price or the amount of the sales tax.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1) affirming the judgment at the trial in favour of the respondent.

This appeal is from the judgment on a case stated for the opinion of the court below. The stated case is as follows:—

1. The defendant is the Board created under and by virtue of Act of Assembly, 9 George V, 1919, chapter 53. The Board was constituted by Order in Council dated April 18, 1921.

2. The plaintiff previous to and at the time of the passing of the said Order in Council was a wholesale licensee authorized to sell intoxicating liquors under the Intoxicating Liquor Act, 1916.

3. On or about the twenty-first of June, 1921, the plaintiff delivered to the defendant two thousand six hundred and fifty-six cases of liquors under the terms of the said Act, containing approximately five thousand three hundred and twelve gallons, and on or about the twenty-fifth day of June, 1921, delivered to the defendant eight hundred cases of liquor then being held in bond, and other smaller lots were also taken over by the defendant at a later date.

4. Subsequent to the payment by the plaintiff of the customs duties on said two thousand six hundred and fifty-six cases of liquor, and while the same were still in plaintiff's possession and before delivering same to the defendant, namely, on or about the tenth day of May, 1921, the duty on intoxicating liquor was increased by the Dominion Parliament to ten dollars per gallon on the strength of proof.

5. The defendant through the Lieutenant-Governor in Council paid the plaintiff the sum of eighty-one thousand six hundred and eighty-two dollars and seventy-two cents 10th October, 1921, for the purpose of satisfying the

(1) [1924] 4 D.L.R. 273.

plaintiff's claim for the said liquors, and which sum the plaintiff received without prejudice to his claim herein. The said sum was made up as shown in the schedules annexed hereto and marked "A," "B," and "C," the sum allowed for duty being based upon the rate in force previous to May 10, 1921.

6. At the time the goods were entered for duty by the plaintiff it was still carrying on its business as a wholesale licensee. Looking to the taking over of said goods the following letters were written by the defendant to the plaintiff dated the 18th April, 1921; 7th May, 1921; and 16th May, 1921; and by the plaintiff to the defendant dated the 13th May, 1921, copies of which are attached hereto marked "D," "E," "F" and "G."

7. That the plaintiff continued in business until the 15th July, 1921, for its export business and until the 30th June, 1921, for its local business.

8. The question to be determined by the court is whether the plaintiff is entitled to be paid under said Act, 9 George V, chapter 53, the value of the said liquors at the time they were taken over by the defendant or the value of the said liquors prior to the increase in the Canadian duty to ten dollars a gallon. If the court is of opinion that the plaintiff is entitled to be paid the value of the said liquors at the time of delivery to the defendant, judgment will be entered for the plaintiff for twenty-four thousand seven hundred and fifty-five dollars and sixty-four cents and interest thereon to date of judgment, if the court is of the opinion that the plaintiff is entitled to interest, and twelve hundred and ten dollars and sixty-three cents sales tax thereon and interest on said sales tax to date of judgment (if the court should be of opinion that the plaintiff is entitled to interest and sales tax), together with costs. If the court is of opinion that the plaintiff is not so entitled judgment will be entered for the defendant with costs.

The material statutory provisions are set out in the judicial opinions published herewith.

Taylor K.C. for the appellant.

Hughes K.C. for the respondent.

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The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Rinfret JJ.), was delivered by

NEWCOMBE J.—A question of law is here submitted in the form of a special case stated for the opinion of the Supreme Court of New Brunswick under the provisions of Order XXXLV, Rule 1, Judicature Rules of New Brunswick, which provides that the parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court; that every such case shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby, and that the court shall be at liberty to draw from the facts and documents stated any inferences, whether of fact or law, which might have been drawn therefrom if proved at the trial.

The special case, which is dated 17th December, 1923, consists of eight paragraphs, as follows. See page 24.

By the Intoxicating Liquor Act, 1916, of New Brunswick, c. 20, the sale of intoxicating liquor in the province, except by licensees, was generally prohibited, and provision was made for the issue of wholesale and retail licences for the sale of liquor in the quantities permitted or for specified purposes. The licences were granted by the provincial Secretary-Treasurer to the licensees, and for the warehouses or stores occupied by them respectively. They were to expire on 1st May in each year, which date, by the amendment now to be mentioned, was changed to 31st October. By the amending Act, c. 53 of 1919, it was provided that the Lieutenant-Governor in Council might take over and conduct the business of the wholesale vendors in the province licensed to sell liquors under the Intoxicating Liquor Act, and that he might appoint a board of three persons to represent him in carrying out the provisions of the Act. It was stated in the argument that when the amending Act came into operation there were in the province only three wholesale licensed vendors. The appellant company was one of these.

