Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Brewers and Maltsters Association of Ontario v. *The Attorney-General for Ontario, from the Court of Appeal for the Province of Ontario; delivered 6th February* 1897.

Present:

LORD HERSCHELL.
LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Herschell.*]

This is an appeal from a judgment of the Court of Appeal for the Province of Ontario upon certain questions referred by the Lieutenant Governor in Council pursuant to the provisions of the 53rd Victoria chapter 13.

The questions referred were the following:—

(1.) Is Sub-section 2 of Section 51 of the Liquor Licence Act Revised Statutes of Ontario chapter 194 requiring every brewer distiller or other person duly licensed by the Government of Canada as mentioned in Sub-section 1 to first obtain a license under the Act to sell by wholesale the liquor manufactured by him when sold for consumption within the province, a valid enactment?

(2.) Has the Legislature of Ontario power either in order to raise a revenue for provincial purposes or for any other

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object within provincial jurisdiction to require brewers distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented spirituous or other liquors to take out licenses to sell the liquors manufactured by them and to pay a license fee therefor?

(3.) If so, must one and the same fee be exacted from all such brewers distillers and persons?

The present appeal relates only to the answers given to the first two questions submitted.

The enactment the validity of which is in question requires every brewer and distiller to obtain a license to sell wholesale within the province. The license fee is imposed "in order "to the raising of a revenue for provincial "purposes." It is a uniform fee of $100 in all cases.

The determination of the appeal depends on what is the true meaning and effect of the 2nd and 9th sub-sections of Section 92 of the British North America Act. The judgment appealed from can only be supported by establishing either that the fee imposed is "direct taxation" within the meaning of Sub-section 2 or that the license is comprised within the term "other licenses" in Sub-section 9.

The question what is "direct taxation" within the meaning of Sub-section 2 does not come now before this Board for consideration for the first time. In the case of the *Bank of Toronto* v. *Lambe*, L.R. 5 App. Ca. 575, it was necessary to put a construction on those words. The Legislature of Quebec had imposed a tax on every Bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or

place of business. The question at once arose, was this "direct taxation"? It was contended that the tax was not direct but indirect. All the arguments in favour of the view that the taxation was indirect, which have been forcibly put before your Lordships by the learned Counsel for the Appellants in the present case were then pressed upon this Board in vain. The legislation impeached was held valid on the ground that the tax imposed was direct taxation in the province within the meaning of Sub-section 2.

Their Lordships are quite unable to discover any substantial distinction between the case of *The Bank of Toronto* v. *Lambe* and the present case. So far as there is any difference it does not seem to them to be favourable to this appeal.

Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious *indicia* of direct and indirect taxation, which were likely to have been present to the minds of those who passed the Federation Act.

The definition referred to is in the following terms:—"A direct tax is one which is demanded "from the very person 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 as the excise or customs."

In the present case as in Lambe's case their Lordships think the tax is demanded from the

very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax.

It was argued that the provincial Legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise.

The view which their Lordships have expressed is sufficient to dispose of this appeal. But their Lordships were not satisfied by the argument of the learned Counsel for the Appellants that the license which the enactment renders necessary is not a license within the meaning of Sub-section 9 of Section 92. They do not doubt that general words may be restrained to things of

the same kind as those particularised but they are unable to see what is the *genus* which would include "shop saloon tavern" and "auctioneer" licenses and which would exclude brewers' and distillers' licenses.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The Appellants must pay the costs of the appeal.