Privy Council Appeal No. 101 *of* 1924.

The Attorney-General of Manitoba - - - - - *Appellant*

v.

The Attorney-General of Canada and others - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1925.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD DUNEDIN.
LORD BLANESBURGH.
LORD DARLING.

[*Delivered by* VISCOUNT HALDANE.]

This case comes by way of appeal from the Supreme Court of Canada. To that Court the Governor-General of Canada had, under a statutory power, referred two questions relating to the constitutional validity of a taxing statute passed by the Legislature of Manitoba. The questions were as follows:—

First, had the Legislature of Manitoba authority to enact chapter 17 of the Statutes of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery?"

Secondly, if the said Act be, in the opinion of the Court, *ultra vires* in part only, then in what particulars is it *ultra vires*?

Under the British North America Act of 1867 a provincial legislature may exclusively make laws relating to direct taxation within the province for raising revenue for provincial purposes. Such a legislature is given no power to levy a tax which is indirect.

The Supreme Court of Canada (consisting of Idington, Duff, Anglin, Mignault, and Malouin, JJ.) answered the questions submitted to them, in the sense that the Act was *ultra vires.* Anglin, J., however, took no part in the judgment.

In order to appreciate the question raised it is necessary to set out the relevant sections of the statute of Manitoba under discussion, the "Grain Futures Taxation Act." After defining "grain" as meaning wheat, oats, barley, rye and flaxseed, and "agreement of sale" or "agreement to sell" as covering options, calls in, puts and calls, and offers, indemnities and privileges; and "exchange" as including all agencies, boards of trade, bourses, auction or other meeting places, at which grain and other products or merchandise are publicly bought, sold, bid for, offered or exchanged, for future delivery or contracts for such future delivery are made, the statute provides (sec. 3),

> "That upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows: Upon every thousand bushels of flaxseed, 12 cents; upon every thousand bushels of wheat, 6 cents; upon every thousand bushels of oats, barley or rye, 3 cents.
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> 4. No such tax shall be payable in any case in which—
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> (*a*) the seller is the grower of the grain, or
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> (*b*) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or
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> (*c*) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers' clearance receipts, or other documents of title for grain transferring actual ownership from the vendor to the purchaser in exchange for the price at the maturity of the contract), or
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> (*d*) the sales are 'transfer' or 'scratch sales' or 'pass-outs,' provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person, or
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> (*e*) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal.
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> 5. The tax imposed by this Act shall be a direct tax upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person and is imposed solely in order to supplement the revenues of this province.
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> 6.—(1) The tax hereby imposed shall be payable in cash by the seller, his broker or agent, in each case, and every person liable to pay such tax shall send to the minister, not later than the 10th day of each month, a return

showing the particulars of all sales made by him during the preceding calendar month in respect of which any tax is imposed upon him by this Act, accompanied by payment of the total amount of all such taxes."

An agreed statement of facts put in by the Attorneys-General concerned shows the course of business in the sale and disposal of grain to which the Act may apply. From this statement it appears that the ultimate market price for grain in Canada and Western America, the producing countries, is determined in the great importing markets in Great Britain and Europe. This is a "world price," which is but little controlled by the producers, and which has to be looked to to cover all the items in cost of production and of transportation. The landowner or farmer who produces the grain sells it to a country elevator manager, or may deliver it to him for warehousing. The purpose is to sell the grain so as to make a profit on the fluctuating world market price. Whoever has to make the sale naturally tries to get the best price of the moment. It may not be wise to sell at once. He accordingly watches the market. But he desires to avoid possible loss from a drop in market price while he is watching his opportunity. To guard against this he "hedges" by selling on the Winnipeg Grain Exchange *for future delivery* an equivalent quantity of grain. His aim in this is to eliminate the risk which he runs from fluctuations in the general market price while waiting to sell what he actually possesses. This he forwards to a terminal elevator and sells at a suitable moment for cash. He then extinguishes his obligation on the sale of the "future" which he has already made as insurance by purchasing on the Winnipeg Exchange an equal quantity for future delivery, thus extinguishing his liabilities as regards the two obligations in the future. These are cancelled out in the books of the clearing house in Winnipeg, and, as he has now sold for cash what he actually held, the risk from fluctuation of price is at an end.

There are minor variations and differences in form which affect classes of transactions upon this principle of insurance by future dealing. But the practice does not vary in its substantial aspect, and it is a characteristic one. Obviously, it involves much employment of brokers and mere agents to carry it out, and these, it is agreed, charge any tax on the transaction to the customer as part of the expenses incurred.

The question which arises is whether the tax imposed by the statute is, in the light of these facts, direct or indirect.

As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as 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 sec. 92 (2) of the British North America Act. 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.

It does not exclude the operation of the principle if, as here, by sec. 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale. whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local legislature which imposes it, but on the provisions of the Imperial statute of 1867. In *Cotton* v. *The King* (1914, A.C. 176) followed in *Burland* v. *The King* (1922, 1 A.C. 215), this Board held that in the case of a provincial succession duty, intended to be collected from a person concerned, it might be, merely with the administration of a testator's estate, who had been obliged by law to make a declaration of the particulars of that estate for taxation to be payable by him personally, and who was naturally entitled to recover the amount paid from the persons succeeding to the estate, the taxation was *ultra vires*. A probate duty (as distinguished from such a succession duty), paid as the price of services to be rendered by the Government and imposed on the person claiming probate, might, it was indicated, on the other hand, well be direct taxation. In *Attorney-General for Quebec* v. *Reed* (10 A.C. 141) Lord Selborne had laid down an analogous application of the same principle. *Bank of Toronto* v. *Lambe* (12 A.C. 575) is another case in which Lord Hobhouse, applying the same principle, found the tax to be direct. In *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897 A.C. 231) Lord Herschell, in delivering the opinion of the Board, followed this case on the ground that the licence tax in question was demanded from the very person who it was intended or desired should pay it, as a tax on his licence with no expectation or intention that he should indemnify himself at the expense of any other person.

On the scope of the taxation imposed by the Act now under consideration there is little room for doubt. The tax is not a licence tax ; it is one to be levied upon the contracts made for the sale of grain for future delivery. There is exemption when the seller under the contract is the grower of the grain, and when either party to the contract is the owner or tenant of the land on which the grain is to be grown, but in nearly every other case the person entering into a contract of sale for future delivery has to pay a tax proportionate to the quantity sold. It is obvious that this liability will extend, not only to brokers and mere agents, but to factors, such as elevator companies, to whom the possession of grain has been entrusted for sale. The agreed statement says in its conclusion that the grain business has many ramifications, all of which fall within the kind of transaction it describes, but all of which the statement does not attempt to specify. To a large number of these the exemptions may not apply. If, therefore,

the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in wluch there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree with Duff, J., in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the legislature intended to pass it in what may prove to be a highly truncated form.

Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by section 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.

This view makes it unnecessary to consider the further point raised in the judgment of Idington, J., that the taxing Act was passed in violation of the provision in sec. 121 of the British North America Act, that all articles of the growth, produce or manufacture of any one of the provinces shall be admitted free into each of the other provinces. On this point their Lordships refrain from expressing any opinion.

The Supreme Court of Canada answered the first question in the negative and treated the second as not arising.

Their Lordships will humbly advise His Majesty that these were the proper answers and that the appeal should be dismissed In accordance with the usual practice there will be no costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF MANITOBA

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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