By ss. 3, 4 and 5 of the last-mentioned Act it is provided as follows:—

3. Each of the wholesale licensees shall, upon request in writing, deliver to the Lieutenant-Governor in Council a correct list of the stock of

liquor on hand held by him, as well as any liquor purchased prior to the delivery of such request and in actual transit at the time, together with a statement of the true prices paid for each item of liquor mentioned in such statement, and in every case in which any such liquor has been purchased subject to a discount or allowance of any kind the same shall be correctly set forth in such statement, which shall be signed by the licensees, the object being to enable the Lieutenant-Governor in Council to arrive at the actual value of the whole stock on hand or in transit as aforesaid, and the said value so arrived at, with the cost of the freight added, together with the value of any equipment hereinafter mentioned, shall be deemed to be the purchase price of such liquor and equipment.

(*a*) Should there be any part of the stock on hand the value of which cannot be determined as aforesaid, such other method of fixing its value shall be adopted as may be mutually agreed upon.

(*b*) Any necessary equipment used by the licensee in carrying on such business may be purchased by the Lieutenant-Governor in Council at a price to be either mutually agreed upon or determined by valuation.

4. Upon payment over to the vendor of the amount of the purchase price by the Lieutenant-Governor in Council the said liquor enumerated in such list with the equipment, if any, shall forthwith become the property of the Lieutenant-Governor in Council and all right and title thereto shall thereupon be vested in the Lieutenant-Governor in Council as trustees free of all claims whatsoever, and the licence held by such vendor under the said Act shall thereafter be null and void to all intents and purposes whatsoever.

5. The right of the Lieutenant-Governor in Council to import, buy and sell liquor for the purposes of this Act or the Intoxicating Liquor Act, shall be as full and ample in all respects as the right of a licensee licensed under the Intoxicating Liquor Act, and any proceedings incident thereto or connected in any way with any matter or thing authorized or permitted by this Act to be done or performed may, with the consent of the Attorney General, be taken by any court of law or otherwise in the name of the said board representing the Lieutenant-Governor in Council.

These sections belong to a group which, it is declared by s. 11, shall be read with and as part of the Intoxicating Liquor Act, 1916, and it is also provided that all enactments inconsistent therewith shall be deemed to be repealed. Section 13 is as follows:—

13. All liquor used, sold or kept for sale in the province of New Brunswick, either by doctors, dentists or licensees, shall be purchased from the board representing the Lieutenant-Governor in Council.

By the following section, 31st October is substituted for 1st May, as the date of the expiry of the licences.

The amending Act was passed on 17th April, 1919; the material sections were to come into force by proclamation which was subsequently issued, and the board was constituted by order in council of 18th April, 1921. Thereupon the chairman of the board wrote the appellant company, by letter dated 18th April, referring to the Act and stating that an order in council had been passed

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appointing the board, or commission, as it is called in the correspondence, and stating that at a regular meeting of the commission the chairman had been directed to request the wholesale vendors to submit a statement of the estimated amount of liquor as defined by the Act which they would have in stock on 1st May, 1921, and requesting the appellant company in accordance with this order to furnish him

> with full information of the amount of stock you would be able to turn over to the Commission on the 1st proximo enumerating the brands and also the sale prices to us,

adding that the board was very desirous to obtain this information at the earliest possible moment. The letter concludes with a statement that the writer expected to be in St. John on 20th April to arrange a meeting of the commission there, and that he would be pleased to meet a representative of the appellant company "who could give the quantity of stock on hand and the prices thereof." This letter obviously had in view negotiations between the parties for sale of goods to be delivered on 1st May at prices to be stipulated. There is in evidence another letter of the chairman to the appellant company dated 7th May, which reads as follows:—

> Fredericton, N.B.,
> May 7, 1921.
>
> The Canadian Drug Co.,
> St. John, N.B.
>
> Gentlemen: I would draw your attention to my letter of the 18th of April, wherein I requested you to deliver to me a statement showing the stock of liquor which you would have on hand on May 1, 1921. I would also make reference to my conversation with you in St. John, April 20, regarding the same subject. I regret very much to say that this statement has not yet been received by me.
>
> In accordance with the Intoxicating Liquor Act amended as passed April 17, 1919, I would request that you deliver to me a correct list of the stock of liquor on hand, held by you, as well as any liquor bought by you and which is in actual transit. I shall also require a statement of the true prices paid for each item of liquor mentioned in your statement, and any other case in which any such liquor has been purchased subject to a discount or allowance of any kind. In addition to this value you may state the cost of freight on those purchases.
>
> The above statements are urgently required by our board, in order that the necessary arrangements may immediately be made for the taking over of your stock, to effect the cancellation of your wholesale licence, and to begin the functioning of the board, as required by law.
>
> I am enclosing a copy of the above mentioned Act for your information, and would particularly draw your attention to section 3 contained therein.

Trusting to receive the statement as requested by registered mail without further delay, I remain,

Yours very truly,

Chairman.

