Privy Council Appeal No. 32 *of* 1933.

The Attorney-General of British Columbia - - - *Appellant*

v.

The Kingcome Navigation Company, Limited - - - *Respondent*

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH OCTOBER 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by* LORD THANKERTON.]

This is an appeal from the judgment of the Court of Appeal for British Columbia dated the 7th March 1933, which affirmed, with one dissentient, the judgment of the Chief Justice of the Supreme Court of British Columbia dated the 11th January 1933, by which the appellant's action for recovery of tax from the respondent was dismissed.

The appellant seeks to recover the tax by virtue of the provisions of the Fuel-oil Tax Act, Statutes of British Columbia, 1930, Chapter 71, as amended by the Fuel-oil Tax Act Amendment Act, Statutes of British Columbia 1932, Chapter 51. The issue in the case is whether the legislation in question is *ultra vires* of the Provincial Legislature in respect either (*a*) that the taxation imposed thereby is not "direct taxation" within the terms of section 92 (2) of the British North America Act, 1867, or (*b*) that it invades the exclusive right of the Dominion under Section 91 (2) to legislate for the regulation of trade and commerce.

The material provisions of the Act of 1930, as amended by the Act of 1932, are as follows :—

" 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.

" 3. The tax imposed by this act shall be paid and collected at such times and in such manner as the regulations may prescribe.

" 4. The amount of any tax imposed by this act may be recovered by action in any Court as for a debt due to the Crown in right of the Province, and the Court may make an order as to the costs of the action in favour of or against the Crown.

" (2) In every action for the recovery of any tax imposed by this act, the burden of proving the quantity of fuel-oil consumed by the defendant, and of proving that the tax has been paid in respect of the fuel-oil in question, shall be upon the defendant. (1932, Chap. 51, s.2.)

" 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.

" 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.

" 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."

The repondent challenges the validity of the tax on three grounds, viz. : (*a*) That in its nature it is either an import duty or a duty of excise, and therefore falls into the category of indirect taxes ; (*b*) that it is not direct taxation in respect that the

burden may be passed on ; and (*c*) that it invades the legislative sphere of the Dominion Parliament in regard to regulation of trade and commerce.

The respondent's first contention is that the tax here in question is a customs or excise duty, according to the general understanding current in 1867, and that all customs and excise duties are outwith the competence of a provincial legislature, apart from any question whether the tax is " demanded from the very persons who it is intended or desired should pay it." For this construction he prays in aid section 122 of the Act of 1867, and, in order to establish that the present tax was in the nature of a customs or excise duty, he relied on the definitions of political economists and the course of custom and excise legislation in this country up to 1867. In their Lordships' opinion this contention is inconsistent with the decisions of this Board, which go back to the year 1878, and have settled that the test to be applied in determining what is " direct taxation " within the meaning of section 92 (2) of the Act of 1867 is to be found in Mill's definition of direct and indirect taxes.

In *Attorney-General for Quebec* v. *Queen Assurance* (1878), 3 App. Cas. 1090, a provincial tax on policies of assurance was held to be of the nature of a stamp duty and not a license duty, and to be an indirect tax. The duty was thus described in the judgment of the Board : " They say on the face of the statute, ' the price of each license shall consist,' and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them ; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them ; but whoever does it complies with the Act." It is difficult to conceive a stamp duty to which such a description would not apply, and the Board found it unnecessary to consider the scientific definition of " direct taxation."

In *Attorney-General for Quebec* v. *Reed* (1884), 10 App. Cas. 141, a provincial duty of 10 cents upon every exhibit filed in Court in any action depending therein was held not to be direct taxation, and Mill's definition was applied. Lord Selborne, in delivering the judgment of the Board, said : —

> " 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. . . .As in all other cases of indirect taxation, in particular instances, by particular bargains or 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 section of the 92nd clause of the Act in question."

It is clear that " ultimate incidence " is not there used in the sense of the political economists, but refers to the ultimate incidence among the parties to the transaction in respect of which the tax is imposed.

Mill's definition was definitely established as the most satisfactory test in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, in which a provincial tax on banks varying in amount with the paid-up capital and with the number of their offices, was held to be direct taxation. It may be noted that an argument was unsuccessfully submitted to the effect that the tax would, according to the views of the English legislature, be regarded as a license or excise duty, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term " direct taxation " in section 92 (2). The following passage may be quoted from the judgment of the Board, delivered by Lord Hobhouse, viz. :—

" After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows :—

" ' Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another ; such are the excise or customs.

" The producer or importer of a commodity is called upon to pay a tax upon it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.'

" It is said that Mill adds a term—that to be strictly direct a tax must be general ; and this condition was much pressed at the Bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point ; nor would they presume to say whether for economical purposes such a condition is sound or unsound ; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind ; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

" Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the Appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act."

On the terms of that judgment it might have been open to the present respondent to maintain that Mill's definition was not

the only alternative as a test, but such a contention is excluded by later decisions of the Board, to which their Lordships will next refer.

In *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* [1897] A.C. 231, the Liquor Licence Act of Ontario, which required every brewer and distiller to obtain a licence thereunder to sell wholesale within the province, was held to be *intra vires* of the provincial legislature (*a*) as being direct taxation under section 92 (2) and (*b*) as comprised within the term " other licences " in sub-section 9 of the same section. There was a uniform fee of $100 in all cases. This decision disposes of any argument that licences were expressly mentioned in sub-section 9, because they are not direct taxation, and would not have been included in sub-section 2. Further, such a duty would be treated for collection as an excise duty in this country. The decision in *Lambe's* case was followed.

