THE ESTATE OF JAMES P. FAIRBANKS AND THE ATTORNEY-GENERAL OF CANADA (INTERVENANT) ..... } APPELLANTS;

1925 *Nov. 23.
1926 *Feb. 8.

AND

THE CITY OF HALIFAX..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Constitutional law—Municipal taxation—Premises leased to Dominion Government for railway ticket offices—Business tax—Statute making owner liable where lessee exempt—Indirect taxation—Ultra vires—B.N.A. Act, ss. 92 (2), 125.

The Halifax city charter provided for the levying of a "business tax," which should be "payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt * * * and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not." The tax was based on the value of the premises occupied. S. 394 provided: "Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property 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 appellant estate leased to His Majesty the King, represented by the Minister of Railways and Canals of Canada, premises for a ticket office of the Canadian National Railways. The lessee was to pay "the business taxes, if any." The city assessed the appellant estate for business tax.

Held, Duff J. dissenting, reversing the decisions of the Supreme Court of Nova Scotia in banco (57 N.S.R. 461), (which divided equally) and of Rogers J., that the appellant estate was not liable for the tax; that the tax made payable by the owner by force of s. 394 of the city charter was an indirect tax and not within provincial powers given by s. 92 (2) of the B.N.A. Act.

A tax is indirect which is imposed upon a person in contemplation that another will pay it; the intention or expectation that the burden will be shifted may be shown by the form in which the tax is imposed, or may be ascertained by the general tendencies of the tax and the common understanding of men as to those tendencies; in the present case it could not be supposed that the legislature expected that the person upon whom the tax was imposed would ultimately bear it; the landlord was put in the position of the tenant because the tenant was exempt, and made responsible for the taxes levied for the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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use of the premises by the tenant for the business purposes for which they were leased, from which it must be anticipated that the taxes would be passed on to the tenant as part of the rent; the ordinary and natural course of business and the substantial character of the tax, based as it was upon the value of the premises occupied and having relation only to the tenant's occupation, showed that the ultimate burden would not rest with the landlord. *City of Montreal* v. *Attorney-General for Canada* ([1923] A.C. 136), disc. and dist.

Per Duff, J. (dissenting): The question of the incidence of local rates levied on occupiers and owners of real property respectively is one so complex and obscure, depending so often upon the appreciation of variable factors, that it must be presumed that the legislation creating the tax contemplated only the person called upon to pay it as the person of incidence, and such legislation cannot be treated by the courts as *ultra vires* unless it is affirmatively established to be so. The present case is in principle governed by *City of Montreal* v. *Attorney-General for Canada* ([1923] A.C. 136.)

APPEAL from the decision of the Supreme Court of Nova Scotia *en banc* (1) affirming by an equal division of the court the judgment of Rogers J. holding that the appellant estate was legally liable for payment of a certain business tax assessed against it by the respondent city.

The matter came before Rogers J. by way of a case stated under the provisions of s. 410 of the Halifax city charter. The case stated was as follows:—

1. At all times material to this case the estate of James P. Fairbanks was the owner of the ground floor of premises known as no. 107-109 Hollis street in the city of Halifax.

2. The said premises were leased by the said estate of James P. Fairbanks to His Majesty the King by lease dated the 22nd day of March, A.D. 1922, a true copy of which is hereto annexed and forms part of this case.

3. At all times material to this case the said premises were in occupation of His Majesty the King as a railway ticket office.

4. Section 370 of the Halifax city charter provides as follows: "The taxation of the city shall consist of: (*a*) Business tax, (*b*) Household tax, (*c*) Licenses and special taxes, (*d*) Poll tax, (*e*) Real property tax, all as hereinafter specified and defined."

5. Section 371 of the Halifax city charter provides as follows: "(1) The business tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

(2) Such tax shall be at the rate fixed as hereinafter provided on fifty per cent of the value of the premises so occupied, except in the case of premises, the value of which is less than two thousand dollars, and occupied solely for the purpose of selling merchandise by retail, in

(1) 57 N.S.R. 461.

respect to which the tax shall be at the said rate on twenty-five per cent of the value of the premises so occupied."

6. Section 394 of the Halifax city charter provides as follows: "Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property 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."

7. The assessor for the city of Halifax purported to assess the said estate of James P. Fairbanks, in respect to the said premises, for a business tax for the year beginning May 1, 1924, and ending April 30, 1925.

8. The said estate of James P. Fairbanks duly appealed from the said assessment to the Court of Tax Appeals for the city of Halifax.

