66, 1933 No. 32 of 1933.

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA SUING ON BEHALF OF HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA,

(Plaintiff) Appellant,

AND:

KINGCOME NAVIGATION COMPANY LIMITED,

(Defendant) Respondent.

CASE FOR THE RESPONDENT.

CASE FOR THE RESPONDENT

1. This is an appeal from the judgment of the Court of Appeal for British Columbia, affirming, with one dissentient, the judgment of the Chief Justice of the Supreme Court of British Columbia, dismissing an action by the Crown to recover taxes asserted to be due under a Provincial Statute, the Fuel-oil Tax Act (Statutes of British Columbia 1930, c. 71). Record, pp. 41-42, Record, p. 18. Record, p. 45, et seq.

2. A previous statute on the same subject (Statutes of British Columbia 1923, c. 71) had been declared by His Majesty in Council to be invalid (*Attorney-general for British Columbia* v. *Canadian Pacific Railway Company* 1927 A.C. 934).

3. The Statute, now in question, contains the following sections:—

"2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon. Record, p. 45, ll. 11-15.

Record, p. 45, ll. 30-41. p. 46. ll. 1-5.

"5. (1) Upon the expiration of thirty days after the commencement of this Act, no person shall keep for sale or sell fuel-oil in the Province unless he is the holder of a licence issued pursuant to this section in respect of each place of business at which fuel-oil is so kept for sale or sold by him.

(2) The manner of application and the forms of application and of the licence shall be as prescribed in the regulations. A licence fee of one dollar shall be payable in respect of each licence.

(3) The minister of finance may, without holding any formal or other hearing, cancel any licence issued pursuant to this section if the licensee is convicted of any offence against this Act, and may during the period of twelve months next succeeding the cancellation of that licence refuse to issue any new licence to the person so convicted.

Record, p. 46, ll. 6-23.

"6. (1) Every Collector, constable, and every person authorized in writing by the Minister of Finance to exercise the powers of inspection under this section may without warrant enter upon any premises on which he has cause to believe that any fuel-oil is kept or had in possession, and may inspect the premises and all fuel-oil found thereon, and may interrogate any person who is found on the premises or who owns, occupies, or has charge of the premises.

(2) Every person interrogated under this section who refuses or fails to answer any question put to him respecting the fuel-oil kept or had on the premises, or who refuses or fails to produce for inspection or to permit inspection of any book, record, or document or any barrel, tank or receptacle in his possession or under his control which he is required to produce for inspection or of which he is required to permit inspection, shall be guilty of an offence against this Act.

Record, p. 46, ll. 24-36.

"7. (1) Every person who consumes any fuel-oil in the Province and every person who keeps for sale or sells fuel-oil in the Province shall keep such books and records and shall make and furnish such returns as are prescribed in the regulations.

(2) Every person who refuses or fails to keep any book or record or to make and furnish any return prescribed by the regulations, or who withholds any entry or information required by the regulations to be made or entered in any book, record or return, or who makes any false or deceptive entry or statement in any such book, record or return shall be guilty of an offence against this Act."

4. Some two years elapsed before the Statute was proclaimed but eventually it was brought into force on the 1st day of June, 1932, and upon the Defendant's refusing to pay the tax, this action was brought. British Columbia Gazette Volume 72, p. 933.

5. It was proved at the trial that fuel-oil is the residuum which is left after the crude petroleum has been subjected to certain processes of distillation, that no crude petroleum is at present produced in this Province, though it is produced in the Provinces of Ontario and Alberta, and that all the requirements of this Province are met by the importation of the crude petroleum from foreign countries and its refinement locally. Record, p. 8, ll. 5-8. p. 7, ll. 32-39. p. 8, ll. 11-15. p. 7, ll. 40-42. p. 8, ll. 1-4. p. 8, ll. 19-33.

6. It was also shown that fuel-oil enters into direct competition with coal, of which there are extensive deposits in this Province, and that the use of coal or fuel-oil depends solely on their relative prices. Record, p. 10, ll. 38-44. p. 11, ll. 1-46. p. 12, ll. 1-10.

7. It was further proved that the tax on fuel-oil under the Statute in question amounted to thirteen per cent (13%) ad valorem, while the personal property tax which used to be levied amounted only to one half of one per cent (½%) (R.S.B.C. 1924, c. 254, sec. 65). Record, p. 10, ll. 15-38.

