

The Honourable J. E. Hetherington, Provincial Secretary-Treasurer
of the Province of New Brunswick - - - - *Appellant*

v.

The Security Export Company, Limited - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1924.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD PHILLIMORE.

LORD CARSON.

LORD DARLING.

[*Delivered by* LORD BUCKMASTER.]

The first question that arises on this appeal is whether the Supreme Court of Canada were right in holding that an order could be made for the issue of a writ of *certiorari* to remove into the Supreme Court of New Brunswick a distress warrant issued by the appellant under section 6 of the New Brunswick Liquor Exporters Taxation Act. The Supreme Court of New Brunswick, Appellate Division, decided that such a writ could not issue and by a majority of three Judges to two that judgment was reversed by the Supreme Court of Canada. In all the judgments there has been a very full and exact consideration of the different authorities and principles of law that regulate the issue of a writ of *certiorari* and with the general principles that are there enunciated their Lordships see no reason to differ for, in their opinion, the real questions for determination here are : (1) The true meaning of the statute under which the warrant was issued ; and (2) The question of fact as to what was actually done. The statute in question provided by section 3 that every person keeping liquor

for export to any place outside the province, or selling liquor for that purpose, should pay to the Crown a tax of 1 dollar 25 cents for each gallon of liquor other than beer, ale, stout and wines. Section 4 provides that the tax imposed by the Act in respect of liquor kept at the time of the passing of the Act should be paid within one month from the date on which the Act came into force, and, on all subsequently acquired liquor within 15 days from the date when it was so acquired, payment in each case to be made to the Provincial Secretary-Treasurer. Section 6 provides that in default of payment within the time limit the amount of tax might be levied under the warrant signed by the Provincial Secretary-Treasurer and directed to the sheriff of the County ; and section 7 enabled the Provincial Secretary-Treasurer, if he thought fit, instead of issuing the warrant, to take steps by action in any Court of competent jurisdiction to recover the tax. Except for the purpose of receiving the tax, of issuing the warrant, and of determining whether to recover by distress or action the Provincial Secretary-Treasurer had no duties whatever expressly imposed upon him by the statute. There is nothing in the Act that directly shows by whom the amount of the tax is to be assessed, nor the procedure that should be adopted for its demand, but by section 9 the Lieutenant-Governor in Council was empowered to make regulations for, among other things, "the fixing and determining the amount of the tax;" such regulations to have the same effect as if they had been incorporated in the statute. The statute appeared however to contemplate that the Attorney-General for the province should be instrumental in the working of the Act for, by section 8, it was provided that information should be given to the Attorney-General of the premises where the liquor was stored with a statement as to the kinds and brands of liquor, the amount and quantity, and such further particulars as the Attorney-General might require for the purposes of the Act, and it is difficult to see what those purposes were unless they included the ascertainment and assessment of the tax. It is noticeable that no such information was to be given to the Provincial Secretary-Treasurer.

Consequent upon the Act the Lieutenant-Governor issued regulations, the first two paragraphs of which are as follows :—

"(1) Upon the recommendation of the Attorney-General, an officer shall be appointed to be designated and called as hereinafter mentioned, and also such assistant or assistants deemed necessary for carrying out of the provisions of the said Act and the regulations hereby made thereunder ; the salaries of the said inspector and assistants, and the necessary expenses of the administration of the said Act and the carrying out of the regulations hereby made thereunder shall be paid out of the revenues of the Province."

"(2) The officer so appointed under the preceding section, unless otherwise provided and designated under these regulations, as Liquor Carrying Inspector, shall be called the Liquor Export Inspector."