9. The said Court of Tax Appeals dismissed the said appeal and confirmed the said assessment.

The questions for the opinion of the trial judge were:—

1. Whether the said estate of James P. Fairbanks is legally liable for the payment of the said business tax.

2. Whether section 394 of the Halifax city charter is *intra vires* the legislature of the province of Nova Scotia.

3. Whether the said Court of Tax Appeals was right in dismissing the said appeal and confirming the said assessment.

The lease was made by the Fairbanks estate to His Majesty the King, represented therein by the Minister of Railways and Canals of Canada, acting under the authority of an Order in Cuncil, and was for five years from May 1st, 1922, at an annual rental of $3,000, and stipulated that the lessee should pay "the business taxes, if any," and the water taxes, the lessors to pay "the yearly assessment" of the premises and all other taxes, and that the lessee should only use and occupy the premises for the purpose of a ticket office of the Canadian National Railways.

Rogers J. held that the Fairbanks estate was liable for the tax and that s. 394 of the Halifax city charter was *intra vircs*. His judgment was sustained by the Supreme Court of Nova Scotia *en banc*, on an equal division of the court, Harris C.J. and Ritchie E.J. supporting the judgment below and Mellish and McKenzie J.J. *contra*. Mellish J., however, adopted the ground that the Crown could not be said to be occupying the premises "for the purposes of any trade, profession or other calling" within s. 371; that the Crown could not be said to be engaged in or exercising any trade, profession or other calling even although the purposes of government might require the servants and agents of the Crown to engage in doing that

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which *per se* might be so described; and he therefore found it unnecessary to deal with the question of the validity of s. 394.

Special leave to appeal to the Supreme Court of Canada was granted by the Supreme Court of Nova Scotia *en banc* to the Fairbanks estate and to the Attorney-General of Canada who had asked to be joined as intervenant.

J. L. Ralston K.C. and *C. J. Milligan* for the appellants.—The city was attempting to impose a direct tax on Crown property. The statutory fiction attempted in s. 394 does not alter the fact that the Crown remains in actual possession under its lease, and it is the occupancy by the Crown which is actually taxed. Such taxation is invalid.

If not a direct tax on the Crown property, it is an indirect attempt to subject the Crown to taxation and is *ultra vires*. See *City of Montreal* v. *Attorney-General of Canada* (1). In that case and in *Smith* v. *Vermillion Hills* (2) the validity of the taxation was upheld because the tax in question was held to be an occupation tax levied on the beneficial interest of the tenant in the lands. The *Montreal Case* (1) is not the converse of the present case. The cases are clearly distinguishable. That the tax in the present case is invalid; see *Attorney-General of Canada* v. *City of Montreal* (3).

S. 394 is indirect taxation and *ultra vires*. B.N.A. Act, s. 92 (2); *Manitoba "Grain Futures Taxation Act" Case* (4); *Cotton* v. *The King* (5); *Bank of Toronto* v. *Lambe* (6); *Attorney-General for Quebec* v. *Reed* (7); *Security Export Co.* v. *Hetherington* (8).

S. 371, defining the tax, only makes it payable by an occupier "for the purposes of any trade, profession or other calling carried on for purposes of gain." His Majesty is not such an occupier, and the tax cannot therefore be levied on anyone in respect to His Majesty's occupancy.

F. H. Bell for the respondent: The tax is not on property of the Crown. It is levied directly on the owner of property in the city and properly subject to its taxing auth-

(1) [1923] A.C. 136 at p. 140.
(2) 49 Can. S.C.R. 563; [1916] 2 A.C. 569.
(3) 13 Can. S.C.R. 352.
(4) [1924] S.C.R. 317; [1925] A.C. 561.
(5) [1914] A.C. 176.
(6) 12 App. Cas. 575, at p. 582.
(7) 10 App. Cas. 141.
(8) [1923] S.C.R. 539.

ority. It is a tax on persons, in respect of property, but not on property. The contention that the Crown is affected or concerned is based wholly on speculation as to its effect and ultimate incidence.

The tax is not "indirect" within any of the interpretations by this court or the Judicial Committee. The interpretations in the leading cases: *Bank of Toronto* v. *Lambe* (1); *Cotton* v. *The King* (2); *Barthe* v. *Alleyn-Sharples* (3), and the *Manitoba "Grain Futures Taxation Act Case"* (4); seem to confine it to cases where the tax is laid on commodities intended for sale, or to transaction such as sales, or on persons acting in a representative capacity, as executors, agents or trustees, who must necessarily be considered as passing the tax on to their principals. The fact that a tax may possibly, even probably, be shifted in whole or in part, does not make it indirect. It may happen in the case of every direct tax. See *Brewers and Maltsters' Association of Ontario* v. *Attorney General for Ontario* (5); *Barthe* v. *Alleyn-Sharples* (6). The tax in question cannot be differentiated in this respect from any other tax on the owner of land.

The decision in *Attorney-General of Canada* v. *City of Montreal* (7), cannot stand in view of subsequent decisions by the Judicial Committee. The reasoning of Strong J., dissenting, is entirely in accordance with those decisions and is confirmed by them. See *Smith* v. *Vermillion Hills* (8); *City of Montreal* v. *Attorney General of Canada* (9). The last mentioned case is the exact converse of the present one and its reasoning is wholly applicable.