NEW BRUNSWICK BOARD OF LIQUOR COMMISSIONERS.

The answer of the appellant company, which is dated 13th May, is as follows:—

May 13, 1921.

Hon. J. F. Tweedale,
Chairman of the Board of Liquor Commissioners,
Fredericton, N.B.

Dear Sir: We have your favour of the 7th (which is unsigned by you), and note your remarks contained therein. When the writer personally met you with Mr. Bently and Mr. McGuire on your last visit to St. John and discussed this matter, at that time he asked you if you desired list of stock on hand at the present time and if you were prepared to take over and pay for it then; your reply was that you were not in a position to take over any stock as you wanted to be equipped for doing business and you had no money to pay for same. The writer asked you when you would be in a position and your reply was not before the middle of June or July and you asked writer if we would have sufficient stock to start you in business at that time; his reply to you then was if you would give us definite date when you would start in business, when you would be prepared to take over stock; your reply was that, after the Commission came back from Montreal you would have another interview with him and in the meantime you asked him if he would write you giving you all the information possible with regards to the liquor business, etc., in New Brunswick, you would appreciate it very much; on account of absence and pressure of business the writer has not been able to do this, but he understands you will be here on Tuesday when we will submit list of our stock and prices.

Yours truly,

And to this the chairman replied, under date of 16th May, as follows:—

Fredericton, N.B., May 16, 1921.

The Canadian Drug Co., Ltd.,
72 Prince William Street,
St. John, N.B.

Gentlemen: I have your favour of the 13th inst., and in reply would say that I expect to be in St. John to-morrow (the 17th inst.), when I shall personally take up with you the subject matter to which you make reference in your communication.

I regret very much that our letter of the 7th inst. to you was inadvertently mailed without my signature, but I am enclosing you another which is duly signed by me to replace the original, and is for your retention please.

Yours very truly,

J. F. Tweeddale,
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The office of the board was at Fredericton and that of the appellant company at St. John, and it was therefore from Fredericton and St. John that these letters were respectively despatched. The 7th May, 1921, fell on a Saturday, but whether or not the chairman's letter of that date was received before 10th May is not stated. I shall assume however that it was received on the 9th, as that would be in ordinary course of the post if the letter were posted on the 7th.

This letter closed the correspondence and it is apparent that no agreement had at that time been reached. It was intended, as the chairman's last letter states, that the discussion should be continued on the occasion of his visit to St. John on the following day.

It is not stated that the appellant company at any time complied with the request of the board of 7th May to deliver a correct list of the stock of liquor on hand and in actual transit with a statement of the true prices paid for each item, and cost of freight thereon, although the list which bears date 21st June, to which I shall refer, contains this information, in addition to other particulars, with regard to the liquor which was taken over by the board on 21st and 25th June. The statement required by letter of 7th May, as therein explained, had for its purpose that arrangements might immediately be made for the taking over of the stock and to effect cancellation of the plaintiff's wholesale licence, and so that the board might begin its operations as required by law, but the letter contains no express intimation that the Lieutenant-Governor in Council proposed to exercise any faculty of decision with which he may have been endowed by the statute to arrive at or determine the actual value of the stock. In fact neither the actual value nor the cost could be arrived at upon evidence of the true prices paid plus freight under the provisions of the first paragraph of s. 3, because the stock in hand of the appellant company had, for the greater part, been imported by the company, which had paid thereon large amounts for customs duty in addition to freight, insurance, and other items of expense contributing to the cost and to the value.

It is matter of plain inference that the parties met at St. John after the chairman's letter of 16th May, and it is stated that, on or about 21st June, the board received and took over from the appellant company a large part of the latter's stock on hand according to the list of that date, in which were set out the various items and opposite thereto the invoice prices including freight, insurance, etc.; the rate of duty paid; the total amount of customs duty; and the wharfage and cartage per case. It appears from this statement that duty had been paid upon each item except one, namely, 800 cases Old Orkney, which had been imported at a cost, including freight, insurance, etc., wharfage and cartage, of £2,423.12.9, converted into Canadian currency, rate of exchange 4.40, at $10,664.02; the Old Orkney was in bond, and there was in the statement no charge for duties upon it. The total value figured according to this statement is $64,941.47.

All the liquors mentioned in this list were delivered by the plaintiff to the defendant on 21st June, except the 800 cases of Old Orkney, which were delivered on 25th June.

Subsequently the remainder of the appellant company's stock was taken over on different days from 5th July to 27th July, when the last delivery was made.

The question for decision is not very aptly framed; it is as follows:—

> The question to be determined by the court is whether the plaintiff is entitled to be paid under said Act, 9 George V, chapter 53, the value of the said liquors at the time they were taken over by the defendant or the value of the said liquors prior to the increase in the Canadian duty to ten dollars a gallon.

