Privy Council Appeal No. 115 *of* 1929.

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

v.

The McDonald Murphy Lumber Company, Limited - - *Respondents*

FROM

THE SUPREME COURT OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH MARCH, 1930.

Present at the Hearing:

LORD BLANESBURGH.
LORD MERRIVALE.
LORD TOMLIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The controversy in this appeal relates to the validity of an enactment of the Legislature of the Province of British Columbia imposing a tax on timber cut within the Province.

The tax was originally imposed in 1903 in substantially its present form by a Provincial statute of that year, and was subsequently re-enacted with unimportant alterations until in Section 58 of the Forest Act, being Chapter 93 of the Statutes of British Columbia, 1924, it assumed the form in which its legality is now for the first time challenged.

The section reads as follows:—

> "58. There shall be due and payable to His Majesty a tax upon all timber cut within the Province save and except that upon which a royalty is reserved by this Act or the 'Timber Royalty Act,' or that upon which any royalty or tax is payable to the Government of the Dominion, which tax shall be in accordance with the following Schedules:—"

The first schedule deals with "timber suitable for the manufacture of lumber and shingles," which it classifies into

three grades, to be taxed respectively at $2, $1.50 and $1 per 1,000 feet board measure. " provided that a rebate of all the tax over one cent per thousand feet board measure shall be allowed when the timber upon which it is due or payable is manufactured or used in the Province." Schedule No. 2 deals with piles, poles and crib timber, Schedule No. 3 with railway-ties, mining props and lagging, pulp-wood and cordwood, and Schedule No. 4 with shingle or other bolts of cedar, fir or spruce, taxes of varying amount being assigned to the different categories. To each of these other schedules, as to the first, is appended a proviso remitting, by way of rebate, all the tax over one cent when the timber is used in the Province.

Section 62 of the statute prohibits under a penalty, the export or removal from the Province of any timber in respect of which any tax is payable to His Majesty in right of the Province unless a permit is obtained from an officer of the Forest Board certifying that all taxes so payable in respect thereof have been paid and confers on the Minister of Lands drastic powers for the enforcement of the Act.

Section 127 requires every owner of granted lands and every holder of a timber lease or licence on lands whereon any timber is cut in respect of which any tax is payable, and every person dealing in any timber cut from any such lands and every person operating a mill or other industry which cuts or uses timber upon which any tax is payable, to keep correct books of account of all timber cut for or received by him and to render monthly statements to the District Forester, " and the owner, lessee or licensee or person dealing in the timber or operating the mill or other industry as aforesaid shall pay monthly all such sums of money as are shown to be due to the Minister."

The respondent company are engaged in the business of logging, and sell both locally and for export timber which they cut upon lands granted to them or their predecessors. Having entered into a contract to sell a consignment of their logs to a purchaser in the State of Washington, U.S.A., they applied to the Customs officials of the Dominion Government for clearance, which was refused on the ground that they did not hold an export permit from the Provincial Government. The officers of the Forest Branch of the Provincial Government declined to grant an export permit except on payment of the tax now in question. Thereupon the respondent company instituted the present proceedings against the Attorney-General of British Columbia claiming a declaration that they were under no obligation to pay the tax demanded, and that the relative provisions of the statute were *ultra vires* of the Provincial Legislature. The case was heard in the Supreme Court of British Columbia by the Chief Justice (Aulay Morrison) sitting alone, who, after hearing evidence, gave judgment declaring Section 58 of the Forest Act and Sections 62 and 127 " in so far as they purport

to implement any tax levied by the said Section 58," to be *ultra vires* of the Provincial Legislature. From that judgment the present appeal is taken.

The validity of the tax was maintained by the appellant on the ground that it was competently imposed by the Provincial Legislature as being "direct taxation within the Province in order to the raising of a Revenue for Provincial purposes," which is the second class of subjects upon which Provincial Legislatures have by Section 92 of the British North America Act, 1867, exclusive power to make laws.

The respondent company, on the other hand, impugned the tax mainly on two grounds, namely: (1) that it was an indirect tax, and, therefore, not within the competence of the Provincial Legislature; and (2) that it violated Sections 121, 122, 123 and 124 of the Act of 1867. Section 121 provides for the free admission into each of the other Provinces of all articles of the growth, produce or manufacture of any one of the Provinces. Section 122 enacts that "the Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada." Section 123 deals with Customs duties in relation to exportation and importation as between two Provinces. Section 124 saves the right of New Brunswick to levy but not to increase certain lumber dues in operation at the Union. "but the lumber of any of the Provinces other than New Brunswick shall not be subjected to such dues."

Their Lordships have on many occasions been called upon to determine questions relating to the constitutional validity of fiscal legislation under the British North America Act and have laid down the principle that in every case the first requisite is "to ascertain the real nature of the tax" (*Rex* v. *Caledonian Collieries* [1928], A.C. 358 at p. 362). Now, in the present case, the real nature of the tax in question is transparently obvious. While the statute sets out to impose a tax on all timber cut within the Province it proceeds in the relative schedules to reduce the tax by rebate to an illusory amount in the case of timber used in the Province, leaving it to operate to its full effect only on timber exported. The best evidence that the tax was intended to be to all intents and purposes an export tax is afforded by the fact that since 1914 the minute rebated tax on timber used within the Province has not been collected. Indeed, the tax has come to be known as "the timber tax on export," and is so described in the Final Report of the Royal Commission of Inquiry on Timber and Forestry, 1909–10, extracts from which are among the exhibits in the case. The economic effect and, presumably, the object of the tax is to encourage the utilisation within the Province of its home-grown timber and to discourage its exportation. The success of the tax, if this be its object, will thus be measured inversely by the revenue which it yields, which is not the normal characteristic of a tax imposed "in order to the raising of a revenue for Provincial purposes."

Once it is ascertained that the tax is in its real nature an export tax, as their Lordships are satisfied that it is, the task of justifying its imposition by the Provincial Legislature becomes one of great difficulty. The appellant admitted that the imposition of Customs and Excise duties is a matter within the exclusive competence of the Dominion Parliament, as, indeed, plainly appears from Section 122 of the British North America Act. The reason for this is, no doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes. If then an export tax falls within the category of duties of Customs and Excise there is an end of the question. Their Lordships are of opinion that according to the accepted terminology and practice of fiscal legislation and administration export duties are ordinarily classed as duties of Customs and Excise. In Wharton's Law Lexicon "Customs" are defined as "duties charged upon commodities on their importation into or exportation out of a country," and a similar definition is given in Murray's New English Dictionary. An early example of this usage is to be found in Comyns' "Digest" (fifth edition, 1822, p. 468), where, under the heading of "Customs of Tonnage and Poundage," there is mentioned poundage "on all goods carried out of the King's Dominions," with a citation of 12 Car. 2, cap. 4, while a modern instance is provided by the Finance Act, 1901, in which Section 3, imposing an export duty on coal, is included in Part I of the Act, headed "Customs and Excise."

Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them. It may be borne by the one or by the other. It was said in the present case that the conditions of the competitive market in the United States compelled the exporter of timber from British Columbia to that country to bear the whole burden of the tax himself. That, however, is a matter of the exigencies of a particular market, and is really irrelevant in determining the inherent character of the tax. While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not sus-

ceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristic of an indirect tax as defined by authoritative decisions.

Their Lordships are accordingly of opinion, without entering upon other topics which were discussed at the hearing, that the timber tax in question is an export tax falling within the category of duties of Customs and Excise, and as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the Provincial Legislature.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

v.

THE MCDONALD MURPHY LUMBER COMPANY, LIMITED.

DELIVERED BY LORD MACMILLAN.

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