

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE ATLANTIC DISTILLING COM- }
PANY, LIMITED } DEFENDANT.

1931
Jan. 21.
March 26.

Revenue—Inspection of Distillery—Proof of Shortage—Excise Act—Collection

Held, That where an inspection of the stock of spirits in a distillery, made according to the directions of the statute, shows that on a given date a substantive quantity of spirits had in some way been removed from the distillery, and that the distillery stock books, required to be kept under the Act, did not show said deficiency to have been lawfully

1931

THE KING
v.
THE
ATLANTIC
DISTILLING
Co., LTD.

- removed, such evidence, unless rebutted by proper and legal evidence, will be proof that said shortage was unlawfully removed.
2. That it results from the proper reading of sections 53, 149, 151 and 152 of the Excise Act, that, upon it being shown that any distilled spirits have been unlawfully removed from a distillery, the excise duties thereon become payable forthwith.
 3. That it is no defence in the present action to show that the spirits had been unlawfully removed by its Sales Manager, who was also a Director, without the knowledge of the other Directors. That the Company is bound by the acts of such Sales Manager and that it cannot escape from the results of the illegal acts of its officers and servants.

Quaere: That from sections 149 and 151 of the Excise Act read together, does not "collection" therein mean a collection to be made when there has been a sale or removal of spirits from a distillery, and that being so where it is shown that a certain shortage occurred through a leakage in a tank in the distillery, no excise duties are payable on such shortage.

ACTION to recover excise duties from the defendant company.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

Gustave Monette, K.C., and Edouard Masson for plaintiff.

S. Jacobs, K.C., and L. Phillips, K.C., for defendant.

On behalf of the plaintiff, it was argued that the shortage is established by measurement and weighing as required by the Excise Act. How duties are ascertained and when payable is fixed by sections 50, 51 and 54. By section 51, duties accrue and are levied on the quantities made or manufactured, ascertained as provided by the Act and not on quantities delivered for consumption. They are collectible on the first of each month, but where they are warehoused, under a bond, the duties are paid only when the spirits are removed from warehouse. That duties are due on spirits forfeited, that is, over and above the penalty of forfeiture.

Mr. Phillips, K.C., for defendant, argued that certain car loads seized came from the distillery which accounts for shortage; that it came out without the knowledge of the Directors other than the one committing the irregularity. That such faulty act could not make the company liable for the duty. The duties are due on consumption, or when goods disappear, disappearance being tantamount to con-

sumption. The provision for payment monthly is obsolete, that being compelled to warehouse for two years, the duty is not payable till taken out of warehouse. Section 179 provides for seizure and forfeiture of goods removed from distillery, but does not impose a tax.

1931
 THE KING
 v.
 THE
 ATLANTIC
 DISTILLING
 Co., LTD.

He cited: *In re The Excise Act* (1929) 4 D.L.R. 155. *Attorney-General v. Reid* (1926) 1 D.L.R. 821. *Rex v. Busy Bee Wine and Spirits Co.* 60 D.L.R. 415. *Rex v. Lee Wine Co.* 61 D.L.R. 411. *Piché v. Quebec Liquor Com.* 70 D.L.R. 493. *Rex v. Nat Bell Liquors* 53 D.L.R. 482. *Rex v. Crawford* (1927) 2 D.L.R. 565. *Parker v. The King* (1928) Ex. C.R. 36. Sections 138, 167, 110, 111, 173, 179, 219, 225.

The facts and principal questions of law in the case are stated and discussed in the Reasons for Judgment.

THE PRESIDENT, now (March 26, 1931), delivered the following judgment.

This is an action for the recovery of excise duties from the defendant company, which at the times material here, was duly licensed to carry on the business of a distiller in the City of St. John, N.B., under the provisions of the Excise Act, Chap. 60 R.S.C., 1927. A certain quantity of spirits was manufactured by the defendant in bond pursuant to the licence, and the same became subject to excise duties.

The basis of this action is that upon two inspections of the distillery by an Inspector of Excise, to ascertain the quantity of spirits produced and entered for use, it was found that the stock of spirits on hand, and in process of manufacture, was less in quantity than that which with the quantity lawfully recorded and legally taken for use and accounted for, would be equal to the whole quantity of spirits produced in the distillery. In plain words, it is claimed that two deficiencies or shortages in the quantities of spirits distilled in the distillery were ascertained upon inspection conducted according to the directions of the Excise Act, viz., on July 13, 1928, 5,605.67 proof gallons, and on March 31, 1929, 554.35 proof gallons; and there was no satisfactory accounting for the deficiencies. That these deficiencies occurred is established beyond doubt.