Now the plaintiff is by strict interpretation not entitled to be paid anything *under the said Act;* it is only by virtue of the proceedings authorized by the Act, or by agreement which the parties are by the Act empowered to make, that the plaintiff can in a sense be entitled to payment under the Act. The Act itself does not bind the Government to acquire the stock of any vendor although it authorizes the acquisition by the exercise of the powers which the Act confers. The object of the question is, however, sufficiently plain. It is put in view of the facts stated and the inferences to be drawn therefrom; for while mere questions of fact cannot be raised upon a special case, *Burgess* v. *Mor-*

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ton (1), the court may nevertheless draw proper inferences of fact which have not been specifically admitted when these are not inconsistent with and reasonably follow from the facts stated; this power is expressly recognized by the rule.

The question has in contemplation the necessity of determining whether the value of the liquor, actually acquired by and delivered to the board for the purposes of the Act, is to be ascertained as of a time before the customs duty was increased, and the date of the increase is accepted as decisive of the point of time at which, as an admitted fact, the liquor took on an additional value of $24,755.64, for the reason that after the appellant company had paid the customs duty upon the greater part of its imported stock, the rate of duty imposed upon the like goods was raised by the Customs Tariff Amendment Act, 1921, which, although not sanctioned until 4th June, declared by s. 4 that these duties shall be deemed to have come into force on 10th May, and to have applied to all goods imported or taken out of warehouse for consumption on or after that day, and to goods previously imported for which no entry for consumption was made before that day.

The parties, by the correspondence and by the negotiations which ensued, were endeavouring to arrive at the actual value of the goods, and they succeeded except as to the incidence of the value which the goods acquired on 10th May. The difficulty which they encountered in coming to an agreement upon the question submitted, as they did upon the other questions presented by their negotiations, appears to have arisen from the fact that the respondent considered that, either by operation of the statute or by the effect of what was done in pursuance of its provisions, the law required that the valuation should proceed as of a date previous to 10th May, and, if so, that the accession of value on that date would not belong to the appellant. Now while the Act of 1919 plainly contemplates, as the justice of the case requires, that a licensee shall be compensated for his stock on hand when acquired by the board, and that the compensation shall be a purchase price based upon the actual value of the goods, there

(1) [1896] A.C. 136.

is no express provision of the Act, and so far as I can perceive no implied provision, requiring that the value shall be fixed otherwise than with regard to the goods actually acquired, and as the value exists at the time of the acquisition.

There are several dates which figure in the case. The Intoxicating Liquor Act 1916 of the province, under which the appellant company was licensed, was passed on 29th April of that year; it was proclaimed on 18th April, 1921; the board representing the Lieutenant-Governor in the Board representing the Lieutenant-Governor in Council for the administration of the Act was appointed also on 18th April, 1921; there are the three letters in evidence which have been quoted, dated respectively 7th, 13th and 16th May, 1921; there is the date when the Customs Tariff Amendment came into operation, 10th May, 1921; there are the dates when the liquor in question was delivered, 21st and 25th June, 1921; there is the date when the liquor was paid for, 10th October, 1921, and, finally, there are the dates, 30th June, 15th July, and 31st October, 1921, respectively, when the appellant company ceased to do local and export business and when its licence was to terminate under the provisions of the Act of 1919.

Of these dates, that of the passing of the Act of 1916 can have no effect because that is the Act under which the appellant was licensed and which provides for the carrying on of his trade as a licensed vendor. Neither can the assent to the amending Act of 1919, nor the date of its proclamation, be taken as the date for ascertaining the value because, without mentioning other reasons, that Act in itself, while it authorizes the Lieutenant-Governor in Council to take over the stock, does not require that he shall do so. The chairman's letters of 7th and 13th May do not, for reasons to be stated, impose any obligation upon the board nor upon the appellant, except it may be to require the latter to furnish a list with prices of its stock on hand for the consideration of the Lieutenant-Governor; it is admitted by the case, and explained by the correspondence, that this request was not complied with previously to 10th May, and the only list in the case is that of 21st June, when the duty-paid goods mentioned therein were delivered.

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Section 3 provides alternative methods of fixing value; it may be arrived at by the Lieutenant-Governor in Council, if he proceed in due course of the law to ascertain and declare the value, or the valuation may be fixed by such other method as may be mutually agreed upon; but moreover by s. 5 it is affirmed that the right of the Lieutenant-Governor in Council to buy liquor for the purposes of the Act shall be as full and ample in all respects as the right of a licensed vendor under the Intoxicating Liquor Act, and the powers of the Lieutenant-Governor, which are exercised by the board, to acquire liquor for the purposes of the Act, either from licensees or others, whether or not they include power to acquire compulsorily, are therefore not limited in any manner which would exclude authority to purchase. It follows from the admissions that the liquor in question was acquired by the board, by authority of the legislature and by the appellant's consent, on and not before 21st June, 1921, when the delivery was made on terms of a price to be paid. The parties agreed that the price which the appellant had paid for the goods, the customs duties actually paid, the freight and insurance, and the minor charges which entered into the actual cost should be figured in the value; but the board, while admitting that the value of the goods was enhanced by an amount equivalent to the increase of customs duty, rejected the appellant's claim to be compensated for that, because it seems to have been considered by the board that this accretion of value took place only after the board had acquired the property, or the right to it.