As to the ground taken by Mellish J., that s. 394 is inapplicable, because the Crown cannot be considered as carrying on any description of trade, there is no supporting authority. The question is covered by *Brighton College* v. *Marriott* (10). The judgment of Harris C. J. below on this point is supported by *Mersey Docks* v. *Lucas* (11), and *Port of London Authority* v. *Inland Revenue Commissioners* (12).

(1) 12 App. Cas. 575.
(2) [1914] A.C. 176.
(3) 60 Can. S.C.R. 1; [1922] 1 A.C. 215.
(4) [1924] S.C.R. 317; [1925] A.C. 561.
(5) [1897] A.C. 231 at p. 237.
(6) 60 Can. S.C.R. 1 at pp. 13-14.
(7) 13 Can. S.C.R. 352.
(8) [1916] 2 A.C. 569.
(9) [1923] A.C. 136.
(10) 41 T.L.R. 165.
(11) 8 App. Cas. 891 at p. 905.
(12) [1920] 2 K.B. 612.

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The judgment of the majority of court (Anglin C. J. C., Mignault, Newcombe and Rinfret J. J.) was delivered by

NEWCOMBE J.—This appeal comes before the court from the Supreme Court of Nova Scotia upon a case stated under the provisions of s. 410 of the city charter of Halifax, proclaimed to come into force 28th January, 1914, and the real question is whether s. 394 of that Act, as amended, is *intra vires* of the legislature of the province.

The estate of Fairbanks was the owner of the ground floor of nos. 107-109 Hollis St. in the city of Halifax, and these premises were leased by the estate to His Majesty the King, represented by the Minister of Railways and Canals, acting under the authority of an order in council of 31st May, 1922. The premises, as described in the lease, consist of

> certain space for passenger offices in the city of Halifax, being space 31 ft. 9 inches by 48 feet 3 inches, for a ticket office on the ground floor of a building adjoining Queen Hotel, nos. 107 and 109 Hollis street.

The lease is dated 22nd March, 1922, and it runs for the term of five years, commencing on 1st May, 1922. The annual rent reserved is $3,000. The lessee covenants to pay the rent

> and the business taxes, if any, and the water taxes during the term; the lessors binding themselves to pay the yearly assessment of the said leased premises and all other taxes of every kind which may be lawfully imposed or levied thereon during said term;

the lessee covenants moreover to use and occupy the premises only for the purposes of a ticket office of the Canadian National Railways.

By c. 39 of the Nova Scotia Act of 1916, it was enacted that immediately after the passing of that Act the city of Halifax should cause to be prepared an Act in amendment of ss. 369-483 of its charter relating to taxation, striking out therefrom all the provisions authorizing and requiring personal property to be assessed and rated for taxation within the city and substituting therefor provisions authorizing and requiring the imposition and rating of business and household taxes as thereby defined. The city charter so required to be amended is the revised and consolidated Act which was prepared and brought into force by proclamation of the Lieutenant-Governor on 28th January, 1914, pursuant to c. 67 of the Act of 1913.

The Act of 1916 defines "business tax" to be

a yearly tax based upon the assessed value of any premises used for the purposes of any business, trade or profession, to be paid by the occupier of the same.

There have been numerous amendments of the city charter since 1916, but this definition, so far as I have discovered, has not been expressly repealed, although it appears in the amending Act prepared by the city authorities, as subs. 1 of s. 371, in a form somewhat varied or limited, as follows:

371. (1) The business tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

The "household tax" is a tax based upon the assessed value of any premises occupied for residential purposes, to be paid by the occupier. The ordinary business tax rate is one per cent of the value of the premises occupied. There are provisions for licenses and special taxes; for a poll tax; for taxes upon buildings and other improvements, and finally it is provided that the remainder of the amount yearly required by the city, after deducting the probable amounts to be yielded by the taxes above mentioned, shall be raised by a rate sufficient to produce that amount on the assessed value of the land apart from buildings or other improvements. By s. 11, it is enacted in effect that when the Act providing the necessary amendments shall have been prepared it shall be submitted to the Governor in Council who may approve subject to such further changes, amendments or additions as are considered desirable; that the Act may then be embodied in an order of the Governor in Council and declared to be in force, and that upon publication of the order in the Royal Gazette,

together with the said amended (*sic*) Act as a schedule thereto, and also specifying the sections so repealed, the said sections shall be repealed and the said amended Act shall be in force and effect in the place thereof.

