Privy Council Appeal No. 85 of 1934.

The Attorney-General of Trinidad and Tobago - - - *Appellant*

v.

Gordon Grant and Company, Limited - - - - *Respondents*

FROM

THE SUPREME COURT OF TRINIDAD AND TOBAGO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1935.

Present at the Hearing:

LORD BLANESBURGH.

SIR LANCELOT SANDERSON.

SIR SIDNEY ROWLATT.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the Attorney-General of Trinidad and Tobago against a judgment of the Supreme Court of Trinidad and Tobago, delivered on the 15th of June, 1934, by the learned Chief Justice.

The appeal raises an important question, viz.: whether the sums of money claimed in the suit are payable by the respondents in respect of warehouse charges for rum, which was stored in the respondents' name in a Government public warehouse in Port of Spain which together with the said rum was destroyed by fire.

The suit was brought on the 30th August, 1932, by the above-mentioned Attorney-General against the respondent company to recover the sum of £1,084 15s. (a sum equal to $5,206·80) alleged to be "payable to the Collector of "Customs and Excise for the warehousing of goods, viz.: "rum in a public warehouse in the City of Port of Spain." Particulars were delivered with the writ of summons, setting out the description of the "packages," the number of hogsheads and puncheons in respect of each "package" the dates when the goods were warehoused and the amounts due in respect thereof.

The fire, which destroyed the warehouse and the rum, occurred on the 25th of June, 1932, and with the exception of one item, which learned counsel suggested was a misprint, the charges were for a number of completed months in respect of each item in the particulars. None of the said

" packages " had been in the warehouse for two years: the earliest date of deposit given in the particulars being the 28th August, 1930. Further particulars of the claim were delivered on the 23rd of November, 1932, and were as follows:—

" (*a*) The moneys claimed by the plaintiff in the above action are payable to the Crown under contracts to pay warehouse rent at the rates of two shillings per puncheon and one shilling per hogshead per month for rum warehoused by the defendant company at the Government Rum Bond in this City.

" (*b*) These contracts are to be implied from the facts that the defendant company warehoused certain quantities of rum in the said Rum Bond and caused other quantities of rum already warehoused by other persons in the said Bond to be transferred into its name as owner thereof in the books of the said Bond with full knowledge that the charges above mentioned were payable to the Crown under the Spirit and Spirit Compound Ordinance Cap. 198 and the notice signed by the Treasurer which appeared at page 449 of the Royal Gazette published on the 3rd day of August, 1922, or alternatively without reasonable grounds for inferring that the same was being warehoused free of charge.

" (*c*) The defendant company is fully aware of the particulars of rum warehoused by it and of rum transferred to its name as owner as above mentioned. It is unnecessary therefore to supply those particulars."

The defence, which was delivered on the 3rd of January, 1933, was as follows :—

" 1. The Defendant Company admits that the rum referred to in the particulars to the Statement of Claim was warehoused in a public warehouse between the dates set out in such particulars.

" 2. There was no contract between the defendant Company and the Crown to pay warehouse rent for or in respect of the said rum as alleged or at all.

" 3. The defendant Company will contend that there is in law no liability on them under or by virtue of the Spirit and Spirits Compounds Ordinance, Chapter 198 or at all to pay the said or any charges for or in respect of the warehousing of the said rum or any part thereof.

" 4. The defendant Company is not indebted to the Plaintiff in the sum claimed therein or at all."

On the 28th of November, 1933, the plaintiff's solicitor gave notice in writing that the plaintiff would apply to amend the particulars by adding a further clause (*d*) in the following terms :—

" d. in the alternative the obligation of the Defendant Company to pay the moneys claimed is statutory and arises under section 46 of the Spirits and Spirit Compounds Ordinance Cap. 198 and the said notice at page 449 of the Royal Gazette for 1922."

At the trial the amendment was allowed. It was agreed that the warehouse in which the rum was stored was a Government public warehouse and that the fire which took place should be attributed to inevitable accident.