8. Under these circumstances, which prevailed at the time of the passage of the Act and of its proclamation, it was submitted that the tax in question was in its intrinsic nature, either an import duty on the crude petroleum, or a duty of excise on the fuel-oil, and, independently of its nature, that its enactment necessarily constituted an interference with the regulation of trade and commerce.

9. The fiscal policy of the Dominion with reference to fuel-oil was settled in 1920, and has remained the same up to the date of the present budget, through all the changes effected in the legislation relating to internal and external duties of revenue.

10. By the Special War Revenue Act 1915 (Statutes of Canada 1915, sections 19 BB and 19 BBB) as amended in 1920 (Statutes of Canada 1920, c. 71 s. 2) a tax, therein expressly called an excise, is imposed on a number of consumable commodities. By section 19 BBB, enacted by subsection 7 of section 2 of the amending Act, however, "Oil for illuminating or heating purposes" (i.e. fuel-oil) is exempt from this duty.

11. The Customs Tariff Amendment Act (Statutes of Canada 1919 c. 47) amended Schedule "A," enumerating the consumable commodities subject to import duties. Item 267 imposed a duty of one half cent per gallon on "oil, petroleum (not including crude petroleum imported to be refined)." Item 267A admitted free of duty crude petroleum imported into Canada to be there refined. The same provisions are found in the Customs Tariff Act (R.S.C. 1927, c. 44).

12. This Provincial Statute would, therefore, if valid, effect a reversal of the Dominion legislation, which embodies the policy of the Dominion Parliament, that crude petroleum imported into and refined within Canada should be free from both import and excise duties.

13. It is further to be observed that this Statute does not impose a tax either on property or on the ownership of property, but on a particular operation or method of dealing with a consumable commodity. It is in reality the imposition of a penalty upon consumption.

14. The Respondent made to the Courts below an eight-point submission, embodying what are submitted to be the principles which can be deduced from the decisions of this Board: thus

(1) the question, what form of taxation a Provincial Legislature is competent to impose is one of law;

(2) at the time of Confederation there was a well-recognized classification of taxation according to which, for instance, taxes on property and income were considered to be direct taxes while duties of customs and excise were considered to be indirect taxes;

(3) While the formulae of the economists may usefully be consulted in the case of a new form of taxation, it is not permissible to use any such formula as a ground for transferring a tax, universally recognized as belonging to one class, into a different class of taxation;

Halifax City v. *Fairbanks' Exors* (1928) 97 L.J.P.C. at page 14; (1926) S.C.R. at page 365.

City of Charlottetown v. *Foundation Maritime Ltd.* (1932) S.C.R. at page 594.

(4) it is not competent to a Provincial Legislature to impose a tax on a consumable commodity, that is, on an article of commerce, at any stage of its circulation, because by so taxing it, it unavoidably interferes with the regulation of trade and commerce;

(5) customs and excise are not taxation at all in the sense in which that word is used in section 92, enumeration 2, of the British North America Act, but are duties imposed on consumable commodities partly for the purpose of raising a revenue, but also, and more particularly for the purpose of regulating trade and commerce;

(6) since duties of customs and excise are imposed under powers given by the head of "the regulation of trade and commerce" in section 91, enumeration 2, of the British North America Act, they are altogether excluded from the competence of the Provincial Legislatures;

Lawson v. *Interior Tree Fruit & Vegetable Committee of Direction* (1931) S.C.R. at pages 362 and 371;

Halifax City v. *Fairbanks' Exors* (1926) S.C.R. at p. 368;

Attorney-General for British Columbia v. *Macdonald Murphy Company* (1930) 99 L.J.P.C. at p. 115;

Attorney-General for British Columbia v. *Attorney-General for Canada* (1922) 64 S.C.R. at pp. 381, 384, 387; (1924) 93 L.J.P.C. at p. 132;

The Act of Union, 3 and 4, Vict. c. 35, s. 43;

Attorney-General for New South Wales v. *Collector of Customs* (1908) 5 C.L.R. 818 at pp. 834, 837, 842, 854;

Attorney-General for Canada v. *Attorney-General for Ontario* (1898) 67 L.J.P.C. at p. 94;

Toronto Electric Commissioners v. *Snider* (1925) 94 L.J.P.C. at p. 123;

Prop. Art. Trade Association v. *Attorney-General for Canada* (1931) 100 L.J.P.C. at p. 91;

(7) if the revenue sought to be raised by the Fuel-oil Tax Act is in its true nature an import duty or excise there is an end of the matter and no further inquiry is required or justified.