By order in council of 24th August, 1918, reciting ss. 1 and 11 of c. 39 of 1916, and that the city of Halifax had caused to be prepared the Act therein referred to, the Lieutenant-Governor in Council approved the said Act and ordered and declared that it should be in force and effect, and that the sections of the Halifax city charter specified in the schedule were repealed to the extent mentioned in the

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schedule. The amending Act is introduced as part V. of the Halifax city charter under the title "Taxation," and it comprises ss. 369 to 401-P inclusive, 413 and 416. The sections mentioned in the schedule as repealed are ss. 369 to 401, both inclusive, and ss. 413 and 416. The Act was published in the *Royal Gazette* of September 4, 1918, and is to be found at pp. 653 to 661 of the files of the *Royal Gazette* for that year. The amending sections which were so brought into force on 4th September, 1918, were, by statute, c. 79 of 1919, s. 2, ratified and confirmed and declared to have the same force and effect as though they had been contained in an Act of the legislature passed at that date.

It is provided by s. 370, as sanctioned by the amending Act, that

> the taxation of the city shall consist of:
>
> (*a*) Business tax,
>
> (*b*) Household tax,
>
> (*c*) Licenses and special taxes,
>
> (*d*) Poll tax,
>
> (*e*) Real property tax,
>
> all as hereinafter specified and defined.

From the foregoing, it will be perceived that by the scheme of the legislation under review, the city revenue to be provided by taxes, in addition to the proceeds of the business and household taxes, licenses and special taxes, poll tax and tax upon the value of buildings and other improvements, is derived from a general levy against real property. By s. 391 some exemptions are provided, including

> the property of His Majesty used for Imperial, Dominion or Provincial purposes.

It is provided by s. 394 of the Amending Act, as proclaimed by the Lieutenant Governor in Council, and confirmed by the legislature, following a like provision in the Act of 1916, that:

> Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property 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 case must be considered upon the statement of it in which the parties have concurred as depending upon the questions submitted, which are as follows:

> 1. Whether the said estate of James P. Fairbanks is legally liable for the payment of the said business tax.

2. Whether section 394 of the Halifax city charter is *intra vires* the legislature of the province of Nova Scotia.

3. Whether the said Court of Tax Appeals was right in dismissing the said appeal and confirming the said assessment.

It is stated that the assessor for the city of Halifax assessed the estate of Fairbanks in respect to the premises for a business tax for the year ending April 30, 1925, the premises being, during that period, in possession of the King as a railway ticket office. The estate of Fairbanks appealed from the assessment to the Court of Tax Appeals for the city, and upon the appeal the assessment was confirmed. The court stated the case for the opinion of a judge of the Supreme Court of Nova Scotia, and the appeal was heard by Rogers J., who answered the questions submitted favourably to the city. The estate then appealed to the Supreme Court of the province sitting *en banc*. The judges who heard the appeal were the Chief Justice, Ritchie E. J. and Mellish and McKenzie JJ. The learned judges were equally divided in opinion, the Chief Justice and Ritchie E. J. holding that the appeal should be dismissed, and Mellish and McKenzie JJ. that the estate was not legally liable for the payment of the business tax, and that the Court of Tax Appeals erred in dismissing the appeal and confirming the assessment. The estate thereupon appealed to this court, and its objections are two: first, that the leasehold was land or property belonging to Canada and therefore exempted from taxation by s. 125 of the British North America Act, 1867; and, secondly, that the business tax, as defined by s. 371, and, by force of s. 394, made payable by the owner (i.e. the estate of Fairbanks) was an indirect tax, and therefore not within the powers of taxation committed to the province by s. 92 (2) of the British North America Act, 1867, as

direct taxation within the province in order to the raising of a revenue for provincial purposes.

The power of direct taxation was considered in *Attorney General for Quebec* v. *Queen Insurance Company* (1), where a question arose as to whether an Act imposing stamp duty on insurance policies, renewals and receipts, was direct taxation. Sir George Jessel, M.R., delivering the judgment of the Judicial Committee, held that, whether the words were considered as used in the sense of political

(1) 3 App. Cas. 1090 at pp. 1100-1101.

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economy, or as used in jurisprudence in the courts of law, there was a multitude of authorities to show that such a stamp imposed by the legislature was not direct taxation, and he said that

> all that is necessary for them (their lordships) to say is that, finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the legislature of England to include it in the term "direct taxation," and therefore that the imposition of this stamp duty is not warranted by the terms of the second subsection of s. 92 of the Dominion Act.

In *Attorney-General for Quebec* v. *Reed* (1), a question arose as to the validity of the Quebec Act, c. 9 of 1880, which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, and Lord Selborne, pronouncing the judgment, said:—

> Now it seems to their lordships that those words (direct taxation) must be understood with some reference to the common understanding of them which prevailed among those who had treated, more or less scientifically, such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill and those who agree with him is less unfavourable to the appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation, as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

And in conclusion, he said:—

> 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, still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

In *Bank of Toronto* v. *Lambe* (2), the validity of a statute of Quebec, c. 22 of 1881, was in controversy. This Act imposed taxes on certain commercial corporations carrying on business in the province, including banks, as to

(1) 10 App. Cas. 141.

