1954

*Feb. 23, 24, 25
*May 19

G. NEIL PHILLIPS and JAMES TAYLOR (*Plaintiffs*) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF SAULT STE. MARIE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Municipal Assessment of land belonging to Crown in right of Canada—Validity of tax levied on persons occupying such land to carry out duties as servants of Crown—Whether indirect tax—B.N.A. Act (Imp.) s. 125—The Assessment Act, R.S.O., 1950, c. 24, ss. 4(1), 32(1), (4).

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Fauteux JJ.

The appellants occupied houses and premises owned by the Crown in the right of Canada where they were required to live while carrying out their duties as Crown servants. Deductions from their salaries were made bearing no relation to the rentable value of the properties. The right of occupancy terminated with their employment. The respondent municipality pursuant to s. 32(1) of the Assessment Act, R.S.O., 1950, c. 24, assessed the appellants as tenants of land owned by the Crown to whom rent or valuable consideration was paid in respect of such land. The assessments and levies were upheld by the lower courts. The appellants appealed on the grounds that the assessments made and taxes levied were on lands belonging to Canada and invalid by virtue of s. 125 of the *British North America Act,* or in the alternative, that both the assessments and taxes were personal, and in so far as they purported to apply to servants of the Crown in the right of Canada, ultra vires as being a law levying an indirect tax, or as being a law which in pith and substance was not in relation to any of the classes of subjects assigned exclusively to the Legislatures of the Provinces by s. 92 of the B.N.A. Act.

Held: 1. That under s. 32(1) of the Assessment Act (Ont.) the assessor places a value on Crown property for tax purposes but the person assessed in respect of the land is not the Crown but the "tenant" who is the one who pays the tax. The value of the land is the measure of the tax, but the Act does not make the land liable to taxation and, therefore, does not conflict with s. 125 of the *B.N.A. Act.*

2. That the tax is clearly direct. The tenant is the person intended by the Legislature to pay the tax for which he is liable, and it is he who eventually bears the burden of it. That as a result of an agreement or private bargain it be paid by some one else does not change the nature of the tax demanded directly from the tenant. The ultimate incidence of the tax is the main factor in the determination of its classification. *Bank of Toronto* v. *Lambe* 12 App. Cas. 575; *A.G. for B.C.* v. *C.P.R.* [1927] A.C. 934 at 938; *Rex* v. *Caledonia Collieries Ltd.* [1928] A.C. 358 at 361; *Atlantic Smoke Shops* v. *Conlon* [1943] A.C. 550 at 564.

APPEAL, by leave of the Court of Appeal for Ontario, from the judgment of that Court (1) affirming the judgment of Gale J. (2) dismissing an action for a declaration that the assessments made by the respondent against the appellants in respect of lands occupied by them were invalid.

C. F. H. Carson, Q.C. W. R. Jackett, Q.C. and *Allan Findlay* for the appellants and the Attorney General of Canada.

W. H. G. Bennett for the respondent.

C. R. Magone, Q.C. and *D. M. Treadgold, Q.C.* for the Attorney General for Ontario.

(1) [1953] O.R. 264; 3 D.L.R. 50. (2) [1952] O.R. 655; 4 D.L.R. 237.

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The judgment of the Court was delivered by:—

TASCHEREAU J.:—Under the authority of The Ontario Assessment Act (R.S.O. 1950, c. 24), the Corporation of the City of Sault Ste. Marie assessed the appellants in respect of the houses and premises owned by the Crown in the right of Canada, in which the appellants are required to reside in the course of their employment, in order to carry on more effectively their duties as Crown servants.

The relevant sections of The Assessment Act are the following:—

Exemptions:

4. All real property in Ontario shall be liable to taxation, subject to the following exemptions:

1. Lands or property belonging to Canada or any Province.

* * *

32. (1) Notwithstanding paragraph 1 of section 4, the tenant of land owned by the Crown where rent or any valuable consideration is paid in respect of such land and the owner of land in which the Crown has an interest and the tenant of such land where rent or any valuable consideration is paid in respect of such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person.

(*a*) For the purposes of this subsection,

(i) "tenant", in addition to its meaning under clause *o* of section 1, also includes any person who uses land belonging to the Crown as or for the purposes of, or in connection with his residence, irrespective of the relationship between him and the Crown with respect to such use.

(4) In addition to the liability of every person assessed under subsection 1 or 3 to pay the taxes assessed against him, the interest in such land, if any, of every person other than the Crown and the tribe or body of Indians for which it is held in trust or any member thereof, shall be subject to the lien given by section 98 and shall be liable to be sold or vested in the municipality for arrears of taxes. R.S.O. 1950, c. 24, s. 32.

In their action, the plaintiffs have asked for a declaration that the assessments made against them are invalid and of no legal force or effect, because they are assessments of property of the Crown, and that taxes levied on those assessments are taxes on "Lands and Property belonging to Canada", and consequently invalid by virtue of s. 125 of the *B.N.A. Act*. Alternatively, if these assessments are personal assessments, and if such taxes are personal taxes, the provisions of the Act authorizing them are *ultra vires*, as invading the field of indirect taxation, exclusively reserved to the Federal Parliament. Mr. Justice Gale dismissed the action, and the Court of Appeal, Mr. Justice Henderson

dissenting, confirmed that judgment. The Attorney General of Canada, and the Attorney General of Ontario were both notified of these proceedings and were represented by counsel.