It was suggested at the argument that the compensation to be paid was to include the actual value of the goods in so far only as the value did not exceed the cost; but by the admissions it is not the value, but the title to it, which is in dispute; it is expressly admitted that the value of the liquors was at the time of delivery greater by $24,755.64 than it was before 10th May. There is no sug gestion that the value was advanced or diminished after 10th May; and therefore the question must be answered favourably to the appellant unless, by the operation of the statute of 1919, or by the effect of the letter of the chairman of the board of 7th May, a time previous to 10th May is limited beyond which increase in the value

of the goods would not accrue to the benefit of the licensed vendor.

One of two methods of determining the value, so far as it was determined, must have been adopted; either, first, by judicial finding of the Lieutenant-Governor in Council under the first paragraph of s. 3; or secondly, by agreement. In my judgment the stated facts are very suggestive of an inference that when the parties came together they realized that the project of taking over the liquors was one which should be arranged by negotiation and agreement, and that it was by that method that the board acquired the stock; but that question is, for the present purpose, immaterial, because in either case the question here submitted was expressly reserved. If the Governor in Council found and declared the value, he did so after 10th May, and in like manner if the parties negotiated for sale at a price, their negotiations were concluded after 10th May.

The learned judge at the trial was of the view that the statute, c. 53 of 1919, operated as a notice to treat; and, applying the rule laid down in *Rex* v. *Hungerford Market Co.* (1), and subsequent decisions under the Land Clauses Act of 1845, found that the passing of the Act on 17th April, 1919, or the proclamation of it which followed, created an obligation upon the Government to acquire and upon the licensees to acquiesce in proper steps for the acquisition, leaving nothing to be determined but the actual value of the goods or the purchase price, which ought to be ascertained as of the coming into force of the Act; or, if the Act in itself did not so operate, that the letters written by the chairman of the board on 18th April and 7th May had the effect of determining the time of taking, and therefore he concluded that the compensation should be measured by the value as of a date not later than 18th April, or certainly not later than 7th May. Grimmer J., in the Appeal Division, disagreed with this view holding that the Act did not provide for compulsory taking, and that neither the proclamation of the statute nor the correspondence in proof was effective to define the time for ascertainment of value or purchase price. Nevertheless he reached a result in conformity with that at which the trial judge had arrived upon

(1) 4 B. & Ad. 372.

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the view that the licensee was entitled to receive only the cost of the goods, and that the cost had not been affected by the increase of duties. White J., while also of the opinion that the claim failed, considered that the taking was compulsory, and the learned Chief Justice, while agreeing in the result, expressed no reasons.

The statute itself, as has been said, contains no mandatory provision that the Lieutenant-Governor in Council shall take over the stock in trade of a licensee; he may or may not give notice calling for a list of the stock and the prices paid therefor with the object of arriving at the actual value; but even if such notice be given, it would appear that the licensee may nevertheless carry on his business as usual and dispose of his stock, or acquire new stock, and that his licence is to remain in operation until his entire stock shall have been taken over and paid for, or until 31st October, when the licence would by its own terms expire.

The letter written by the chairman of the respondent board to the appellant company of 7th May is the only communication from the board which might upon any possible interpretation have statutory effect. It does include a request conveyed, as is said,

> in accordance with the Intoxicating Liquor Act amended as passed April 17, 1919,

that the appellant deliver to the chairman a correct list of its stock of liquor on hand and in transit with a statement of the true price paid for each item, and it is said that in addition the cost of the freight may be stated; but the statute of 1919 provides for none of the steps to be taken by either party consequent upon demand for particulars of goods and prices such as were directed to follow upon notice to treat by the legislation which was considered in the cases upon which the learned trial judge relies, and in which it was held that the notice when given by corporations or trustees for public purposes, not directly representing the Crown, is of binding effect. Obviously there could be no proceedings, against the Crown or against the board in its capacity as exercising the powers of the Lieutenant-Governor in Council, to compel any action in consequence of the notice. The Crown was not bound to proceed to determine the value in the execution of any statutory powers; it gave no express notice of an intention to do so; and, its

determination of the value, if any, took place after 10th May, and was provisional and subject to the question submitted by the case. Therefore in my view, notwithstanding the chairman's letter of 7th May, whether or not it was received before 10th May, the appellant company retained the *jus disponendi* of its stock in trade unimpaired by any right which the Lieutenant-Governor in Council or the board had acquired in consequence of that letter.

