

No. 465

**TAXATION — CONSTITUTIONAL LAWS — FEDERAL
REGULATIONS—CUSTOMS—LIVESTOCK—CATTLE—
WAREHOUSES—BONDED WAREHOUSES—MERCHAN-
DISE—RANCHING**

Held: Where cattle or other livestock are imported into this state from the Republic of Mexico, Argentina, or other foreign country, are in this state on the first Monday in March of any year, are held in or on a ranch or range consisting of a large area, which such area is designated as a so-called "warehouse" by the Treasury Department Division of Customs, and are in the State of Montana for the purpose of grazing thereon, breeding or fattening—such cattle or other livestock are not exempt from taxation, but are assessable and taxable—under our Constitution and laws—the same as domestically owned cattle or livestock, owned and possessed by Montana ranchers.

August 17, 1942.

Mr. Bert W. Kronmiller
County Attorney
Big Horn County
Hardin, Montana

Dear Mr. Kronmiller:

You have submitted the following question for my opinion:

"Where a person or corporation imports cattle from the Republic of Mexico or other foreign country, into the State of Montana under bond, and in the custody of the United States Department and where such cattle are run and grazed upon lands and ranges designated by the Customs Department as a fourth class warehouse and consisting of hundreds of thousands of acres, and pursuant to the Federal Law and the Regulations of said Department and particularly Section 934, Revised Statutes of the United States, Article 940 (a) of the Customs Regulations of 1937, and said cattle are in the state and county on the first Monday in March, 1942, are the said cattle taxable as other like domestic livestock grazed and ranged by the Montana ranchers?"

In considering your question it is necessary to note that Article I, Section 8 of the Constitution of the United States provides in part as follows:

"The congress shall power—

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States; . . .

"To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes; . . .

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all the powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Section 10, paragraph 2, of Article I, provides:

"No states shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

Section 555 of Chapter 497, Statutes at Large, Vol. 46, Part 1, Page 743 (Title 19, U. S. C. A., Section 1555) provides:

"Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit storage, or manipulation or merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse; and under the supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse."

Treasury Department regulations applicable are in part as follows:

"Imported goods in bonded warehouse are exempt from taxation under the general laws of the several states."

52 Statutes at Large, 1077, (Title 19, Paragraph 1557, U. S. C. A.) provides in part as follows:

"Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may

be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner, importer, or consignee. Such merchandises may be withdrawn, at any time within three (or ten months in the case of grain) from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of the duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port; **Provided**, That the total period of time for which such merchandise may remain in bonded warehouse shall not exceed three years (or ten months in the case of grain) from the date of importation. Merchandise upon which the duties have been paid and which shall have remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers, may be entered or withdrawn at any time within three years (or ten months in the case of grain) after the date of importation for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, or the island of Guam, under such regulations as the Secretary of the Treasury shall prescribe, and upon such entry or withdrawal, and exportation or shipment, 99 per centum of the duties thereon shall be refunded."

From the foregoing it would appear at first blush that such cattle would not be taxable, but we should now refer to our own state constitution and laws, where we find:

"The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises, and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed."

Article XIII, Section 17, Montana Constitution.

Our Supreme Court, in commenting on Section 17 of Article XII, *supra*, stated:

"... its definition of that which may be made subject to taxation, is sufficiently comprehensive to include all matters and things, visible and invisible, tangible and intangible, corporeal and incorporeal, capable or private ownership."

Northwestern Mutual Life Ins. Co. v. Lewis and Clark County,
28 Mont. 484, 72 Pac. 987.

Section 2 of Article XII, expressly provides the property that may be exempted from taxation as follows:

"The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries shall be exempt from taxation; and such other property as may be used exclusively for the agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, institutions of purely public charity and evidences of debt secured by mortgages or record upon real or personal property in the state of Montana, may be exempt from taxation."

Section 1997, Revised Codes of Montana, 1935, provides:

"All property in this state is subject to taxation except as provided in the next section."