Attorney-General for British Columbia v. *Macdonald Murphy Company* (1930) 99 L.J.P.C. at p. 115.

(8) a Provincial Legislature cannot by the employment of a subterfuge, encroach on the domain reserved to the Dominion, by attempting to levy a form of revenue which differs, in its real nature, from the semblance which the Provincial Legislature has sought to give to it.

Attorney-General for Quebec and Queen Insurance Co. (1878) 3 A.C. 1090, at p. 1097;

Union Colliery Co. v. *Bryden* (1899) 68 L.J.P.C. at p. 120;

Attorney-General for Ontario v. *Reciprocal Insurers* (1924) 93 L.J.P.C. at p. 141;

Great West Saddlery Co. v. *R.* (1921) 90 L.J.P.C. at p. 115;

Brewers & Maltsters Association of Ontario v. *Attorney-General of Ontario* (1896) 66 L.J.P.C. at p. 35.

15. The Appellant in the Court below, largely rested its case on a supposed conflict between the earlier and later decisions of this Board, which it thought it had detected.

16. It is respectfully submitted that no such conflict exists, but that the more recent decisions, such, for instance, as *Halifax City* v. *Fairbanks' Exors* (ubi supra) are but logical developments of the principles established in the earlier decisions, such as *Bank of Toronto* v. *Lambe.*

17. For the purpose of supporting this submission it may perhaps be permitted to quote extensively from the opinion of the Board in *Halifax City* v. *Fairbanks' Exors* (1928) 97 L.J.P.C. at p. 14:—

"In considering the question so raised, it is their lordships think, **important to bear in mind that the problem to be solved is one of law,* the answer to which depends upon a true understanding of the meaning of the expression 'direct taxation within the Province,' as used in the British North America Act. In this connection some observations made by Lord Hobhouse in delivering the judgment of this Board in *Bank of Toronto* v. *Lambe* (1887), 56 L.J.P.C., at page 89; 12 App. Cas. at page 581 are of value. The tax there in question was a tax imposed upon banks and insurance companies carrying on business within the Province of Quebec and Lord Hobhouse dealt with the point as follows: 'First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper or rather necessary to have careful regard to such opinions, as has been said in previous cases before this Board. **But it must not be forgotten that the question is a legal one,* namely, what the words mean, as used in this Statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct" and "indirect" according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.'

**The result of these observations, which are closely applicable to the present case, is that their lordships have primarily*

* Italics are those of Respondent

to consider, not whether in the view of an economist the business tax imposed on an owner under section 394 of the Halifax City Charter would ultimately be borne by the owner or by someone else, but whether it is in its nature a direct tax within the meaning of section 92, head 2 of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories, namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial Government are made to extend, From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to anyone else. 'It merely takes so much from the landlord and transfers it to the State' —*Political Economy,* vol. 2, p. 416. On the other hand **duties of customs and excise were regarded by everyone as typical instances of indirect taxation.* When therefore the Act of Union allocated the power of direct taxation to the Province, it must surely have intended that the taxation of property and income should belong exclusively to the Provincial legislatures, **and that without regard to any theory as to the ultimate incidence of such taxation.* To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

**What then is the effect to be given to Mill's formulae above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species.* The imposition of taxes on property and in-

* Italics are those of Respondent

come, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, **just as the exaction of a customs or excise duty on commodities* or of a percentage duty on services **would ordinarily be regarded as indirect taxation;* and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation;

"If this be the true view, then the reasoning of the majority of the Supreme Court of Canada requires reconsideration. It may be true to say of a particular tax on property, such as that imposed on owners by section 394 of the Halifax Charter, that the taxpayer would very probably seek to pass it on to others; but it may, none the less be a tax on property and remain within the category of direct taxes. Probably no one would say that the income tax levied in this country under Schedule "A" of the Income Tax Act, although levied upon the occupier of property who is authorized to recover it from the owner, is not a direct tax. **So, although a customs duty paid by a person importing commodities for his own use is not passed on to anyone else, it would hardly be contended that such a duty is a direct tax within the meaning of the British North America Act.* It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; and, judged by that test, the business tax imposed on an owner under section 394 is a direct tax.

"The authorities cited by Newcombe, J., show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover; should be classed as direct or indirect; but, with the possible exception of *Cotton* v. *Regem,* which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognized as direct has been held to be indirect for the purposes of the British North America Act by reason of any theory as to its ultimate incidence."

