Privy Council Appeal No. 65 of 1927.

The Attorney-General of British Columbia - - - - *Appellant*

v.

The Canadian Pacific Railway Company - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

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

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD BLANESBURGH.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Canada dismissing an appeal brought to it from the Court of Appeal of British Columbia, which in its turn dismissed an appeal from a judgment of Mr. Justice Morrison.

The question which has been decided is concerned with the validity of the British Columbia Fuel-Oil Tax Act, 1923, and especially with Section 3 and Section 6 of that Act. It is contended for the respondents that under Section 92 of the British North America Act there was no power in the Provincial Legislature to pass the statute, the ground being that the taxation attempted is not "direct."

The purpose was to enact that every person who purchases within the Province fuel-oil sold for the first time after its manufacture in or importation into the Province should pay for provincial purposes a tax equal to one-half cent per gallon on the oil so purchased. By the definition clause "purchaser" is to mean "any person who within the province purchases fuel-oil

when sold for the first time after its manufacture in or importation into the Province." " Vendor" is to mean " any person who within the Province sells fuel-oil for the first time after its manufacture in or importation into the Province." By Section 3 the purchaser is to pay the tax as so defined. By Section 4 the vendor, on the sale to the purchaser, is to levy and collect and pay it over to the Government. By Section 6 every person who has in his possession for use or consumption fuel-oil on which the tax has not been paid is to pay it. The rest of the Act forbids the use of fuel-oil unless the tax has been paid, makes an exception from liability to the tax for fuel-oil used in the operation of vessels plying between ports in the Province and ports outside the Dominion; and imposes penalties.

The first and cardinal question is whether the tax is direct or indirect within the meaning of the expressions used in Sections 91 and 92 of the British North America Act. If the tax is indirect, the respondents escape wholly. Their Lordships entertain no doubt that within the meaning placed on the language employed by a series of decisions in the Canadian Courts and in the Privy Council, the tax is indirect. If so, the statute in question was *ultra vires*.

In *A.G. for Manitoba* v. *A.G. for Canada* (1925 A.C. 561) the Board held invalid an Act of Manitoba to impose a tax on persons selling grain for future delivery, notwithstanding that the Act declared in terms that the tax was a direct one. There was in that case an agreed statement that the ultimate price of the grain, which was called a " world price," was fixed, was but little controlled by the producers, and had to be looked to as covering all the items in cost of production and transportation.

It was laid down by the Board that while 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 should indemnify himself at the expense of another, as may be the case with excise and customs. A tax levied, as in that case the tax was, on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation. The meaning of the distinction had been settled by the exposition given of it by the political economists, whose broadly phrased definition had been adopted in earlier decisions, such as *A.G. for Quebec* v. *Reed* (10 A.C. 141, Lord Selborne); *Bank of Toronto* v. *Lambe* (12 A.C. 575, Lord Hobhouse); and *Brewers and Maltsters Association of Ontario* v. *A.G. for Ontario* (1897, A.C. 231, Lord Herschell). It was true that the question of the meaning of the words used in ss. 91 and 92 was one, not of political economy but of law. Still, as Lord Hobhouse pointed out, the legislation 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 these tendencies. The

definition given by John Stuart Mill was accordingly taken as a fair basis for testing the character of the tax in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious *indicia* of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867. Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test. The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applies. An exhaustive partition would be an impracticable task.

Taking the principle so laid down as the guide to the solution of the present question, the result does not seem doubtful. There are two fuel-oil Companies which are associated in business in a close fashion. The Union Oil Company of California sells its oil to the Union Company of Canada, which has large storage tanks at Vancouver which the former Company keeps replenished according to directions from the Canadian Company. The respondents purchase oil in British Columbia from the latter Company. It is sought to tax them as first purchasers under Section 3, and as holders of the oil for consumption under Section 6, which has to be read with reference to Section 3. It may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel-oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one.

Other points were argued against the validity of the Act in question, as, for instance, that it contravened the special provisions of the British North America Act in reference to excise. On these points their Lordships abstain from expressing an opinion. The conclusion at which they have arrived renders it unnecessary to discuss them, and, in accordance with their practice, they accordingly avoid doing so. They agree with the conclusion arrived at by all the Courts below, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

v.

THE CANADIAN PACIFIC RAILWAY COMPANY.

DELIVERED BY VISCOUNT HALDANE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

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