The law as it now reads was amended in 1950 (Ont. c. 3, s. 6), following a judgment of the Court of Appeal of Ontario (*Stinson* v. *The Town of Middleton* (1), which held in a similar case, that the Act prescribed a tax on land only and that the plaintiffs were not "tenants" of their houses within the meaning of the law.

In 1950, the Legislature defined the word "tenant", as it is now found in s-s. 32(1)(*a*) (*supra*) and the words "the lands" in s-s. 4 were struck out, and the word "him" (*supra*) was substituted therefor.

It is common ground, that as a result of this amendment, the appellants are "tenants" within the meaning of the Act, because they are persons who use land belonging to the Crown, in connection with their residence. But it is argued on behalf of the appellants, and of the Attorney General of Canada, that the amendment to s. 32, s-s. (1)(*a*) has not the effect of changing the nature of this tax which remains a land tax on federal property, and therefore, *ultra vires*.

There can be no doubt that under s. 32(1), the assessor places a value on Crown property for tax purposes, but the person assessed in respect of the land is not the Crown but the "tenant" who is the one who pays the tax. The value of the land is the measure of the tax, but the Act does not make the land liable to taxation and, therefore, does not conflict with s. 125 of the *B.N.A. Act*. Subsection 4 of s. 32 makes this provision clear, when it says that in addition to the liability of every person assessed to pay the taxes *assessed against him*, the interest in such land, *if any*, may be sold, etc. . . . In my view this seems to be a clear indication that what is contemplated is a tax levied against the tenants, for which their personal liability only is engaged, leaving the land free of all encumbrances, if the tenants have no interest in it. Here, the tenants have no interest in the land, and it is therefore not liable to be sold or vested in the municipality for arrears of taxes that may be due by the tenants.

(1) [1949] O.R. 237.

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Taschereau J.

That the occupier of land owned by the Crown may be assessed in respect of the land, and that the taxes payable by him shall be based on that value, is a proposition that can no longer be challenged. In *Cochrane* v. *Cowan* (1), Chief Justice Meredith said:—

> I see no reason why a Provincial Legislature may not provide that, in assessing the interest of an occupant of Crown lands or of any other person in them, it shall be assessed according to the actual value of the land, or in other words that the taxes payable by him shall be based upon that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land.

This statement of the law was approved by the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (2). *Vide* also *Smith* v. *Vermillion Hills* (3), *City of Vancouver* v. *Attorney General of Canada et al* (4)).

The second point raised by the appellants is that if the tax imposed is a personal tax, it is an indirect tax. The contention is that "the normal effect and tendency" of the tax in question, will be for it to be passed by the Crown servants, from whom it is demanded, to the Crown. I do not think that this proposition is sound. It is a well known principle that a tax is direct if it is demanded from the very person who it is intended or desired, shall pay it, and it is indirect, if it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. The ultimate incidence of the tax is the main factor in the determination of its classification. *Bank of Toronto* v. *Lambe* (5), *Attorney General for British Columbia* v. *C.P.R.* (6), *Rex* v. *Caledonian Collieries Ltd.* (7), *Atlantic Smoke Shops* v. *Conlon* (8), *Atlantic Smoke Shops* v. *Conlon* (9).

In the present case, I believe that the tax is clearly direct. The tenant is the person intended by the Legislature to pay the tax for which he is made liable. I can see no expectation or intention that he shall pass it and indemnify himself. It is he who eventually bears the burden of it. It

(1) (1921) 50 O.L.R. 169 at 173.
(2) [1923] A.C. 136 at 143.
(3) [1916] 2 A.C. 569 at 573.
(4) [1944] S.C.R. 23.
(5) (1887) 12 App. Cas. 575.
(6) [1927] A.C. 934 at 938.
(7) [1928] A.C. 358 at 361.
(8) [1941] S.C.R. 670.
(9) [1943] A.C. 550 at 565.

may be that as a result of an agreement, or as Martin J.A. said in *Rex ex Rel. Sinclair* v. *Gebhart* (1), as a result of a "private bargain", the tax will be paid by someone else, but this does not change the nature of the tax which is demanded directly from the tenant. In the *Sinclair* case (cited *supra*) it was held that a tax imposed upon pedlars, was a direct tax, although the pedlar could recoup himself by charging a higher price for his goods, or by being reimbursed by his principals.

Counsel for the respondent submitted that the issues in this case were *res judicata*. Each of the appellants appealed to the Court of Revision of the City of Sault Ste. Marie, under the provisions of the said Assessment Act, against the assessments made upon the sole ground that they were not assessable in respect of their use of the lands, and the assessments were confirmed. Each appellant thereupon appealed against the decision of the Court of Revision to the Judge of the District Court of the District of Algoma upon the same ground, but the appeal was dismissed. Under The Assessment Act, s. 80, an appeal lies to the Municipal Board from the decision of the District Judge, but the appellants did not avail themselves of this right. It is now the contention of the respondent that the judgment given by the Judge of the District Court was final and that the question of the validity of the assessments is, therefore, *res judicata*. For the reasons given by Mr. Justice Laidlaw in the Court of Appeal, I believe that this argument fails.

I would dismiss the appeal. The costs of this appeal will be paid by the appellants Phillips and Taylor, to the respondent city. There will be no costs to the Attorney General of Ontario.

Appeal dismissed.

Solicitors for the appellants: *Tilley, Carson, Morlock & McCrimmon.*

Solicitors for the respondent: *Hamilton, Carmichael & Bennett.*

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(1) [1926] 2 W.W.R. 230 at 240.