Section 1998, Revised Codes of Montana, 1935, then provides:

"The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, evidence of debt secured by mortgages of record upon real or personal property in the state of Montana, and public art galleries and public observatory not used or held for private or corporate profit, are exempt from taxation, but no more land than is necessary for such purpose is exempt; provided, that the terms public art galleries and public observatories used in this act shall mean only such art galleries and observatories whether of public or private ownership, as are open to the public, without charge or fee at all reasonable hours, and are used for the purpose of education only, and also when a clubhouse or building erected by or belonging to any society or organization of honorably discharged United States soldiers, sailors or marines who served in army or navy of United States, is used exclusively for educational, fraternal, benevolent or purely public charitable purposes, rather than for gain or profit, together with the library and furniture necessarily used in any such building, and all property, real or personal, in the possession of legal guardians of incompetent veterans of the World War or minor dependents of such veterans, where such property is funds or derived from funds received from the United States as pension, compensation, insurance, adjusted compensation, or gratuity, shall be exempt from all taxation as property of the United States while held by the guardian, but not after title passes to the veteran or minor in his or her own right on account of removal of legal disability."

Our Supreme Court has held:

"When we recall that our Constitution is not a grant of authority, but a limitation upon the powers of government—that our legislature exercises inherent and not delegated authority—the reference to the second class becomes equally explicit. While the language is permissive in form, it is prohibitory in effect. The legislature may extend the exemption to the property enumerated, but it cannot go further or include any other. This is the construction uniformly placed upon such provisions, and is commanded by the rule of interpretation contained in the Constitution itself. (Sec. 29, Art. III.) . . .

"It is a rule which has been in force in this jurisdiction for more than thirty-five years, that, whenever, the language of a statute is plain, simple, direct and unambiguous, it does not require construction, but it construes itself. . . . The same rule is applicable in the interpretation of a provision of the Constitution. . . .

"The taxing power of the state is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. . . .

"Our Bill of Rights guarantees to everyone the protection of his property, but this protection carries with it the corresponding obligation to support the government which affords the protection. An exemption from taxation is a release from this obligation, and anyone who seeks the immunity must show that his property belongs to a class which is specifically exempt." (Emphasis mine.)

Cruse v. Fishl, 55 Mont. 258, 175 Pac. 878.

Section 2247, Revised Codes of Montana, 1935, provides:

". . . Personal property which was in the state and subject to taxation on the first Monday in March of any year shall be taxable wherever and whenever found in any county in the state, whether the

same be owned, claimed, or possessed by the person owning, claiming or possessing it on the first Monday of March or not; . . ."

The purpose of any person placing such imported cattle on the range or ranch is to graze them, fatten them, and to handle them for sale on the market. The plan apparently is to bring such cattle out of Mexico as young and as thin as possible and to put weight on them with the lush grass from the Montana range.

The Supreme Court of the United States long ago defined imports as follows:

Imports can cover "nothing which is not actually brought into our limits."

Marriott v. Brune, 9 How 619, 632, 50 N. S. 619, 13 L. Ed. 282, 288.

Can it be argued that a herd of young, thin heifers or steers—grazing on the ranges of our state for two or three years, and increasing in weight materially which was not brought into this state as an import—cannot be taxed by the state of Montana, the state that has given full protection to this property? It cannot be contended that such cattle would retain or remain in the same form or shape as that in which they were imported.

Low v. Austin, 13 Wall 29, 80 U. S. 29, 20 L. Ed. 517.

It should be remembered our constitution is a limitation upon the powers of government, that our legislature exercises inherent and not delegated authority.

By examining Section 555 of Chapter 497, *supra*, it will be noted the statute speaks only of imported **merchandise**, and the **warehousing of merchandise**.

Surely there is not now available the elasticity necessary to stretch the word merchandise to encompass a cow, a heifer or a bull.

The word merchandise has a well defined meaning. It connotes the personality used by merchants in the usual course of trade. Horses, cattle, sheep are not included in the term. To speak of a merchant's stock of goods as a herd of cattle or a flock of sheep would do violence to the intellect.

Merchandise pertains to inanimate articles and objects such as stocks of goods, wares, and articles of trade. Cattle, sheep and hogs are not "merchandise" under Revenue Act.

Brown v. United States, 298 Fed. 177 (1920).

Turning to the customs regulations we find in Chapter XVII, entitled custom warehouses and control of merchandise therein, at Article 919, classes of custom warehouses, classes 1 to 8.