(2) 12 App. Cas. 575.

which the tax imposed was a sum varying with the paid-up capital, and an additional sum for each office or place of business. Lord Hobhouse, who gave the judgment, considered the meaning of "direct taxation," and he adopted the definition of John Stuart Mill, to which Lord Selborne had referred in the *Reed Case* (1), as a fair basis for testing the character of the tax in question, and as embodying

> 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.

This definition, as quoted in the judgment, 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.

Lord Hobhouse said that the legislature could not possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases, but that 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. And he held that, both according to the probabilities of the case and the frame of the Act, the Quebec legislature must have intended and desired that the very corporations from whom the tax was demanded should pay and finally bear it, and that it was carefully designed for that purpose; he said that it was 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.

In *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (2), we have Lord Herschell's comments upon the foregoing authorities. The question was as to the power of the legislature of Ontario to impose license duties upon brewers and distillers for the sale of liquor manufactured by them, and their Lordships con-

(1) 10 App. Cas. 141.

(2) [1897] A.C. 231.

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sidered that, as in the case of *Bank of Toronto* v. *Lambe* (1), the tax was demanded from the very person whom the legislature intended or desired should pay it; that there was neither expectation nor intention that he should indemnify himself at the expense of some other person, and Lord Herschell observed that:

> 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.

In the case of *Cotton* v. *The King* (2), which has been much discussed, the question of direct taxation was considered with regard to the legislation of Quebec regulating succession duties. Lord Moulton pronounced the judgment. He considered the earlier cases, and he said that in their Lordships' opinion those decisions had 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 from the treatise of John Stuart Mill and that this question is no longer open to discussion.

He reviewed the succession duty Acts of Quebec, and he said that

> to determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation.

And he held the taxation invalid because the payment was obtained from persons not intended to bear it, within the meaning of the accepted definition.

Very recently the question came before the Judicial Committee again in *Attorney-General for Manitoba v. Attorney-General for Canada* (3). Lord Haldane, who

(1) 12 App. Cas. 575. (2) [1914] A.C. 176.
(3) [1925] A.C. 561.

pronounced the judgment, pointed out that by successive decisions of the Board the principle laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of the British North America Act. He said:—

> The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples.

The legislation in question provided that, upon certain contracts for the sale of grain for future delivery, the seller or his broker should pay to the province a tax computed upon the quantity sold or agreed to be sold, and that the person actually entering into the contract of sale, whether as principal, broker or agent, should pay the tax. Lord Haldane concluded:—

> Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting.

By the foregoing authorities it is shown not only that a tax is indirect which is imposed upon a person in contemplation that another shall pay it, but also that the intention or expectation that the burden will be shifted may be shown by the form in which the tax is imposed, as in the last cited case, or may be ascertained by the general tendencies of the tax and the common understanding of men as to those tendencies, as explained by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1). Common business experience and knowledge must of course be imputed to the legislature, and results which follow in the natural and ordinary course of common business transactions must be held to have been contemplated.

In *City of Montreal* v. *Attorney-General for Canada* (2), the Judicial Committee had to consider the validity of a tax imposed by the legislature of Quebec; land in the city

(1) 12 App. Cas. 575 (2) [1923] A.C. 136.

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of Montreal, belonging to the Dominion Crown and leased to a tenant, who occupied it for industrial and commercial purposes, had been assessed under a section of the city charter of Montreal which enacted that persons occupying, for commercial or industrial purposes, buildings or land belonging to the Federal Government should be taxed

> as if they were the actual owners of such immovables, and shall be held to pay the annual and special assessments, the taxes and other municipal dues.

It was contended, first, that this legislation conflicted with the constitutional immunity provided by s. 125 of the British North America Act, which declares that no lands or property belonging to Canada shall be liable to taxation; and, secondly, that, if the taxation did not fail upon that ground, it was not direct taxation, and was therefore incompetent. Lord Parmoor, who delivered the judgment, reviewed the legislation; he said that the effect of it was that the occupant was made liable to pay on an annual assessment, not to exceed one per cent of the capitalized value of the occupied property, and he proceeded to say:—

> The method of assessment determines the amount for which an occupier is liable during his occupancy, but does not alter the incidence of the taxation or transfer the incidence from the occupant to the owner. There is no suggestion that the assessment, in the case under appeal, has not been fairly ascertained, or that there has been any attempt to differentiate between the tenants of the Crown lands and the tenants of private individuals or corporation, to the disadvantage of the Crown tenants. The ultimate incidence of taxation imposed on tenants, as the occupants of lands, is a matter on which economic experts have expressed different opinions. If, however, municipal taxation is to be regarded as *ultra vires*, on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed. The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their lordships the interest of an occupant consists in the benefit of the occupation to him during the period of his occupancy, and does not depend on the length of his tenure. The annual assessment, to which objection is taken, is an assessment for which the tenant is only liable so long as his occupancy continues and which ceases so soon as his occupancy is determined. If on the cessation of his tenancy the Crown chooses to leave the land unoccupied or to occupy the land by an official acting in his official capacity, there would be no further liability to taxation under art. 362-a of the charter affecting either the land or the Crown.