In *The Queen* v. *The Commissioners of Her Majesty's Woods, Forests, etc.* (1), the Commissioners of Woods and Forests had given notice to a landowner under the powers of an Act for forming a royal park (9-10 Vict., c. 38) that they required his land for the purposes of the Act, and he had in consequence sent in his claim for compensation, to which the commissioners did not agree and he accordingly required to have a jury summoned to assess the amount, which they refused to do; the landowner obtained a mandamus commanding the commissioners to summon a jury, and the return stated that they acted only on behalf of Her Majesty under the provisions of the Act; that they had expended or appropriated the value of the funds which they had been able to raise; that they had no means of raising any further sums at present; and that they gave notice to the claimant and others only for the purpose of ascertaining what sum would be required to purchase the lands for the purposes of the Act, and to determine whether its objects could be effected, and that it seemed probable that the sum which they were authorized to expend would be exceeded.

The observations of Patteson J., pronouncing the judgment of the court, are apposite, and the present case seems to fall within them so far as concerns the effect of the notice. The learned judge said:

> If this were the case of a railway or other private company, no doubt the return would be insufficient because, notice having been given that the lands were required, and a claim sent in accordingly, a contract is entered into, and the parties stand in the relation of vendor and purchaser. If the company had not the means of paying for the lands, they should have abstained from giving notice to the owner. But a private company to whom an Act is granted for their profit differs materially from commissioners appointed under a public Act to do on behalf of the executive government certain things for the benefit of the public; and the

(1) 15 Q.B. 761.

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principle that imposes liabilities upon a private company, as arising in consideration of the statute granted to them, has no application in the case of such public commissioners. There may be reason for holding a notice to treat for a purchase, when given by a private company which has the option of taking land, to be a declaration of their option to take, and a contract or purchase, of which this court will compel specific performance, making the obligation on such a company reciprocal with the obligation on the landowner. But, in the case of commissioners for the public having a limited power of taking land provided the required quantity can be obtained for a given sum, a notice to treat for the purchase should be construed to be that which it is; the commissioners cannot ascertain whether the land can be obtained for a price unless they treat for the purchase. There is a duty under the statute to open the treaty; but it would defeat the intention of the legislature if the opening of a treaty was held to be the completion of the contract. *Steele* v. *Corporation* (1); *Birch* v. *The Vestry of the Parish of St. Marylebone* (2).

Appellant owned the goods and had the same right to be paid for them, upon delivery, which an ordinary vendor of goods possesses; the statute provided that, upon payment of the purchase price to the vendor by the Lieutenant-Governor in Council, the liquor should become the property of the latter; if the statute provided for expropriation, and the goods were acquired in that manner, the appellant came under no obligation previously to 21st June when the provisional statement of value was made up and the goods delivered; if the transaction was a sale it was not completed until after 10th May. In the interval the property and the risk were the appellant's. It is admitted that the goods had then increased in value by an amount stated, and in my judgment it does not admit of doubt that the whole value was the appellant's asset for which the appellant was entitled to be paid. The appellant received from the Lieutenant-Governor in Council on 10th October, 1921, in respect of the liquor in question, $64,941.47, and by admission should be paid $24,755.64 more if, in the opinion of the court the appellant was entitled to be paid the value of the liquor at the time of delivery to the respondent. In my view the appellant was so entitled.

What I decide as matter of law in response to the question submitted is that neither the statute nor anything done under it, nor any of the facts admitted or to be inferred, operated to deprive the appellant company, on or

(1) 7 B. & S. 261. (2) 20 L.T. 697.

before the 10th May, of any right or title which it theretofore had to the liquor delivered to the board on 21st June, and from this it follows that the appellant was on 10th May solely entitled to any value which was at that time represented by the goods.

There are two subordinate questions as to interest and sales tax.

Interest is payable only by statute or by contract. *In re Gosman* (1); it is not payable as damages for detention of debt. *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.* (2). The provisions of the New Brunswick Judicature Act, ss. 24-26, cited at the argument, do not, in my view, impose a liability for interest; neither is there any contract for the payment of interest, and the claim for interest therefore fails.

As to the sales tax, upon the assumption that the transaction between the parties should be regarded as a sale of the goods by the appellant to the respondent, no reason is suggested why this sale was not subject to the tax. The only compulsory power which the Lieutenant-Governor in Council possessed to acquire the goods was under section 4, whereby it is provided that the liquor shall forthwith become the property of the Lieutenant-Governor in Council upon payment by him to the vendor of the purchase price. In fact, although the liquor was delivered by the appellant to the respondent board on 21st and 25th June, the price was not paid until 10th October following, and in the interval I should think that the Government was indebted to the appellant in the amount of the purchase, for the price of goods sold and delivered. It may be true that the vendor was influenced in the arrangement by the fact of the legislation under which the licenses were to be terminated, and by which the board was empowered to take over the stock in hand of the licensees, but if the parties reached an agreement, as I think they did, it would still be an agreement notwithstanding the conditions which operated to bring about the relationship of vendor and purchaser.