It appears that the rum was originally deposited in the said warehouse by one H. F. Smith, a licensed distiller and a director of the respondent company and shortly after the deposit it was transferred into the name of the respondent company, who were the owners thereof, and for the purpose

of the suit it was admitted by the respondent company that on the dates mentioned in the said particulars the respondent company had warehoused in the "rum bond" (i.e. the Government public warehouse) the spirits contained in the packages mentioned in the said particulars against the respective dates.

The learned Chief Justice entered judgment for the defendants with costs.

He based his decision on the course of dealing.

The ground thereof is concisely and clearly stated at the end of his judgment as follows:—

> "The course of dealing here is decisive. No depositor of rum is ever asked for, or pays, rent till re-warehousing or clearing takes place (Mr. Ramirez' evidence shows that); and this course of dealing though it cannot affect the right to sue in the abstract can and does constitute agreement as to when payment shall fall due. On the rum with which this case is concerned the time agreed on for payment had not arrived and before the time did arrive the rum and the warehouse, the whole of the subject matter of this contract on both sides, were destroyed by an inevitable accident not provided against in this regard by the contract. Clearly the principle of *Taylor* v. *Caldwell* (1863) 32 L.J.N.S. (Q.B.) 164, *Appleby* v. *Myers* (1867) L.R. 2 Com. Pl. p. 651 and *C.S.C.S.* v. *General S.N.C.* (1903) 2 K.B. 756—it is indeed the principle of *Cutter* v. *Powell*—applies and, the loss lying where it has fallen, nothing not specifically due and payable can be recovered at all. There must be judgment for the defendants with costs."

The learned counsel for the appellant rested his case mainly on the allegation that the obligation of the respondent company to pay the moneys claimed was statutory and arose under section 46 of the said ordinance and the said notice in the Gazette of 1922.

He referred to the three classes of cases in which a liability may be established founded upon a statute, which are referred to in the judgment of Willes J. in *The Wolverhampton New Waterworks Company* v. *Hawkesford* 6.C.B. (N.S.) 336 at page 356.

The three classes are there stated as follows:—

> "One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

It was argued on behalf of the appellant that the present case comes within the first of the above-mentioned three classes.

The learned counsel for the appellant relied also upon the implied contract set out in the said particulars delivered on the 23rd November, 1932.

The main argument presented on the appeal on behalf of the respondent company was that the said ordinance contains a complete scheme by which the collection of duties on spirits and the warehousing of the said spirits are regulated, that the ordinance provides specific means for the recovery of the warehouse charges, which do not include a right in the Government to sue for the said charges. The learned counsel for the respondent company relied upon the principle stated in the well-known passage in the judgment of Lord Tenterden C.J. in *Doe dem. The Bishop of Rochester* v. *Bridges*, 1 B. & Ad. 847 at page 859, which is as follows:

> "Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

It therefore becomes necessary to examine the provisions of the ordinance chapter 198. It was made in September, 1922, and is cited as the " Spirits and Spirit Compounds Ordinance " and it relates to the manufacture, removal, warehousing and sale of spirits and compounds of spirits.

It is provided in the interpretation section, viz., section 2, that the word " Regulations " means the regulations made or prescribed under this or any other excise ordinance by the Treasurer with the assent of the Governor, and that " Warehouse " means a secure place approved by the Treasurer for the service of the public for the deposit of spirits liable to a duty of excise without the payment of such duty.

Section 31 provides for duty to be paid on spirit, not warehoused within a certain time.

Part V of the ordinance deals with " Warehouses."

Section 46, which is the first section of this part of the ordinance, provides as follows:

> " 46. Spirits, the produce of the Colony, shall only be warehoused in a public warehouse to be named for that purpose by the Treasurer, and subject to such rules and regulations and to the payment of such charges as the Treasurer shall from time to time direct, with the approval of the Governor; and it shall be lawful for the owner of any spirits to warehouse the same, and a document, in such form as the Treasurer shall direct, shall be passed by the owner or the authorized agent of the same for warehousing thereof."

In pursuance of this section notice was given in the *Royal Gazette* for 1922 at page 449 that " from the 1st " September, 1922, the following will be the warehouse " charges for rent on rum stored in excise warehouses, viz.: " 1s. per hogshead per month or any part of a month—2s. " per puncheon per month or any part of a month." For the purpose of this case it may be taken that the words " excise " warehouses " include the warehouse in question which comes within the above-mentioned definition in the ordinance.