The objection that the tax was indirect had been distinctly put at the argument, and is thus reported:—

The article is *ultra vires*, because the taxation is not direct taxation according to the view in *Cotton* v. *The King* (1); a tenant taxed as owner will obtain an indemnity from the Crown in the form of the rent paid or otherwise.

It must therefore be inferred that in the opinion of their Lordships the tax was not indirect although the property, belonging to the Crown, was in the occupation of a tenant who was to be taxed as the actual owner, and held to pay the taxes so imposed. The judgment seems to have proceeded upon the view that it was the tenant's interest only that was assessed, the amount of the tenant's liability being determined by the method of assessment.

It was forcibly argued by Mr. Bell, on behalf of the respondent, that the present case was the exact converse of the *Montreal Case* (2) and concluded by the reasoning of the judgment in the latter; that in the *Montreal Case* (2) the municipal authority assessed the leased property at its full value as if the tenant were the owner, and this it might do notwithstanding that the property of the landlord was exempt from taxation; while in this case, where the property of an individual is leased to the Crown for its business purposes, it is still for these purposes deemed to be in the occupation of the owner, who is therefore made liable for the business tax; and he urged that there was no distinction in principle between the two cases; that whereas in the *Montreal Case* (2) the Crown would naturally, in the course of business, receive less rent by the amount of the tax levied in respect of the value of its interest in the demised property, it would, in the *Halifax Case,* naturally, and in the ordinary course, be required to pay more rent by the amount of the tax chargeable to the landlord by reason of the tenant's occupation of the property for business purposes and his exemption from the business tax which is ordinarily borne by the tenant. This argument is however shown to be unsound when it is considered that, in the view which the Judicial Committee seems to have taken of the *Montreal Case* (2), it was the occupier's interest which was assessed, and if I do not misinterpret the decision, the direction to tax the occupier as if he were the actual owner was intended only to regulate the method of assessment.

(1) [1914] A.C. 176. (2) [1923] A.C. 136.

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It is said, and it seems obvious enough, that all taxation, including that nominally charged on things, is in the last resort paid by persons. Adam Smith (McCulloch's New Ed., 1839, p. 371 et seq.) considered that every tax must finally be paid from one or other of the different sources of revenue, rent, profit and wages, and accordingly he grouped taxes under those three headings, with their subdivisions. The ascertainment of the actual person by whom a particular tax is ultimately paid is, owing to the possibilities of shifting the burden as originally imposed, frequently a difficult problem; but, that there may be indirect taxation of land, or of persons in respect of land, in the sense in which the expression "direct taxation" has passed into the constitution of Canada, I see no reason to doubt. And such taxation is no more competent to the provinces than indirect taxation of persons in respect of their personal property, earnings or profits. It would seem to have been the view in the *Montreal Case* (1) that the taxation of a tenant in the ordinary case was not indirect by reason of the incidence of the taxation, and that therefore it was not necessary to attempt to ascertain where the burden would ultimately rest; it does not necessarily follow from the decision that the taxation of a tenant is not indirect if the assessment embrace the landlord's estate in the demised premises as well as that of the tenant, when the increased charge would cause the tenant to stipulate, and compel the landlord, if he would lease his property, to agree for an equivalent reduction of the sum which would otherwise represent the fair or obtainable rent. It may perhaps be gathered from the few brief lines in which Lord Parmoor disposes of the question of indirect taxation that in the facts of the case he found nothing to distinguish it in principle from the ordinary case of landlord and tenant, where there is a tax upon the rent, or upon the tenant's interest, to be paid by the tenant; that in such a case it could not be supposed that the legislature intended or contemplated any putting over of the tax, and that the court would therefore not follow the incidence of the taxation. We are told no more than that

> the ultimate incidence of taxation imposed on tenants as the occupants of lands is a matter in which economic experts have expressed different

(1) [1923] A.C. 136.

opinions. If however municipal taxation is to be regarded as *ultra vires* on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed.