18. Insofar as "the common understanding of men" and the recognition of a definite classification of taxation is concerned, there were, at the date of Confederation, two documents which must have been very familiar to the statesmen who framed the British North America Act.

* Italics are those of Respondent

19. Adam Smith's "Wealth of Nations" contains an article devoted to this subject of the taxation of consumable commodities.

20. This is Article 4 of Part 1 of Chapter 2 of the 5th Book (New Edition of 1863) where the author says, in part:—

Page 393:—

"The impossibility of taxing the people, in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities. The State not knowing how to tax, directly and proportionably, the revenue of its subjects, endeavours to tax it indirectly by taxing their expenses, which, it is supposed, will in most cases be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out."

Page 395:—

"The observation of Sir Matthew Decker that certain taxes are, in the price of certain goods, sometimes repeated and accumulated four or five times is perfectly just with regard to taxes upon the necessaries of life. In the price of leather, for example, you must pay not only for the tax upon the leather of your own shoes but for a part of that upon those of the shoemaker and the tanner. You must pay, too, for the tax upon the salt, upon the soap and upon the candles which those workmen consume while employed in your service, and for the tax upon the leather, which the saltmaker, the soapmaker and the candlemaker consume while employed in their service.

"In Great Britain, the principal taxes upon the necessaries of life are those upon the four commodities just now mentioned, salt, leather, soap and candles.

"Salt is a very ancient and a very universal subject of taxation. It was taxed among the Romans, and it is so at present in, I believe, every part of Europe. The quantity annually consumed by any individual is so small, and may be purchased so gradually, that nobody, it seems to have been thought, could feel very sensibly even a pretty heavy tax upon it. It is in England taxed at three shillings and fourpence a bushel; about three times the original price of the commodity. In some other countries the tax is still higher. Leather is a real necessary of life. The use of linen renders soap such. In countries where the winter nights are long, candles are a

necessary instrument of trade. Leather and soap are in Great Britain taxed at three halfpence a pound; candles at a penny; taxes which, upon the original price of leather, may amount to about eight or ten per cent; upon that of soap to about twenty or five-and-twenty per cent; and upon that of candles to about fourteen or fifteen per cent; taxes which, though lighter than that upon salt, are still very heavy, As all those four commodities are real necessaries of life, such heavy taxes upon them must increase somewhat the expense of the sober and industrious poor, and must consequently raise more or less the wages of their labour.

"In a country where the winters are so cold as in Great Britain, fuel is, during that season, in the strictest sense of the word, a necessary of life, not only for the purpose of dressing victuals, but for the comfortable subsistence of many different sorts of workmen who work within doors; and coals are the cheapest of all fuel. The price of fuel has so important an influence upon that of labour that all over Great Britain manufacturers have confined themselves principally to the coal counties; other parts of the country, on account of the high price of this necessary article, not being able to work so cheap. In some manufactures, besides, coal is a necessary instrument of trade, as in those of glass, iron and all other metals. If a bounty could in any case be reasonable, it might perhaps be so upon the transportation of coals from those parts of the country in which they abound, to those in which they are wanted. But the legislature, instead of a bounty, has imposed a tax of three shillings and threepence a ton upon coal carried coastways; which upon most sorts of coal is more than sixty per cent of the original price at the coal pit. Coals carried either by land or by inland navigation pay no duty. Where they are naturally cheap, they are consumed duty free; where they are naturally dear, they are loaded with a heavy duty.

"Taxes upon the necessaries of life are much higher in many other countries than in Great Britain. Duties upon flour and meal when ground at the mill, and upon bread when baked at the oven, take place in many countries. In Holland, the money price of the bread consumed in towns is supposed to be doubled by means of such taxes. In lieu of a part of them, the people who live in the country pay every year so much a head, according to the sort of bread they are supposed to consume. Those who consume wheaten bread pay three guilders fifteen stivers; about six shillings and ninepence halfpenny. These, and some other taxes of the same kind, by

raising the price of labour, are said to have ruined the greater part of the manufactures of Holland. Similar taxes, though not quite so heavy, take place in the Milanese, in the States of Genoa, in the duchy of Modena, in the duchies of Parma, Placentia and Guastalla, and in the ecclesiastical State."

