

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of the
Attorney General for Quebec v. Reed from
the Supreme Court of Canada; delivered
November 26th, 1884.*

Present:

THE LORD CHANCELLOR.

LORD FITZGERALD.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THEIR Lordships have considered the argument which they have heard, and they have come to the conclusion that the judgement appealed from must be affirmed.

The points to be considered are three; first of all, can this charge upon exhibits used in the Courts of Justice of the province be justified under the 2nd sub-section of clause 92 of the British North America Act? Is it a case of direct taxation within the province "in order to the raising of a revenue for provincial purposes?" What is the meaning of the words "direct taxation?"

Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the Appellant's argument than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time

at which it is to be paid ; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain ; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant, expecting or hoping for success in the suit ; and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The Legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else.

Therefore it cannot be a tax demanded "from the very persons who it is intended or desired should pay it;" for in truth that is a matter of absolute indifference to the intention of the Legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume, that that expectation and intention may not be realised. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd subsection of the 92nd clause of the Act in question. Still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under subsection 14. One of the things which are to be within the powers of the Provincial Legislatures—within their exclusive powers—is the administration of justice in the province, including the

constitution, maintenance, and organisation of Provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a Provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the Provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation indeed is a matter of procedure in the Provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the second sub-section; it is made part of the general consolidated revenue of the province. It therefore is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue.

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.

With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-

existing powers of the Governors or Lieutenant-Governors in Council to do certain things, not there specified. That, however, was subject to a power of abolition or alteration by the respective Legislatures of Ontario and Quebec, with the exception, of course, of what depended on Imperial Legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers, there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts, not for the general revenue purposes of the province, but for the purpose of forming a special fund called "the Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury Fund. It is a Legislative Act without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th.

Their Lordships must, therefore, humbly advise Her Majesty to dismiss this Appeal.