It is upon the terms of section 46 coupled with the said notice that the appellant relies for the support of his first contention, viz., that the respondent company is under a statutory liability to pay the warehouse charges and that the appellant is entitled to recover by means of a suit such charges as were incurred in respect of the period during which the rum was warehoused, even though the said rum was destroyed by fire and could not be delivered to the owner thereof.

The respondent company, however, relies upon other sections which follow the above-mentioned section for the purpose of showing that the ordinance provides a special and particular remedy for enforcing the Government claim in respect of the warehouse charges.

Section 47 provides that

> "47. All spirits shall be cleared either for use in the Colony or for exportation within two years from the day on which the same were warehoused, unless the owner of such spirits is desirous of re-warehousing the same, in which case, at the expiration of two years from the date of warehousing, the same shall be examined by the proper Officers and the quantity so found shall be re-warehoused in the name of the then owner in the same manner as on first warehousing. The warehouse rent and charges due up to the time of re-warehousing shall be paid before the goods shall be re-warehoused."

and section 48 is in the following terms

> "48. If any warehoused spirits are not duly cleared for use in the Colony, or to be carried coastwise, or exported, or re-warehoused, and the warehouse rent due thereon paid as provided at the expiration of two years from the previous entry and warehousing thereof, the same shall, after one month's notice by advertisement in the *Royal Gazette*, signed by the Treasurer or the Sub-Treasurer, giving the number and marks on the package or packages, and the owner's name, be sold, and the proceeds thereof be appropriated in the first instance for the payment of warehouse rent due and owing thereon, after which the balance of the proceeds of sale, if any, shall be paid to the owner of the spirits sold, on a claim being made for it in the regular manner. If such claim is not made within six months of the date of sale thereof, such balance of proceeds of sale shall be carried to the credit of the general revenue of the Colony."

It appears to their Lordships that the terms of these two sections make it clear that the owner of the spirits which were warehoused in pursuance of the ordinance would be entitled to withdraw the spirits at any time he wished : if he did withdraw the spirits he would have to pay the warehouse charges which were due in respect thereof at the time of withdrawal and the officer in charge of the warehouse would not allow the spirits to be withdrawn until the warehouse charges were paid.

The reference therefore in the notice as to the charges " per month or any part of a month " is necessary to cover the case where the owner withdraws the spirits before the expiration of the two years' limit mentioned in section 47.

It is also clear that under the terms of the last-mentioned sections the owner of the deposited spirits is entitled to keep the spirits in the warehouse for the specified period of two years and the Government cannot compel him to take delivery at an earlier period; this was not disputed at the hearing of the appeal.

The Government therefore is fully protected as to the warehouse charges if the owner wishes to withdraw the spirits at a date earlier than the two years, because the owner must pay the charges in order to obtain delivery of the spirits.

What then is the position if the owner of the goods or his transferee allows the spirits to remain in the warehouse for the specified two years?

When the period of two years expires the owner must take delivery of the spirits and pay the charges which are due, or he must re-warehouse the same and pay the warehouse rent and charges due up to the time of re-warehousing. It is provided that such charges shall be paid before the spirits are re-warehoused.

If the owner of the deposited spirits at the expiration of the two years fails to take one or other of the two above-mentioned courses, the Government may put in force the provisions of section 48 and sell the spirits, and the proceeds of the sale will be appropriated in the first instance to the payment of the warehouse rent due and owing thereon.

It appears therefore that whether the owner of the spirits takes delivery thereof before the expiration of the two years, or allows the spirits to remain for two years in the warehouse, the Government are in a position to recover the warehouse charges, without any procedure such as a suit to recover them from the owner of the spirits. The charges, specified in the notice, viz.: 1s. per hogshead or 2s. per puncheon for the whole of the two years would amount to a trifling sum as compared with the amount which would be realised by a sale of the rum unless it had greatly deteriorated, and therefore the Government would be fully protected as to the warehouse charges.

In that respect it is material to notice that the re-warehousing is only to take place after the spirit has been examined by the proper officers, who would be able to ascertain whether any deterioration had taken place.