Page 396:—

*"*Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways. The consumer may either pay an annual sum on account of his using or consuming goods of a certain kind; or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer.* The consumable goods which last a considerable time before they are consumed altogether are most properly taxed in the one way. Those of which the consumption is either immediate or more speedy in the other. The coach tax and plate tax are examples of the former method of imposing; **the greater part of the other duties of excise and customs, of the latter.*"

"It was the well-known proposal of Sir Matthew Decker that all commodities, even those of which the consumption is either immediate or very speedy, should be taxed in this manner; the dealer advancing nothing, but the consumer paying a certain annual sum for the license to consume certain goods. The object of his scheme was to promote all the different branches of foreign trade, particularly the carrying trade, by taking away all duties upon importation and exportation, and thereby enabling the merchant to employ his whole capital and credit in the purchase of goods and the freight of ships, no part of either being diverted toward the advancing of taxes. The project, however, of taxing in this manner, goods of immediate or speedy consumption, seems liable to the four following very important objections."

(Adam Smith then discusses the objections to the proposals).

Page 397:—

"In several countries, however, commodities of an immediate or very speedy consumption are taxed in this manner . . . In Holland, people pay so much a head for a license to drink tea. I have already mentioned a tax upon bread, which, so far as it is consumed in farmhouses and country villages, is there levied in the same manner.

* Italics are those of Respondent

"The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the most general use. There can never be any doubt either concerning the goods which are subject to those duties, or concerning the particular duty which each species of goods is subject to. They fall almost altogether upon what I call luxuries, excepting always the four duties above mentioned, upon salt, soap, leather, candles, and perhaps, that upon green glass.

"The duties of customs are much more ancient than those of excise."

(Adam Smith then proceeds to discuss customs duties).

21. The other document is the Constitution of the United States of America and its exegesis in The Federalist.

22. The first clause of the 8th Section of the Constitution empowered Congress "to lay and collect taxes, duties, imposts and excises."

23. Certain chapters of The Federalist are taken up with the subject of the respective powers of the Federal and State authorities, which were conceded to be co-equal in respect of certain kinds of taxation, amongst others, what was referred to as internal taxation.

24. In Chapter 36, Mr. Hamilton, in dealing with this subject says:—

"the taxes intended to be comprised under the general denomination of internal taxes may be sub-divided into those of the direct and those of the *indirect* kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed as to the latter, by which must be understood duties and **excises on articles of consumption,* one is at a loss to conceive what can be the nature of the difficulties apprehended. The knowledge relating to them must evidently be of a kind that will either be suggested by the nature of the article itself or can easily be procured from any well informed man, especially of the mercantile class."

25. Is it not most probable that to the framers of our Confederation, who must have been very familiar with these docu-

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ments, the word excise would have had a perfectly precise and definite connotation, as being, firstly an indirect tax and, secondly, a duty on an article of consumption and that whether levied upon the manufacture, distribution, or consumption of the article?

26. According to every economist, the intention of the legislator, in imposing a duty of excise, is to reach the pocket of the consumer, by enhancing the price of the article, and thus to spread the tax over the whole body of consumers of the commodity.

27. Is it not most strained and artificial to suggest that if the duty is taken, in the first instance, from the consumer, instead of through the mediation of the manufacturer or retailer, the taxation is no longer a duty of excise, though the very pith and substance of an excise is thereby preserved, merely stripped of an unessential accessory?

28. The intimate association of ideas between excise and consumption is manifested by the references to the subject in the legal text books. Thus Blackstone says in his Commentaries in Volume 1 at page 318:—

> "directly opposite in its nature to this (customs) is the excise duty which is an inland imposition, paid sometimes upon the consumption of the commodity or frequently upon the retail sale which is the last stage before the consumption."

And in Stephen's Commentaries (17th Edition, Volume 1, page 272) is found a similar passage:—

> "*excise duties,* which are also controlled by the Commissioners of Customs and Excise, are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the customs duties; for they are an inland imposition, paid sometimes on the consumption of the commodity, frequently upon the retail sale."

It is to be observed that the first edition of Stephen's Commentaries was published in 1842.

29. From the very earliest times the exaction of the tax from the consumer has been the essence of an excise, although the particular method of its collection has varied.