I can only conclude therefore that the Attorney-General failed in his alternative contention in the *Montreal Case* (1) for lack of evidence, either in the form of the tax as imposed, or in the facts of that particular case, to establish any legislative expectation or intention that the tenant would indemnify himself at the expense of the landlord; the burden being upon him to make out that it was expected or intended, having regard to the form of the tax and the facts and circumstances of the case, that the tax would be passed on by the tenant. In that view the decision does not affect the case now under consideration, where the tax appears to have all the indicia to which the judicial authorities have referred as definitive of indirect taxation. The motive and intention are reasonably apparent; seeing that the tenant is exempt from taxation, the landlord is made liable for the tax which would have otherwise been chargeable to the tenant in respect of the special purpose for which he occupied the premises; and, whatever may be said about the *Montreal Case* (1), the landlord is by the legislation now in question put in the position of the tenant, because the latter is exempt, and made responsible for the taxes levied for the use of the premises by the tenant for the business purposes for which they were leased, from which nothing is more to be anticipated than that the taxes will be immediately passed on to the tenant as part of the rent. A more inviting, indeed compelling, case for the landlord to exact indemnity from his tenant, for whose particular and beneficial enjoyment of the property he is obliged to pay a special tax, it is difficult to imagine.

It may I think be said of this business tax, with relation to the case of the exempted tenant, as was said by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (2), with regard to Customs duty, that it enters at once into the price of the taxed commodity. The business tax is a tax payable by the occupier by reason of the trade which he carries on upon the demised premises. It is a tax which cannot be

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(2) 12 App. Cas. 575.

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levied save for the tenant's occupation for the particular purpose; but, when the tenant is exempt from taxation, the legislature would nevertheless avail itself of his occupation by declaring that it shall be deemed to be that of the owner, thereby making the owner liable for the tax which would have fallen upon the tenant if he had not been exempt. Consequently, in the competition for the leasehold, the tenant exempt from taxation is subject to the disadvantage that the rent which he offers is of less value to the landlord, by the amount of the tax, than it would be in the case of his non-exempt competitors. Therefore it seems out of question that the landlord would ultimately assume the burden of the tax. He did pass it on as was natural to expect; that was a result which is not likely to vary in particular cases, and the tenant, in paying the tax as part of his rent, pays no more than the annual value of the premises, or in the aggregate precisely the same as the non-exempt tenant would pay in rent and business tax combined. Thus it may justly be said that, as to tenants exempt from taxation, the tax enters immediately into the rent. In holding in the *Brewers and Malsters Case* (1), that the tax was not indirect, Lord Herschell said that no transfer of the burden would in ordinary course take place or could have been contemplated as the natural result of the legislation, having regard to the uniformity and trifling amount of the license fee, which was imposed upon all brewers and distillers without any relation to the quantity of the goods which they sold, and that it could not have been intended by the imposition of such a burden to tax the customer or consumer. The conditions in the present case are the very opposite. The ordinary and natural course of business and the substantial character of the tax, based as it is upon the value of the premises occupied, and having relation only to the tenant's occupation, show that the burden will not rest with the landlord. It would be doing less than justice to the intelligence, foresight or intention of the legislature to suppose that it anticipated or expected that the person upon whom the tax was imposed would ultimately bear it. In considering the character of the tax levied in the *Manitoba Case* (2), their Lordships of the Judicial Committee had regard to a statement of

(1) [1897] A.C. 231.

(2) [1925] A.C. 561.

facts submitted with relation to the grain trade, showing the course of business in the sale and disposal of the commodity, and it is said that

> it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should bear it.

The form of the tax in the present case, in view of the implications of the statute, seems to be that inasmuch as the occupiers of all premises for business purposes are required to pay a tax based upon the value of the property so occupied, and inasmuch as certain persons may become occupiers who are exempt from taxation, therefore when the tenant is exempt and the landlord is not exempt, the landlord shall be deemed to be the occupier and shall pay the tax which would otherwise fall directly upon the tenant; thus conclusively pointing to the probability and intention that in the end the tax will become part of the rent. The landlord would obviously exercise the means of which he has the control to indemnify himself against the ultimate burden.

I would therefore answer the questions in the negative. In this result the appeal must be allowed with costs throughout to the appellant.

DUFF J. (dissenting).—The question mainly discussed in the courts below was whether or not the legislation in question, s. 394 of the charter of Halifax, offends against the prohibition of s. 125 of the British North America Act. This question is much the same as that which was passed upon in the *Montreal Case* (1). There, the legislation provided for the assessment of proprietors of land, and, subsidiarily, enacted that where land exempt from taxation, including Crown land of the Dominion or of the province, was occupied by a private person for industrial or commercial purposes, the occupant should be deemed, for the purposes of assessment to the property tax, to be the proprietor, and should be assessed accordingly.

It was contended on behalf of the Dominion that this in effect amounted to an assessment of Crown lands, where the lands assessed in virtue of such occupancy were the property of the Dominion, and that it was consequently obnoxious to s. 125. This contention was rejected on the

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authority of the previous decision in *Smith* v. *Vermillion Hills* (1).

In principle, this decision, in so far forth as concerns the suggestion that the legislation now before us infringes upon s. 125, seems to govern the present case.