There are other sections to which their Lordships' attention was drawn by the learned counsel for the respondent company in support of his argument.

As for instance, sections 53, 54 and 55.

Their Lordships do not think it necessary to set out their terms in full.

They refer to the delivery of the spirits out of the warehouse in certain cases and to the removal of the spirits from one public warehouse to another public warehouse, and in

every case there are provisions for securing before the spirits are removed either the payment of the warehouse charges or the execution of a bond with a surety in a sum equal to the duty chargeable on such spirits for the due arrival and re-warehousing of the said spirits at the place of destination.

These sections, in their Lordships' opinion, support the contention of the respondent company.

There is not to be found in the ordinance any express provision giving the Government or its proper officer the right to sue for the warehouse charges.

If such right exists, it has to be implied. Apart from the matters already referred to, there appears to be great difficulty in implying such a right.

As for instance, there is no doubt that the owner of spirits deposited in the public warehouse is entitled to transfer his interest in the spirits to a third party, without removing the spirits from the public warehouse. What would be the position on such a transfer taking place?

Could the Government or its proper officer on receiving notice of the transfer recover by suit from the transferor the warehouse charges incurred up to the date of the transfer, although the Government still retained possession of the spirits in the public warehouse and are bound so to retain them until the transferee demanded delivery or until the expiration of two years from the time of deposit?

Or again, in the case of a transfer of the owner's interest in the spirits to a transferee, while the spirits remained in the public warehouse, could the transferee be sued in debt at any time before the two years expired for the amount of the warehouse charges which were incurred not only during the period when the transferee was owner, but also during the period before the transferee became owner?

No provision is made in the ordinance for such contingencies, and in the absence of a special contract giving the Government the right to sue for the charges, which does not exist in the present case, their Lordships are of opinion that a right to recover the warehouse charges by means of a suit for debt was not contemplated by the draftsman of the ordinance, and cannot be extracted from the terms thereof.

It has to be remembered, as already pointed out, that the warehouse charges must be comparatively small as compared with the value of the spirit: e.g., the charge would be 24s. only for the warehousing of a hogshead for two years, and it is fairly clear from the provisions of the ordinance that it was intended that such warehouse charges should be collected in the manner indicated by the above-mentioned sections, which would obviously be the most convenient, businesslike and inexpensive way. For these reasons their Lordships are of opinion that the contention of the respondent company on this part of the case is correct, and that the clauses of the

ordinance do provide a special and particular manner for the recovery of the warehouse charges and do not give the Government or its proper officer a right to sue for the same.

There remains the contention of the appellant that the respondent company is liable to be sued for the warehouse charges which are claimed, by reason of contracts which are said to be implied from the facts set out in paragraph (b) of the particulars delivered on the 23rd November, 1932. The difficulty in the appellant's way on this part of the case is that there is no suggestion of any contract which is independent of the terms of the ordinance. In fact the argument was that the contract is to be implied because the respondent company warehoused the said quantities of rum with full knowledge that the said charges were payable under the said ordinance.

If however the construction which their Lordships have placed upon the terms of the above-mentioned clauses is correct, as in their opinion it is, the said charges did not become recoverable under the said ordinance, in the manner alleged by the appellant, but only on the happening of one or other of the contingencies, which have already been referred to.

Their Lordships therefore are of opinion that the last-mentioned ground of the appellant's appeal cannot be sustained. The truth seems to be that such a contingency as has arisen in this case was not contemplated or provided for in the ordinance.

Their Lordships agree with the conclusion at which the Chief Justice arrived, viz. that judgment should be entered for the defendants, but with respect to the learned Chief Justice they are not prepared to adopt the ground of his decision as stated above.

It is interesting to note that the course of dealing in general has been in accordance with the construction which their Lordships have placed upon the sections of the ordinance, but their Lordships do not find any evidence of a course of dealing between the Government and the respondent company which would justify them in drawing the inference that an agreement had been made between them as indicated by the learned Chief Justice.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be dismissed with costs and they will humbly advise His Majesty accordingly.

(29656—3A) Wt. 8034—41 90 6/35 P. St. G. 338

In the Privy Council.

THE ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO

v.

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