30. The first excise act being 12 Car. II c. 24, after imposing by section 15 a number of duties upon liquors, provides by section 35 as follows:—

> "Provided always and be it enacted and ordained by the authority aforesaid, that no brewers or retailers of beer and ale, shall take any more in the price thereof, upon sale of the same, than according to the usual rates and prices: saving that every common brewer shall and may take and receive of all and every person and persons to whom he shall sell and deliver any ale or beer, the excise thereupon due as aforesaid, over and above the usual rates and prices."

31. Precisely the same method of direct collection from the consumer was adopted, 250 years later, by the Dominion Parliament, in the Special War Revenue Act Amendment Act 1920 (Statutes of Canada 1920 c. 71, s. 2, s. s. 3) which provides:

> "the excise taxes imposed by the preceding subsections shall be paid by the purchaser to the vendor at the time of sale and delivery for consumption or use . . . . . "

32. It is submitted that, viewed in the light of the principles established by the Board, the distinction between a payment of the tax directly by the consumer to the Crown on the one hand or through the mediation of the manufacturer or vendor on the other hand can have no real relevance in a consideration of the true nature of the tax.

33. Since under the Statute of Charles II. as well as under the Special War Revenue Act, and many statutes in between, a tax upon the consumer in respect of his consumption has invariably been treated and most frequently described in the legislation itself as a duty of excise, can it be successfully contended that the Fuel-oil Tax Act, which also imposes a tax, not on possession, but on consumption, differs from the category which has been established by the unbroken usage of centuries?

34. No distinction has ever been made between a tax levied upon the retailer and a tax levied upon the actual consumer. Thus in the case of Salt (5 W. & M. c. 7, s. 22), coal (9 & 10 W. III. c. 13, s. 13), and soap (10 Anne. c. 19, s. 11, s. 19) no distinction is drawn between those who sell and those who use those commodities: both alike are subject to the same tax, which in each case is an excise duty.

35. Again those who keep dogs or those who enjoy the benefits of carriages, servants, or armorial bearings are alike subject

to taxation in respect of the services which they themselves consume or enjoy and the legislation imposing these duties expressly refers to them as duties of excise (30 Vict. c. 5, s. 4), (32 and 33 Vict. c. 14, s. 18).

36 Again under the Inland Revenue Act (1880) (43 and 44 Vict. c. 20, s.s. 32, 33 and 34) it is not only those who brew beer for sale who are rendered liable to the excise duty but those who brew either for domestic use or consumption by their own labourers are expressly made subject to the same excise.

37. Furthermore, the whole institution of bonded warehouses was devised for the purposes of relieving the vendor or retailer from the obligation of paying excise duties until the commodities which they sell are actually on the point of consumption. Thus, the Excise Act, 1860 (23 and 24 Vict. c. 114) contains the following as section 122:—

> "A Distiller or Dealer may transfer Spirits deposited in his Name in a general Warehouse to a Purchaser, upon giving Notice in Writing of his Intention so to do to the Collector in whose Collection the Warehouse is situated; and upon such notice being given, and no Objection made by the Collector, the Transfer may be completed; and upon an Order to transfer being endorsed on such Notice by the Distiller or Dealer, and delivered to the Officer in charge of the Warehouse, he shall forthwith transfer the Spirits so sold from the Name of the Proprietor to the Name of the Purchaser in the Book kept by such Officer; and all such Spirits shall after such Transfer be discharged from all Claim in respect of any Duties, Penalties or Forfeitures to which the Distiller or Dealer from whom such Transfer has been made may be liable; **but no Spirits shall be delivered out of Warehouse for Home Consumption until Payment shall be made of the full Duties of Excise chargeable thereon.*"

38. This constitutes an enactment expressly imposing the excise duty on the consumer and must have been present to the attention of the legislators who enacted the British North America Act.

39. A similar provision is to be found in the statute of 27 and 28 Victoria, c. 12, s. 11.

40. And to turn to another indicium, the right of entry and search conferred by s. 6 of the Fuel-oil Tax Act (B.C. 1930 c. 71)

* Italics are those of Respondent

has been a feature of excise legislation from the earliest times. For instance, a similar provision is found in the Excise Management Act of 1827 (7 & 8 George IV, c. 53, s. 22) and is repeated in the Revenue Act of 1867 (30 and 31 Vict. c. 90, s. 10) which was passed in the same session as the British North America Act.

41. The same features are to be found in our own legislation.

42. Immediately following Confederation, the Act respecting Inland Revenue was passed on the 21st of December, 1867. This statute which is c. 8 of 31 Vict. commences by repealing all existing legislation as to excise duties in the former Provinces and then goes on to exact a series of excises in respect of a number of commodities specified in the Act.