1931
 THE KING
 v.
 THE
 ATLANTIC
 DISTILLING
 Co., LTD.
 Maclean J

The Excise Act requires every person licensed as a distiller to keep a book or books, in a form furnished by the Excise Branch of the Department of National Revenue, wherein the distiller is required to enter day by day the transactions of the distillery, including, "the quantity of spirits distilled, manufactured or made by him or removed or brought into the distillery premises." All entries thus made in the distillery books, are verified by the excise officer in charge of the distillery. Pursuant to the provisions of the Excise Act, any spirits distilled in the defendant's distillery were weighed and tested by officers of excise, in the manner and at the times required by the statute and the regulations made thereunder. The defendant's annual inventory for the year ending March 31, 1928, showed 50,613·81 proof gallons of spirits in process of manufacture in the licensed premises. This inventory was signed and sworn to by the defendant's manager on behalf of the defendant, and verified by the excise officer in charge of the distillery. On April 23, 1928, the stock of spirits in the distillery was weighed and tested and a slight surplus of some 450 gallons was found. In May of the same year a slight deficiency was estimated, but the inspection was not a very careful one. Late in June the Excise Officer discovered what seemed to be a very substantial deficiency and there followed a complete and careful weighing and testing of the spirits in the distillery by excise officers in the presence of distillery representatives. On July 12, the inspection was completed, and a shortage of spirits was found in the distillery stock amounting to 5,605·67 proof gallons. There is no dispute as to this deficiency and nothing further need be said concerning it. Upon the annual stock taking of spirits in the distillery, for the year ending March 31, 1929, made in accordance with the statute and the regulations, a further deficiency of 554·35 proof gallons was found; the accuracy of this quantity was not seriously questioned. The facts as to the alleged deficiencies in the quantity of spirits in the distillery, as claimed by the plaintiff, are not seriously in controversy, and that is all that needs be said concerning this phase of the case.

It may be convenient here to mention the principal defences set up by the defendant. It appears two cars of

spirits were seized by the plaintiff, one at Moncton, N.B., and one at Montreal, P.Q., on April 17, 1928, and April 20, 1928, respectively. The Commissioner of Excise, in June following, wrote the defendant stating that the cars of spirits seized were suspected of being removed unlawfully from its distillery. The defendant, after an investigation, concluded that two car loads of spirits had been illegally shipped from its distillery at St. John, by persons unauthorized, and without its knowledge or consent, it is said. The defendant then requested that the two cars of spirits, amounting to 11,000 gallons, be returned to it, so that the same might be sold in due course and the proper excise duties paid thereon. The goods were not returned but were forfeited. The defendant now claims that the seized car loads of spirits came from its distillery, and were permitted to be taken therefrom unlawfully by its Sales Manager, one Fisher, who by the way was also a Director of the defendant company, and it further contends that this was done without the knowledge or approval of the defendant company. Shortly after this, Fisher fled from Canada and his whereabouts has since been unknown to the defendant, it claims. After investigation by some of the principal officers of excise, it was concluded that the seized goods did not originate from the defendant's distillery; other officers associated with the investigation still believe that the two cars of spirits did come from the defendant's distillery. That issue was not and could not be tried at the trial of this cause. In my opinion it was altogether irrelevant. This defence may as well be disposed of here as elsewhere. If I assumed the seized spirits came from the defendant's distillery, I do not see how that could improve the position of the defendant, in law. To say that the company is not bound by the act of its Sales Manager, a Director of the defendant company as well, assuming he fraudulently removed the seized spirits from the distillery, is hardly arguable. I think the defendant company cannot escape from the illegal acts of its officers and servants, particularly in cases of this kind, by saying that the illegal act was committed without its knowledge or sanction. It is the duty of licensed distillers to see that dutiable goods are not unlawfully removed from their premises. Sec. 126 of the Excise Act states that the payment of any penalty

1931
THE KING
v
THE
ATLANTIC
DISTILLING
CO., LTD.
—
Maclean J.
—

1931
 THE KING
 v.
 THE
 ATLANTIC
 DISTILLING
 Co., LTD.
 Maclean J.

or forfeiture incurred under the Excise Act, shall not discharge the person paying the same from the obligation to pay all duties due by such person, and the same may be recovered as if such penalty had not been paid or incurred. I think this affords an answer to this defence. The defendant however pleads that the seized spirits accounts for the deficiency of 5,605·67 gallons found in the stock of spirits at the distillery, although the quantity of spirits seized was apparently double the quantity of that deficiency, and further that the plaintiff is not now entitled to demand from the defendant the sum of \$50,619.20 based on the shortage of 5,605·67 proof gallons. I do not think this plea is of any substance or force and I need not again return to it. The defence in reference to the shortage of 554·35 proof gallons is, that it occurred through a leakage in one of the tanks at the distillery, and that the defendant company was not aware at the time that this tank was in a defective condition or that the leakage was occurring; on this ground the defendant pleads it is not responsible for the payment of excise duties demanded by the plaintiff in connection with this deficiency. I shall again return to a consideration of this defence.