In the case of *Cotton* v. *Rex* [1914], A.C. 176, which related to succession duties, Lord Moulton, in delivering the judgment of the Board, pointed out that until the Act of 1867 was passed the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of the colonies was concerned, and that there could not be said to have existed any recognized definition of either class which was universally accepted; but that, as soon as the Act was passed it became essential that the Courts should, for the purposes of that statute ascertain and define the meaning of the phrase " direct taxation " as used in such legislation. After reviewing the three cases of *Reed*, *Lambe* and *Brewers and Maltsters' Association* already referred to, Lord Moulton stated " Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase " direct taxation " in s. 92 of the British North America Act, 1867, is substantially the definition quoted above (*i.e.*, in *Lambe's* case) from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

These decisions, in their Lordships' opinion, make clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax. Among the numerous subsequent decisions of the Board, the respondent was only able to refer to two, as containing any suggestion to the contrary, viz., *City of Halifax* v. *Fairbank's Estate* [1928], A.C. 117, and *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co., Ltd.* [1930], A.C. 357.

In *Fairbanks'* case a city charter, enacted by the provincial legislature, imposed a " business tax " to be paid by every occupier of real property for the purposes of any trade, profession or other calling carried on for the purposes of gain. Where the

property was let to the Crown or to any person exempt from taxation, the owner was to be deemed to be the occupier, and was to be assessed for business tax according to the purposes for which it was occupied. The property in question was let to the Crown, and the respondent estate, as owner, had been assessed to the tax. It was held that the tax was direct taxation even though the owner probably would seek to pass it on to the tenant. Lord Cave, who delivered the judgment of the Board, stated in regard to the Act of 1867 :—

> " 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. . . .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 for provincial purposes to the province, it must surely have intended that the taxation, for those purposes, 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.
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> " What then is the effect to be given to Mill's formula 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 income, 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 recognised as belonging to one class to a different class of taxation."

In this passage Lord Cave is dealing with the argument that the probability of the tax being passed on by arrangement rendered the tax an indirect one, and his rejection of that argument is in conformity with the previous decisions of the Board. As has already been pointed out the ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the

transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon that one of the parties to the trading in the particular commodity who is selected as the taxpayer. This is brought out in the second paragraph of Mill's definition, and is true of the typical custom and excise duties referred to by Lord Cave. Again, taxes on property and income are imposed in respect of the particular taxpayer's interest in property or the taxpayer's own income, and they are a peculiar contribution upon him, and it is intended and desired that he shall pay it, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists. The decision in *Fairbanks'* case is in accordance with the principles already stated by their Lordships as those to be derived from the earlier decisions of the Board.

In the *McDonald Murphy Lumber Company's* case a provincial tax upon all timber cut in the province, with a rebate of nearly the whole tax in the case of timber used or manufactured in the province was held to be in its nature an export tax " levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions." The tax was held to be *ultra vires* of the provincial legislature for the reasons stated in the following passages of the judgment of the Board, which was delivered by Lord Macmillan :—

> " The appellant admitted that the imposition of cutoms and excise duties is a matter within the exclusive control competence of the Dominion Parliament, as, indeed, plainly appears from s. 122 of the British North America Act. The reason for this is, no doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes. If then an export tax falls within the category of duties of customs and excise there is an end of the question. Their Lordships are of opinion that according to the accepted terminology and practice of fiscal legislation and administration export duties are ordinarily classed as duties of customs and excise. . . .Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them. . . .While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax, which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the

first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristics of an indirect tax as defined by authoritative decisions."

It is clear that this decision applied Mill's definition, as adopted by the previous decisions of the Board, as the test, and that the result was in accordance with those decisions. The present respondent relied on the reference to section 122 of the Act of 1867 as being of assistance to his argument. In their Lordships' opinion the customs or excise duties on commodities ordinarily regarded as indirect taxation, referred to in the judgments in *Fairbanks'* case and the *McDonald Murphy Lumber Company's* case, are duties which are imposed in respect of commercial dealings in commodities, and they would necessarily fall within Mill's definition of indirect taxes. They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a licence duty, such as was considered in *Lambe's* case. Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted. Section 122 of the Act merely provided for the temporary continuation of the then existing legislation as regards customs and excise, and the respondent was unable to point to anything in that legislation which would fall outside the above definition of customs and excise duties. It follows that the tax here in question must be tested by Mill's definition, as adopted by the decisions of the Board.

Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot effect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of section 92 (2) of the British North America Act.

The last contention of the respondent was that the Fuel-oil Tax Act invaded the province of the Dominion Parliament, in that it regulated trade and commerce. Except that the Act

taxes persons in respect of a commercial commodity, which is not produced in its raw state within the Province, there is nothing in the Act to suggest that its purpose was the regulation of trade and commerce, and the respondent has to rely on extrinsic circumstances such as the competition of coal in the fuel market. But, if the taxation falls within the terms of section 92 (2), that is, if it is direct taxation within the province in order to raise a revenue for provincial purposes, and it does not purport to regulate trade and commerce, there is no reason to limit the legislative power expressly conferred on the province. "If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament" (*Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, at p. 587). The case of *Lawson* v. *Interior Fruit and Vegetable Committee* (1931), S.C.R. 357, affords an interesting contrast, for there, on the face of the statute, the provincial legislature sought to regulate the import of commodities.

Their Lordships are therefore of opinion that the appeal should be allowed, that the judgments appealed from should be set aside, and that the appellant is entitled to decree for the amount in suit, and their Lordships will humbly advise His Majesty accordingly. The appellant will have the costs of this appeal and his costs in the Courts below.

In the Privy Council.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

v.

THE KINGCOME NAVIGATION COMPANY, LIMITED.

DELIVERED BY LORD THANKERTON.

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