"Warehouses of Class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof in which case they will be designated as importers' private warehouses. . . ."

"Bonded yards or sheds for the storage of heavy and bulky imported merchandise.

"Warehouses of this class shall be used exclusively for the storage of heavy and bulky articles. If the collector deems it necessary yards must be inclosed by substantial fences, with entrance gates capable of being secured by customs locks. The collectors may send to such yards unclaimed or seized goods of a character above described.

"Stables or parts thereof may be bonded upon approval of the bureau for the storage of animals."

Volume II, Part 2, Federal Register (1937), Article 919, page 1653; 19 Code of Federal Regulations 17.1.

Webster's New International Dictionary, Second Edition, defines warehouse as:

"A storehouse (sometimes a store room) for wares or goods. The term is broadly used, and may include any structure used to hold goods, stores, or wares. To deposit in a warehouse especially to place in the government or custom house stores or bonded warehouse, to be kept until duties are paid."

Webster's New International Dictionary, Second Edition, defines yard as:

"A small enclosed place in front of, or around, a house, barn or other building; an enclosure within which any work or business is carried on, as a brick yard, railroad yard, campus of a university."

From the foregoing may it be construed that a fourth class customs warehouse may consist of hundreds of thousands of acres of ranch lands? To ask the question is to answer it: Such a construction would be beyond the realms of reason. This is just another instance of the unbounded zeal of Federal Departments and Bureaus to attempt to extend their authority and power (and incidentally their pay roll) in all directions beyond the limitations of the original intent and purpose of their creation at the expense of the sovereignty of the state.

Our Supreme Court has repeatedly held:

"In construing a statute, its words and phrases must be given their plain and ordinary meaning."

State v. Bowker, 63 Mont. 1, 205 Pac. 961.

For many citations of Montana cases on this point, see Volume Eight of the Montana Digest.

The words "merchandise" and "warehouse" have a well defined meaning in law and should be construed accordingly.

Such a construction and holding of the intent and purpose of the Tariff Act and the rules and regulations of the Treasury Department in relation to the Custom would lead to an ultimate absurdity; to state it is to refute it.

Suppose that a few large corporations bought and leased most of our ranges in Montana and, instead of importing a few hundred thousand head of livestock, they were to import millions of head. The result can readily be observed—our ranges and the natural resources thereof, our grass (one of our most precious assets) would be taken from the state. All this livestock would receive the protection of our state without contributing one cent to the maintenance of that protection or to the weal of the sovereign; and, if such livestock were exported within three years from the date of import, no duty would be paid to the federal government.

The purpose, intent, and understanding of the Tariff Act—I am convinced—was not to impose the term "merchandise" upon livestock nor to pervert the term "warehouse" to encompass a three hundred thousand acre ranch. Such an interpretation can connote only that the Bureau of Customs has greedily attempted to extend its authority, unwarranted by law, at the expense of the sovereignty of the state.

Here is a large, wealthy corporation importing thousands of cattle from the Republic of Mexico, placing them upon the ranges of Montana to fatten on our verdent hills and valleys, in competition with our own Montana ranchers. The imposter escapes without any payment of taxes—and, in the event he exports the cattle within three years, he pays no duty or tariff to the Federal Government—nor does he pay any tax to this state, which has given him and his cattle the same protection as the Montana rancher.

The sovereignty of Montana may not be so evaded or shunted aside. A similar case was recently decided by the Supreme Court of New Mexico, which was plagued with the same question. The Court held:

"Neither do imported cattle retain their character as imports so as to be immune from taxation by the mere fact that they were held within 'bonded warehouses,' if such indeed were the case, under the provisions of Tariff Act of 1930 (June 17, 1930 Chap. 497, Title IV, Sec. 551, et seq. U. S. C. A. Title 19, Sec. 1551, et seq.)