The appeal should be allowed and, in accordance with the submission, judgment should be entered for the appellant for $25,966.27, together with costs throughout.

(1) 17 Ch. D. 771.

(2) [1893] A.C. 429.

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IDINGTON J.—The appellant was licensed under the "Intoxicating Liquor Act, 1916," of New Brunswick, to sell by wholesale intoxicating liquors in said province in manner therein provided, and had been engaged in carrying on said business under said Act for some considerable time prior to the amending Act, 9 Geo. V, chapter 53, by which the legislature changed its system of using such licensed wholesale dealers for one substituting a board such as the respondent to carry on the like business as appellant and another had been doing to supply retail dealers.

The appellant in the course of carrying on said business had acquired a considerable quantity of intoxicating liquors. It evidently was the expectation of the legislature that the licensed wholesale dealers, seeing their substitute designed to take over the business, would be glad to sell their stock of liquor to the board to be created under said amending Act, and they made no imperative provision in the way of expropriating the stocks of liquor held by any such licensed wholesale dealers, but enacted as follows:—

1. The Lieutenant-Governor in Council of the Province of New Brunswick may take over and thereafter conduct the business of the wholesale vendors in this province, licensed to sell liquor under the "Intoxicating Liquor Act, 1916."

2. The Lieutenant-Governor in Council may appoint a board of three persons to represent the Lieutenant-Governor in Council in carrying out the provisions of this Act.

3. Each of the wholesale licensees shall, upon request in writing, deliver to the Lieutenant-Governor in Council a correct list of the stock of liquor on hand held by him, as well as any liquor purchased prior to the delivery of such request and in actual transit at the time, together with a statement of the true prices paid for each item of liquor mentioned in such statement, and in every case in which any such liquor has been purchased subject to a discount or allowance of any kind the same shall be correctly set forth in such statement, which shall be signed by the licensees, the object being to enable the Lieutenant-Governor in Council to arrive at the actual value of the whole stock on hand or in transit as aforesaid, and the said value so arrived at, with the cost of the freight added, together with the value of any equipment hereinafter mentioned, shall be deemed to be the purchase price of such liquor and equipment.

(*a*) Should there be any part of the stock on hand the value of which cannot be determined as aforesaid, such other method of fixing its value shall be adopted as may be mutually agreed upon.

(*b*) Any necessary equipment used by the licensee in carrying on such business may be purchased by the Lieutenant-Governor in Council at a price to be either mutually agreed upon or determined by valuation.

4. Upon payment over to the vendor of the amount of the purchase price by the Lieutenant-Governor in Council the said liquor enumerated in such list with the equipment, if any, shall forthwith become the property of the Lieutenant-Governor in Council and all right and title thereto shall thereupon be vested in the Lieutenant-Governor in Council as trustees free of all claims whatsoever, and the license held by such vendor under the said Act shall thereafter be null and void to all intents and purposes whatsoever.

There was a correspondence stated by the said respondent board, in April, 1921, shortly after its creation, with the appellant, looking for the information it and others of like licensees were respectively bound, by said section 3 above quoted, to furnish respondent.

Misapprehension on the part of the appellant, partly through a blunder on the part of respondent's manager failing to sign his letter, and the absence in Quebec of those composing the board (or the more active members thereof), in quest of knowledge from those in the latter province well qualified by experience to give them information bearing on the new functions of the respondent, caused delay in compliance with said section 3.

I cannot see the importance that counsel for respondent saw fit to attach thereto.

It is self-evident, I imagine, that a lapse of time must inevitably take place before the respondent could get into a position to carry on, and appellant meantime must unless a great many people were to be put to needless inconvenience. And the time for the licence to run had not expired.

Both parties hereto seem to have acted very reasonably after due allowance is made for the first misadventure I have referred to.

It so happened that all said section 3 requires was complied with, and then the appellant, as entitled to do, pointed out that by reason of the Dominion Parliament having doubled its tariff on such liquors that inevitably raised their actual value in New Brunswick beyond the original cost, and that the actual value prior thereto of the liquor in question could not be held by any fair-minded person at the same price as paid for them before the said increased tariff was enacted.

Hence the parties hereto differed, and could not agree upon the "actual value." Why not? Surely in the actual condition of things in Canada, he who in Canada had

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bought before the increased tariff had got something which, by that increase of tariff rate, became automatically worth, in actual market value, that much more. For he who had not had the foresight to look ahead and buy, must pay, when driven to buy in any open Canadian market, the cost price before the increase in tariff plus the new increase in tariff.