But another contention is now advanced, which in effect is that the enactment upon which the impeached assessment rests cannot be sustained by the authority given to the provinces on the subject of "direct taxation"—in other words, that the tax is one which does not fall within the category of "direct taxation".

The able review of the decisions upon this subject in the judgment of my brother Newcombe is one which may be accepted for the most part without criticism. It is only when one comes to the application of the doctrine of the cases that difficulty arises.

The first paragraph in Mill's third chapter of Book V. has been adopted as affording a guide to the application of section 92 (2). But it would, I think, be going far beyond the authorities and would be a grave error to suppose that by force of the decisions of the Judicial Committee the whole of that chapter had become incorporated as a part of s. 92. I am inclined to think that one must, in applying the decisions, attend mainly to the thing decided, rather than to particular expressions.

Most of the cases in which provincial legislation in this field has been held invalid have been comparatively simple, not to say obvious, cases: taxes imposed upon trustees in respect of the property of their beneficiaries, as in *Cotton Case* (2), taxes imposed upon agents in respect of transactions on behalf of their principals, as in the *Manitoba Case* (3), and taxes universally classed as indirect, such as taxes on commodities or stamp duties (*Attorney General for Quebec* v. *Queen Insurance Co.* (4). *Reed's Case* (5) was a very special one. The stamp duty there in question was collected by means of the requirement that all exhibits in legal proceedings should be stamped—the ultimate liability to pay being ascertained only at the termination of the litigation, and then determined by law.

(1) [1916] 2 A.C. 569.
(2) [1914] A.C. 176.
(3) [1925] A.C. 561.
(4) 3 App. Cas. 1090.
(5) 10 App. Cas. 141.

The determination of the incidence of local rates on occupiers, building owners and land owners presents extraordinary difficulties. Mill treats the subject, in chapter 3, in a very summary way, as compared with the searching analysis it has received during the last thirty years, notably in the masterly treatise of Professor Seligman, published in 1898, in the memoranda presented to the Royal Commission of 1898 by the British economists, and in the commentary of Professor Edgeworth thereon. The subject is beset with difficulty and obscurity, and differences of opinion divide economists on most phases of it.

Mill, writing in 1848, says that the burden of a tax on occupiers remains where it is laid, while a house tax, levied on the builder or owner, is an indirect tax. Dr. Marshall, in a note retained in the edition of the "Principles" of 1920, says,

> The burden of * * * rates is * * * shifted from the occupiers of business premises partly on to their landlords, and partly on to their customers.

According to Professor Seligman, the incidence of such rates—that is to say, rates on urban land or urban buildings or urban occupiers—is determined by a great variety of factors, varying in character, as well as in force and activity, not only with the locality but with the economic conditions prevailing. All such rates as a rule, he says, experience has shewn will fall on occupiers in the crowded areas of great cities, and the same rule holds, according to him, in the United States in times of abounding prosperity, while in decaying towns and decaying parts of large cities, and generally in times of depression or stagnation (all too frequent everywhere), the burden falls upon the landlord. According to him, rates of precisely the same character, levied at one and the same time, in states like California and New York, may fall in one locality within the state ultimately upon the landlord, and in another, ultimately upon the occupier. Obviously, if the application of the canon adopted from Mill is to be regulated by determining in each case the fact of incidence, the courts have set before them in this region of municipal rates a task well-nigh impossible of performance.

This difficulty is recognized in the judgment in the *Montreal Case* (1). And in truth, in view of the difficulties

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and obscurities surrounding the subject, it seems reasonably safe to say that legislation imposing such taxes does not contemplate their ultimate incidence, but only the immediate application of them. It may properly be observed also that if Mill's view, baldly expressed in the third chapter, that a tax on house landlords is an indirect tax, be accepted as controlling the operation of s. 92 (2), it would probably have the effect of eviscerating any system of municipal taxation now or hitherto in force in this country.

Effect, of course, must be given to provincial legislation, unless the courts can clearly see that it is *ultra vires*.

It seems, moreover, not unreasonable to hold that such subsidiary provisions as that in question in the *Montreal Case* (1) and that now in question are not really infringements against the principle of s. 92 (2). Both provisions aim at avoiding inequality. In each case there is an assessment in respect of the capital value or a proportion of the capital value of real property. In the legislation in question in the *Montreal Case* (1), the occupier of exempt property for industrial or commercial purposes was held as if proprietor. Under the legislation before us, the owner of property in occupation of an exempt occupier is held as if he were occupier.

Such ancillary provisions would appear to be not inadmissible as part of a scheme of local rates authorized by s. 92 (2).

The appeal should be dismissed.

Appeal allowed with costs.

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Solicitor for the appellant, the Attorney-General of Canada: *J. L. Ralston.*

Solicitor for the respondent: *F. H. Bell.*

(1) [1923] A.C. 136.