Coming now to a consideration of the Excise Act, which I always approach with some fear, because of its many and manifest obscurities and contradictions. Sec. 51 enacts that all duties of excise imposed by the Act shall accrue and be levied on all goods made or manufactured, and shall be ascertained in the manner provided by the Act. This section needs no discussion because the quantities of goods manufactured and liable to excise duties were ascertained as by statute directed, and there is in fact no dispute concerning this. Sec. 52 states that the duties imposed shall be due and payable on the first day of each month, for the quantity of each article produced during the preceding month. This section seems to be in conflict with succeeding sections, it is probably obsolete, and there is no suggestion that it was ever invoked against the defendant. Sec. 53 is, I think, of importance here; it is to the effect that no goods subject to a duty of excise, shall be removed from any distillery or warehouse until the duty on such goods has been paid or secured by bond. The goods in question here were in the distillery so far as I can gather from the evidence, but possibly a part of the distillery was treated

as a bonding warehouse; the evidence is not clear upon this point, but I do not think it is of importance. Spirits or other articles subject to excise duty may be deposited in a bonding warehouse, without payment of the duty imposed by the Act. Sec. 149 states that "there shall be imposed, levied and collected on all spirits distilled, the following duties of excise," and in this case the duty is fixed at \$9 on every gallon of the strength of proof by Sykes hydrometer. Then sec. 151 defines how the duty upon spirits shall be charged and computed; the quantity of spirits is to be ascertained at the tail of the first worm in which it is condensed into the closed spirit receivers, that is, where the spirits pass from the vapour to the liquid form; and ss. (e) enacts the duty shall be charged "upon the quantity of spirits sold or removed from any distillery by the distiller or by his agent or for his account." Sec. 152 ss. (d) defines how the quantity of spirits which passes from the first worm is to be ascertained, but no question arises concerning that point. Sec. 152, ss. (e) is to the effect that the quantity of spirits sold or removed from any distillery shall be the quantity recorded in the distillery stock book kept under the provisions of the Act, but any inspector of excise is not bound to rely solely upon this evidence. In this case the stock books did not disclose any sale or removal of spirits from the distillery explanatory of the major deficiency, but an inspection of the stock of spirits in the distillery, made according to the directions of the statute, in July, 1928, did show that a substantial quantity of spirits had in some way been removed from the distillery. The deficiency of some 5,605 proof gallons of spirits, in July, 1928, has been proven, though the distillery stock books of the defendant would still show that quantity in the distillery. Being once in the distillery and not being there in July, 1928, the goods must have been unlawfully removed from the distillery, because the books of the defendant which the Act requires them to keep, does not show that the goods were lawfully removed. In these circumstances, under sec. 151, ss. (e) the duty shall be charged upon the spirits removed. I think, when it is once shown that any distilled spirits have been unlawfully removed from a distillery, the excise duties thereon become payable at once. That, I think, is the purpose and meaning of sections 53, 149, 151 and 152 of the Excise Act. I

1931
THE KING
v.
THE
ATLANTIC
DISTILLING
Co., LTD.
Maclean J.

1931
THE KING
v.
THE
ATLANTIC
DISTILLING
Co., LTD.
Maclean J.
—

therefore think the plaintiff is entitled to judgment for the recovery of the excise duties upon 5,605·67 proof gallons, calculated at the rate of \$9 per gallon.

In respect of the alleged shortage of 554·35 found upon inspection in March, 1929, the evidence given by Murphy, the excise officer in charge of the distillery, and being the only evidence on the point, is to the effect that this deficiency was due to a leakage in one of the tanks in the distillery, and there is no suggestion that that quantity was by any improper agency abstracted from the distillery. I am not sure that any deficiency occurring in this matter constitutes a "removal" from the distillery within the contemplation of the statute. The quantity of spirits, it is true, is ascertained at the tail of the first worm but the duty is computed upon "the quantity of spirits sold or removed from any distillery." The evidence is that there was no "removal" from the distillery, and that evidence was given by the plaintiff's own witness. I am not satisfied that the statute provides for the collection of duties upon spirits lost owing to such a cause in a distillery. It is true that sec. 149 states that duties of excise shall be "imposed, levied and collected on all spirits distilled," but then sec. 151 states that "the duties upon spirits shall be charged and computed" upon "the quantity of spirits sold or removed from any distillery." I think, reading the two sections together, "collection" means a collection to be made when there has been a sale or removal from a distillery. I do not see my way clear to allow this item of the plaintiff's claim.

The plaintiff will have his costs of the action.

Judgment accordingly.