This result of changes in tariff affecting "the actual values" (which I hold means market values) of goods in general use, is so obvious and so well known and recognized that I am surprised to find any difficulty in correctly appreciating it.

If the tariff instead of being doubled had been obliterated, the actual value of the goods in question would have become that much less in value, and the appellant would inevitably have lost that much.

It is nothing new to find business men looking ahead and trying to measure the trend of public opinion and its probable effect on legislators possessed of the power to change the tariff up or down.

And for that very reason astute governments having the power of doing so maintain, on such a question when the acute stage is reached, absolute silence, and the change is made suddenly so that all will be treated fairly.

Of course if the tariff is moved up he having a large stock of goods will be counted lucky, but if down unfortunate.

The parties hereto not being able to agree on this single point settled all others according to the provisions above quoted, and left this point unsettled, but without prejudice to the appellant claiming for more if it could show an increase in way of actual value arising out of said incident.

The appellant then sued respondent for same and some other causes, and, like sensible men, agreed upon a stated case, which is set forth as follows (in which the exhibits named are not included). See page .

This case was duly submitted to the court in New Brunswick and was heard by Mr. Justice Barry, whose decision was against the appellant, following a train of reasoning which, with great respect, I cannot follow.

He seems to proceed upon the theory, from the authorities he refers to, that this is a case of expropriation.

Yet he, after citing many such, speaks as follows:—

> Excepting only that they refer to the compulsory taking of lands instead of goods the authorities which I have quoted seem to me to be exactly applicable to the circumstances of the present case, for I can see no reason for the application of any different rule of compensation on the case of goods compulsorily taken from that applied in the case of lands. The plaintiff was not, it is true, obliged to part with its stock of liquors, but having parted with them and handed them over to the board representing the Government, it must be taken to have parted with them upon the terms and conditions stipulated in the Act and upon no other.

The learned trial judge thus expressly admits, and correctly so, that the plaintiff, now appellant, was not obliged to part with its stock of liquor.

With that admission the authorities he cites and upon which he founds his judgment can, I respectfully submit, be of no service in determining the issues in question herein.

For aught I can discover I see no reason in law why appellant could not have shipped its entire stock to Quebec and got from the Liquor Commission there the prices prevalent after the raising of the tariff.

I submitted that proposition to counsel arguing herein, but got no reason, nor any pretence that in law it was impossible.

Of course in such event it might be out the freight.

On appeal to the New Brunswick Court *en banc* Mr. Justice Grimmer, who was the only member of said court writing at length, was very emphatic in his view that the case could not be treated as one of expropriation.

He seems, however, to have reached the same conclusion by a process of reasoning that, I respectfully submit, I cannot adopt in the interpretation and construction of section three, above quoted from the said amending Act.

The expression therein of

> the object being to enable the Lieutenant-Governor in Council to arrive at the actual value of the whole stock in hand

seems to me to bear but one interpretation and that is " the actual value of the whole stock in hand " at the time the respondent was taking it over.

These words seem to me too clear for any other alternative as being had in view. And, therefore, I think this appeal should be allowed and the amount of $24,755.64 agreed upon by sections 8 of the stated case, and interest

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thereon from the date of delivery of the goods to the respondent to the date of judgment herein.

As to the item of $1,210.63, sales taxes thereon, I can see no reason why that should not be allowed.

The respondent's counsel, and some judicial expressions in the court below, suggested that there were evidently more items allowed in adjusting the supposed actual value than are explained, and hence enough had been paid.

I cannot understand that forlorn hope at all, for there were a great many items beyond those set forth in the stated case, which I am quite sure would be elements entering into the proper adjustment of the actual value which the respondent could be trusted to deal with, and no doubt properly did so.

It occurs to me that these very items having been allowed by those who knew what they were about is destructive of the arguments based on the price lists and on the adding of freight to goods in transit as if bearing on the goods long in stock.

Such a method of applying an Act such as this does not commend itself to me.

Some of us, including myself, had occasion some months ago to consider, in the case of *Versailles Sweets* v. *Attorney General of Canada* (1), a great variety of grounds for paying, and a greater variety for non-payment, of sales taxes and, I imagine, the officers in charge of that branch of the public service know a great deal more than ordinary counsel or judges who have not had their minds directed to the subject. And I am confident that they are not likely to be biased, and when they persist for a couple of years and finally threaten suit, and counsel cannot see their way to advise resisting or defending such a suit, I feel I have no right to interfere as the probabilities are that the officers were correctly advised and the items were chargeable and surely should be added to the price of goods being sold, or supposed to be sold, at actual value.

I think the appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *MacRae, Sinclair & MacRae.*
Solicitors for the respondent: *McLellan & Hughes.*

(1) [1924] S.C.R. 466.