The Attorney-General did in fact appoint one Thomas J. Finigan as the Liquor Export Inspector, and his appointment

was duly approved. Finigan reported to the Attorney-General that the respondent company, at the time of the passing of the Act, had in their possession 49,642 gallons of liquor which were subject to tax of 1 dollar 25 cents. The amount of the tax payable was upon this information fixed and determined by the Attorney-General who demanded payment. The respondents however refused to pay on the ground that the statute was *ultra vires*, and thereupon the Attorney-General decided that a distress warrant should be issued under section 6 of the statute. He accordingly made out a distress warrant for the amount, dated the 10th August, 1922, and placed it before the Provincial Secretary-Treasurer for signature who signed and delivered it to the sheriff to be executed. It is this warrant in respect of which it is sought to obtain issue of a writ of *certiorari* in order that it may be brought up to be quashed upon the grounds already stated. The guiding principle regulating the issue of such a writ is not in serious controversy. It is well established that, if the issue of a distress warrant involves a judicial act, it is subject to the procedure by which an excessive exercise of jurisdiction can be brought up and challenged. If, on the other hand, it is a mere ministerial act following on the exercise of powers possessed by other people, then the writ of *certiorari* is not the proper remedy to apply.

In the present case the Court has thought that the Provincial Secretary-Treasurer was in fact entrusted by the statute with the duty of enquiring into the precedent facts. In the words of Mr. Justice Duff :

“ The statute cannot contemplate the issue of the warrant without enquiry of the Provincial Secretary-Treasurer into the facts, an enquiry which, though not judicial in the sense that the decision is binding, is judicial in the sense that it aims at ascertaining the facts with a view to a possible proceeding in the nature of a prosecution, the issue of which rests in his discretion.”

and again Mr. Justice Brodeur, who agreed with Mr. Justice Duff, says :—

“ Before issuing this distress warrant the Secretary-Treasurer had to satisfy himself that the appellant company had in its possession a certain quantity of liquor ; that it had property rights in the liquor kept ; that it was liable for the tax claimed ; that there was a demand of payment and default on the part of the debtor, and that the law which he had as a minister of the Crown to carry out was within the competency of the Legislature.”

If their Lordships thought that the inferences contained in these extracts were well-founded they would agree with the conclusions of law which follow therefrom. They are, however, unable to take this view as in the course of the hearing, finding that the information was imperfect on the relevant points, they adjourned the hearing in order that further evidence of fact might be obtained and from this evidence it appears clear that, in point of fact, as already stated, all the ascertainment and enquiry was done by the Attorney-General and with it the Provincial Secretary-Treasurer had no concern. The question, therefore,

is whether the Attorney-General's action was authorised by the statute, for, if it was not, the mere fact that he assumed the jurisdiction he did not possess could not assist the argument. Their Lordships think that the statute and the regulations did in fact confer this authority upon the Attorney-General. As already pointed out there are no duties whatever cast upon the Provincial Secretary-Treasurer except the receipt of monies and the exercise of the machinery necessary to secure their payment. The information required for the assessment of the tax is, by the statute, to be given to the Attorney-General alone. The regulations which were expressly issued for the purpose of fixing and determining the amount of the tax places in the hands of the Attorney-General the power of appointing the necessary officer for the purpose and, although neither the regulations nor the statute are plain, the true inference to be drawn from them is, in their Lordships' opinion, this, that the duty of fixing and determining the amount and requesting process for its recovery rests solely with the Attorney-General and the Provincial Secretary-Treasurer possesses only the power of saying whether such sum should be recovered by warrant or by proceedings in the Courts. The fact that in such a case he determines to proceed by warrant does not render its issue a judicial act and for these reasons their Lordships think that a writ of *certiorari* cannot be issued for the purpose of quashing a warrant so issued.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court of Canada set aside and the judgment of the Supreme Court of New Brunswick (Appellate Division) restored with costs in the Courts below.

The respondents will pay the costs of the appeal.

In the Privy Council.

THE HONOURABLE J. E. HETHERINGTON,
PROVINCIAL SECRETARY-TREASURER OF THE
PROVINCE OF NEW BRUNSWICK.

v.

THE SECURITY EXPORT COMPANY, LIMITED

DELIVERED BY LORD BUCKMASTER.

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