Privy Council Appeal No. 79 *of* 1926.

The City of Halifax - - - - - - - - *Appellant*

v.

The Estate of James P. Fairbanks and another - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 18TH OCTOBER, 1927.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD WRENBURY.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* THE LORD CHANCELLOR.]

The substantial question raised in this appeal is whether a tax imposed by the City of Halifax on the estate of John P. Fairbanks as the owner of certain premises in the City is valid, or whether (as the Supreme Court of Canada has held) it is void as not being "direct taxation" within the meaning of section 92 (ii) of the British North America Act.

The City of Halifax levies under its Charter three taxes called respectively a business tax, a household tax and a real property tax. The business tax is payable by every person occupying real property for the purpose of any trade, profession or calling for purposes of gain, and is assessed on 50 per cent. of the capital value of such property. The household tax is payable by every occupier of any real property for residential purposes, and is assessed on 10 per cent. of the capital value of such property. The real property tax is a tax on the owners of all real property and is assessed on its capital value. By section 391 of the Charter real property which is the property of His Majesty used for Imperial Dominion or Provincial purposes, or which is used for certain

charitable and other public purposes there described, is exempt from real property tax. By section 392 no household tax or business tax is to be paid by the occupiers of any of the properties declared exempt from real property tax if such occupiers are the owners or lessees thereof and are occupying the same solely for the purposes of the association or other body specified as entitled to exemption. By section 394 it is enacted that property let to the Crown or to any person, corporation or association exempt from taxation, shall be deemed to be in the occupation of the owner thereof for business or residential purposes, as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

The respondent estate is the owner of certain ground floor premises in the City and has let them to His Majesty the King, represented by the Minister of Railways and Canals of Canada, for a term of years, the lease providing that the demised premises shall only be used as a ticket office of the Canadian National Railways, and that the lessee shall pay the business taxes, if any; and the property is in fact used as a ticket office. The respondent estate, having been assessed and rated to business tax in respect of these premises, appealed to the Court of Tax Appeals for the City of Halifax, which confirmed the assessment, and the decision was affirmed by the Supreme Court of Nova Scotia; but on a further appeal to the Supreme Court of Canada that Court (by a majority) set aside the decision of the Courts in Nova Scotia, and held the tax to be *ultra vires* and void. Hence the present appeal.

In the course of the argument for the respondent estate it was suggested that an occupation by the Crown cannot be held to be for purposes of gain, and accordingly that the premises in question were not assessable to the business tax; but in their Lordships' view there is no substance in this argument. A business is undoubtedly carried on upon the premises, though on behalf of the Crown, and they are therefore within the ambit of the tax. It was also urged that the tax in dispute is a tax on property belonging to Canada, and so is void under section 125 of the British North America Act; but their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada. The real and substantial question to be decided is whether the tax is a direct tax falling within the authority of section 92 (ii) of the British North America Act, or whether it is an indirect tax and so beyond the powers of the Province under that section; and it was because the Supreme Court held the tax to be indirect that they declared the respondent not legally liable for payment.

The reasons for the decision of the majority of the Supreme Court of Canada were stated by Mr. Justice Newcombe in a lucid judgment, in the course of which he relied upon the often quoted statement of John Stuart Mill ("Political Economy," ed. 1886,

vol. 2, page 415), that "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it," while "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." The learned Judge held that such an expectation or intention might be inferred from the form in which the tax is imposed, or from the results which in the ordinary course of business transactions must be held to have been contemplated; and he expressed the opinion that in the present case, where the owner is made liable for a tax which is imposed in respect of the purposes for which the tenant occupies the premises, it was only to be expected that the landlord would exact indemnity from the tenant. He held, therefore, that the tax was an indirect tax upon the tenant and beyond the powers of the Provincial Legislature. On the other hand, Mr. Justice Duff, who dissented from the judgment of the Court, called attention to the great difficulty of determining the actual incidence of local rates on occupiers, building owners and land owners; and he quoted the opinion of Professor Seligman ("Income Tax," 1914), that the incidence of such rates in an urban district is determined by a great variety of factors depending on the demand for houses or business premises and the general state of trade. He declined therefore to act upon any general theory as to such incidence, and held the tax to be direct.

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, L.R. 12 A.C. 575 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, 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 in direct 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 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 (ii) 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 recognised 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, page 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 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.

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 tax payer 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 authorised 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 Mr. Justice Newcombe 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. *The King* (L.R. 1914, A.C. 176), which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognised 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. On the other hand, the case of *City of Montreal* v. *Attorney-General for Canada* (L.R. 1923, A.C. 136), where land in Montreal belonging to the Crown in right of the Dominion and let to a tenant was held to have been validly assessed under a section of the City Charter which enacted that persons occupying for commercial purposes land belonging to the Federal Government should be taxed as if they were the owners, appears to be directly in point and to support the contention of the appellant in this case.

Upon the whole their Lordships have come to the conclusion that the tax here in dispute is direct taxation within the meaning of the statute, and accordingly that this appeal should be allowed and the decision of the Supreme Court of Nova Scotia restored, and that the respondent estate should be ordered to pay the costs of the appellant here and below; and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE CITY OF HALIFAX

v.

THE ESTATE OF JAMES P. FAIRBANKS AND ANOTHER.

DELIVERED BY THE LORD CHANCELLOR.

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