Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeals of

The Bank of Toronto

versus

Lambe,

The Merchants' Bank of Canada

versus

Lambe,

The Canadian Bank of Commerce

versus

Lambe,

and The North British Mercantile Insurance Company and others

versus

Lambe,

from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 9th July 1887.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD BAGGALLAY.
SIR RICHARD COUCH.

These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act 1867 which apportion legislative powers between the Parliament of the Dominion and the Legislatures of the Provinces. It is undoubtedly a case of great constitutional importance, as the Ap-

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pellants' Counsel have earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary courts of law, who must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes. A number of incorporated Companies are resisting payment of a tax imposed by the Legislature of Quebec, and four of them are the present Appellants. It will be convenient first to deal with the case of the Bank of Toronto, which was argued first.

In the year 1882 the Quebec Legislature passed a statute entitled "An Act to impose "certain direct taxes on certain commercial "Corporations." It is thereby enacted that every Bank carrying on the business of banking in this province; every Insurance Company accepting risks and transacting the business of insurance in this province; every incorporated Company carrying on any labour, trade, or business in this province; and a number of other specified Companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed is a sum varying with the paid up capital, and an additional sum for each office or place of business.

The Appellant Bank was incorporated in the year 1855 by an Act of the then Parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount belonging to other persons and the amount disposable elsewhere.

The Bank resists payment of the tax in question on the ground that the Quebec Legislature had no power to pass the statute which imposes it. Mr. Justice Rainville sitting in the Superior Court took that view, and dismissed an action brought by the Government Officer, who is the Respondent. The Court of Queen's Bench, by a majority of three Judges to two, took the contrary view, and gave the Plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested its judgement were as follows:—That the tax is an indirect one; that it is not imposed within the limits of the province; that the Parliament has exclusive power to regulate banks; that the Provincial Legislature can tax only that which exists by their authority or is introduced by their permission; and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the Parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, and that it is also a matter of a merely local or private nature in the province, and so falls within Class 16 of the matters of provincial legislation. It has not been contended at the bar that the Provincial Legislature can tax only that which exists on their authority or permission. And when the Appellants' Counsel were proceeding to argue that the tax did not fall within Class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add very ably, at the bar.

To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation

allowed by Class 2 of Section 92 of the Federation Act, viz., "Direct taxation within the province "in order to the raising of a revenue for pro- "vincial purposes"? Secondly, if it does, are we compelled by anything in Section 91 or in the other parts of the Act, so to cut down the full meaning of the words of Section 92 that they shall not cover this tax?

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, viz., 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.

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 on 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.

Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec Legislature must have intended and desired that the very Corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the Bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the Bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of

mercantile dealings the Bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the Bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government. For these reasons their Lordships hold the tax to be direct taxation within Class 2 of Section 92 of the Federation Act.

There is nothing in the previous decisions on the question of direct taxation which is adverse to this view. In the case of the Queen Insurance Company, 3 App. Ca. 1090, the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under Class 9 of Section 92, which relates to licenses. In Reed's case, 10 App. Ca. 141, the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In Severn's case, 2 Sup. Court of Canada p. 70, the tax in question was one for licenses which by a law of the Legislature of Ontario were required to be taken for dealing in liquors. The Supreme Court held the law to be *ultra vires*, mainly on the grounds that such licenses did not fall within Class 9 of Section 92, and that they were in conflict with the powers of Parliament under Class 2 of Section 91. It is true that all the Judges expressed opinions

that the tax, being a license duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a license duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the province. It is urged that the Bank is a Toronto Corporation, having its domicile there, and having its capital placed there; that the tax is on the capital of the Bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that Class 2 of Section 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This Bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the Bank, any more than its profits. The Bank itself is directly ordered to pay a sum of money; but the Legislature has not chosen to tax every bank, small or large, alike, nor to leave the amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province, it is for the Legislature and not for Courts of law to judge of its expediency.

Then is there anything in Section 91 which operates to restrict the meaning above ascribed to Section 92 ? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the Provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two Sections was noticed by way of illustration in the case of Parsons, 9 L. R. App. Ca. Their Lordships there said (page 108) :—" So ' the raising of money by " ' any mode or system of taxation ' is enumerated " among the classes of subjects in Section 91 ; " but, though the description is sufficiently large " and general to include ' direct taxation within " ' the Province, in order to the raising of a " ' revenue for provincial purposes,' assigned to " the Provincial Legislatures by Section 92, it " obviously could not have been intended that, in " this instance also, the general power should " override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within Class 2, viz. the regulation of trade and commerce ; and within Class 15, viz. banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of

banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in Severn's case it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in Parsons's case, 7 App. Ca., and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the Provincial Legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in Parsons's case, they would be straining them to their widest conceivable extent.

Then it is suggested that the Legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning

of Classes 2 and 9, is, in their Lordships' judgement, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great Judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution Chief Justice Marshall found one of those limits at the point at which the action of the State Legislature came into conflict with the power vested in Congress. The Appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the Provincial Legislatures under Section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under Section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor

General. And the question they have to answer is whether the one body or the other has power to make a given law. 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 otherwise would be open to the Dominion Parliament.

It only remains to refer to some of the grounds taken by the learned Judges of the Lower Courts, which have been strongly objected to at the bar. Great importance has been attached to French authorities who lay down that the *impôt des patentes*, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. And it has been suggested that the Provincial Legislatures possess powers of legislation either inherent in them, or dating from a time anterior to the Federation Act and not taken away by that Act. Their Lordships have not thought it necessary to call on the Respondents' Counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgements below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration. And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the Provincial Legislatures rests with the Parliament.

The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench. And they will humbly

advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favour of the Appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favour of the other Banks. The Insurance Company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favour of the Banks. The cases have been treated as substantially identical in the Courts below, and their Lordships will take the same course with respect to all of them.

The Appellants in each case must pay the costs of the appeal.