"It is entirely illogical to contend that cattle can usually be 'stored' like ordinary commodities. Storage connotes a certain degree of permanency and immobility, but grazing or similar terms that are in use denote the manner of harboring cattle, connote transience. For a similar distinction, see *Monument Garage Corporation v. Levy*, 266 N. Y. 339, 194 N. E. 848. Storage according to Webster's New International Dictionary, involves the safekeeping of goods. While there may be some small amount of diminution when goods are stored, it seems wholly improbable that it may include a material increase in the quantity of goods stored. Nor can it be effectively contended without straining the connotation of the word "merchandise" that it encompasses cattle or other live stock. See *Brown v. United States*, D. C. 298, F. 177; *Jewell v. Board of Trustees of Sumner Township*, 113 Iowa 47, 84 N. W. 973, 975.

"Even if it be conceded that a United States Customs officer or a Treasury department regulation describes a pasture as a warehouse for 'storage of animals,' such an interpretation is not binding upon a court, even if it were one of long standing. The practice of placing imported cattle in bonded warehouses is of recent origin; hence, lacks even an age-ripened interpretation to support it.

"Treasury regulation, Article 921, under which appellant's ranch was recognized as a bonded warehouse, provides that stables or parts thereof may be bonded upon approval of the Bureau for storage of animals. Even it does not, as the trial court has so aptly indicated, provide for a ranch of a half million acres, which is not even fenced in, as a warehouse. We fail, therefore, to find that the terms of the Tariff Act or the regulations promulgated by the Treasury department pursuant thereto, exempt the cattle in controversy from the rules applicable to imports generally. . . .

"If the cattle are imported and held in a railroad car, pen or corral for a reasonable time, whether such a corral is or is not bonded warehouse, the detention affords good proof quite independent of the 1930 act that the cattle are still imports, just as the original package does with respect to goods. But when they are taken to a ranch for the purpose of grazing, fattening and breeding, the contrary is shown. Warehousing may be an incident to importation, but grazing, fattening or breeding cattle for two or three years are not. We find in *Jewell v. Board of Trustees*, supra (113 Iowa 47, 84 N. W. 974), the following pertinent observation: 'There are, it is true, persons who trade and traffic in live stock the same as in ordinary merchandise, but they are not feeders. They feed simply to preserve life and flesh, not to add to the *avoirdupois*. They purchase with a view to immediate sale. The ordinary stock raiser buys, not for immediate sale, but to derive a profit from the produce that he feeds his stock. There is a manifest difference between a stock merchant or buyer and a stock feeder, and this distinction, we think, is preserved in the statutes.'

"A similar distinction should be held to exist between the buyer-importer as such and the stock raiser. The purpose of the bonded warehouse, provided for by the 1930 Tariff Act, we believe, was not to abolish this distinction and to preserve the characteristics of imports in goods or livestock in all eventualities, but merely to secure the government with respect to its import duties and other costs and expenses."

Tres Ritos Ranch Company v. Abbott, 105 Pac. (2nd) 1070, 1073, 1074, 44 New Mexico, 566, 130 A. L. R. 963.

The New Mexico decision is equitable and sound and, in my opinion, is the correct interpretation.

We are at war as a nation—and every effort must be made by each one to bring this conflict to a successful conclusion; but it must be remembered that Montana, as a member of the Union, is at war as much as any other part of the country. The expense of war activities of the state fall heavily on our taxpayers. All property in the state must bear its just proportion for the common good.

I have not overlooked the decisions of the Supreme Court of the United States culminating in the recent case of *McGoldrick v. Golf Oil Corporation*, 309 U. S. 414, but all such decisions are in regard to inanimate products and commodities easily interpreted as merchandise.

It should be pointed out that:

“The Secretary of the Treasury cannot change or amend a revenue law by regulation. His power is limited to the regulation of the mode of proceedings for carrying into effect what Congress enacted.”

Mellon v. Minneapolis, St. P. & S. S. M. Ry. Co., 285 Fed. 980.

From the foregoing, it is my opinion that—where cattle or other livestock are imported into this state from the Republic of Mexico, Argentina, or other foreign country, are in this state on the first Monday in March of any year, are held in or on a ranch or range consisting of a large area, which such area is designated as a so-called “warehouse” by the Treasury Department Division of Customs, and are in the state of Montana for the purpose of grazing thereon, breeding, or fattening—such cattle or other livestock are not exempt from taxation; but they are assessable and taxable—under our constitution and laws—the same as domestically owned cattle or livestock owned and possessed by Montana ranchers.

Sincerely yours,

R. V. BOTTOMLY
Attorney General