43. What is significant is that it was considered necessary expressly to exempt from the Act, for instance, beer and tobacco manufactured for the use of the manufacturer. This is effected by subsections 3 and 4 of section 3 and shows, it is submitted, that the mere accident of a duty being imposed upon or payable by the actual consumer has no effect in removing such a duty from the category of an excise.

44. This statute also contains a series of provisions dealing with bonded warehouses and attention is particularly directed to section 102 which reads as follows:—

> "No goods shall be removed from a warehouse for consumption unless upon the payment of the full amount of duty accruing thereon and the duty so paid on spirits, malts and tobacco so taken out of the warehouse **for consumption* or which shall have directly gone for consumption shall not be refunded by way of drawback or otherwise upon the exportation of such spirits, malts or tobacco out of Canada."

45. Of equal significance is the Act passed in the following year, 1868, 31 Victoria, Chapter 50, imposing an excise tax on petroleum. By section 7 of this Act it is provided that:—

> "There shall be imposed, levied and collected on every wine gallon of refined petroleum, refined, manufactured or made in Canada, on or after the 29th day of April, in the present year, one thousand eight hundred and sixty-eight, **a duty of excise of 5c,* and the said duty shall be held to have been imposed on the day last mentioned."

46. It is submitted it will be difficult to distinguish between this statute and the Fuel-oil Tax Act, especially since section 5

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of the Fuel-oil Tax Act is anticipated in substance by section 5 of the Inland Revenue Act, 1868, now being referred to. And section 6 of the Fuel-oil Tax Act finds its prototype in section 17 of the Inland Revenue Act, 1868.

47. There is incidentally another argument upon which the Respondent wishes to lay great stress and which may be derived from the consideration of another one of the heads of enumeration in section 92. Head 9 empowers the Provincial Legislature to make laws in relation to "shops, saloons, taverns, auctioneers and other licences in order to the raising of a revenue for provincial, local or municipal purposes." It has been expressly decided in *Brewers and Maltsters' Association* vs. *Attorney-general for Ontario* (1896) 66 L.J.P.C., p. 35, that the money to be raised by means of these licenses is of the nature of direct taxation. Why then it may be asked is a specific head required for this class of taxation which might be assumed to fall under head 2, being as it is, direct taxation within the Province. The answer clearly is that the method of taxation permitted by head 9, while direct, is an instance of the imposition of an excise duty and, therefore, required a specific power to be conferred upon the Provincial Legislature, because though direct, the exaction partook of the nature of an excise.

48. Even according to the definition of the economists themselves, the revenue sought to be collected by the Fuel-oil Tax Act may be described as of the nature of indirect taxation. In *Security Export Co.* v. *Hetherington* (1923) S.C.R., Mr. Justice Duff said at page 558:—

> "The principle of distinction adopted, according to Professor Bastable by 'practical financiers' which regards those taxes as direct that are levied on 'permanent and recurrent occasions' and those as indirect which are levied upon 'occasional and particular events' would equally exclude this tax (i.e., an import tax) from the class of direct taxes."

49. This, it is submitted clearly differentiates the personal property tax from the Fuel-oil Tax and conclusively prevents any ascription of the latter to the category of personal taxes. Clearly, personal property taxes are levied on permanent and recurrent occasions while taxes on consumption are equally clearly levied upon occasional and particular events.

Record, pp. 20-39.

50. The Chief Justice of the Supreme Court and the majority of the Court of Appeal accepted these submissions and held that the Fuel-oil Tax Act was invalid.

51. It is submitted that their decision is correct for the following:—

REASONS:—

(1) Because the tax imposed by the Fuel-oil Tax Act is either an import duty or a duty of excise:

(2) Because the tax is not an instance of direct taxation within the Province for the raising of a revenue for provincial purposes:

(3) Because the Act constitutes an interference with the regulation of trade and commerce.

All of which is respectfully submitted.

Vancouver, B.C., the 29th of April, 1933.

"E. C. MAYERS,"
Counsel for the Respondent.

No. 32 of 1933.

In the Privy Council

On Appeal from the Court of Appeal
for British Columbia

BETWEEN:

THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA SUING ON BEHALF OF HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA,
(Plaintiff) Appellant,

AND:

KINGCOMBE NAVIGATION COMPANY LIMITED,
(Defendant) Respondent.

Case for Respondent

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