1894
*Oct. 3, 4.
1895
*Mar. 11.

JOSEPH FORTIER (DEFENDANT).....APPELLANT ;

AND

WILLIAM B. LAMBE, ÈS QUALITÉ, (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

Constitutional law—Powers of provincial legislatures—Direct taxation—Manufacturing and trading licenses—Distribution of taxes—Uniformity of taxation—Quebec statutes 55 & 56 V. *c.* 10 *and* 56 *V. c.* 15—*British North America Act*, 1867.

The provisions of the Quebec statute, 55 & 56 V. c. 10 as amended by 56 V. c. 15 do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax and *intra vires* of the legislature.

The license required to be taken out by the statute is merely an incident to the collection of the tax and does not alter its character.

Where a tax has been imposed by competent legislative authority the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional.

Bank of Toronto & Lambe (12 App. Cas. 575), followed.

Attorney General v. *The Queen Insurance Co.* (3 App. Cas. 1090), distinguished.

APPEAL from the decision of the Superior Court sitting in review at Montreal (1), affirming the judgment in the Superior Court (2), which condemned the defendant to pay the amount of the license fee imposed on manufacturers and traders under the statutes 55 & 56 Vic. c. 10 amended by 56 Vic. c. 15.

The action was brought by the plaintiff, as collector of provincial revenue for the district of Montreal, to

*PRESENT :—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) Q.R. 5 S.C. 355.

(2) Q.R. 5 S.C. 47.

recover the license fee or tax imposed by the statutes upon the defendant as a merchant carrying on business by wholesale and retail within the limits of the city of Montreal. Defendant resisted the recovery on the grounds, 1. That the acts were *ultra vires*, being a regulation of trade and commerce; 2. That the license fee or tax imposed was an indirect tax; and 3. That admitting the tax to be within the competence of the provincial legislature, it had not been levied or apportioned in a legal or constitutional manner.

The preamble of the Act recites the extent of the funded and floating debt of the province and of the estimated expenditure and the insufficiency of the present revenue to meet the increased expenditure and additional burdens put on the province, and the expediency and necessity of levying new taxes to meet such debts and obligations, and the statute then proceeds to impose the taxes. The tax now specially questioned is the double license fee provided by section 826*c* which enacts that every trader doing business in Montreal by wholesale, or by wholesale and retail, shall, if his stock in trade exceeds in value $500, be obliged to take out in each year a license from the collector of provincial revenue, for which he shall pay $100; and section 826*d* which provides that in certain cases double license fees shall become due and be exacted, and the person in default shall, in addition to any other recourse against him, be liable to a penalty of $100, and in default of payment to imprisonment for one month. Among the cases specified is that of any person or firm bound to take out a license failing to do so, or carrying on trade or business, or selling by wholesale or retail, any goods, wares or merchandise of any kind without having a license.

The defendant admitted that he was a person of the class specified, and based his defence entirely upon the constitutional objections taken.

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Geoffrion Q.C. and *Leet* for appellant. The tax is unconstitutional because:

1. It is an indirect tax. 2. It is a regulation of trade and commerce. 3. It affects to license and control subjects outside the category of licenses a province may issue. 4 If, in its incidence, it is direct it has not been legally apportioned.

The legislature intended to make the carrying on of business impossible without a license, to pass a license Act governed by principles and rules of law relating to license Acts and license fees, and coming within subsec. 9, of sec. 92 of the British North America Act, and the courts must interpret the Act according to such intention.

The levy is not "taxation" within the legal meaning of the term and within the meaning of the term as used in the British North America Act, and the legislature, in endeavouring to levy a license fee, violated an imperative principle necessary to direct taxation under subsec. 2. *Severn* v. *The Queen* (1); Cooley on Taxation (2); Blackwell on Tax Titles (3).

A levy, in order to meet the requirements of taxation, must be apportioned over the whole taxing district at a uniform rate. Cooley on Taxation (4). See *Jonas* v. *Gilbert* (5), remarks by Ritchie C.J. at p. 365.

The essential elements necessary to distinguish this impost from arbitrary levies are wanting. The remarks of the judges below would indicate that the power for such a levy lies not so much in the fact that it conforms to the legal definition of a tax, as because of the sovereign power of the legislature. The powers of the Imperial Parliament are not restricted by a written constitution imposed by a superior power, and

(1) 2 Can. S.C.R. 70.
(2) 2 ed. p. 237.
(3) 5 ed. secs. 2, 3.
(4) 2 ed. pp. 141, 243.
(5) 5 Can. S.C.R. 356.

consequently Mr. Justice Jetté's quotations as to absolute sovereignty cannot apply. The only English authority really applicable are the remarks of Sir Barnes Peacock in *Hodge* v. *The Queen* (1).

The legislature can simply levy a tax. It cannot confiscate. It cannot arbitrarily select one city or one municipality and collect from it the whole revenue of the province, nor can it levy from the inhabitants of one municipality at a different rate from another. It cannot select a few individuals to bear the tax.

The principle that the legislature cannot discriminate is laid down in *Attorney General* v. *Toronto* (2).

While the rate of apportionment is entirely within the discretion of the legislature, yet if the rate is not uniform and equal but the reverse, the courts should interfere to prevent the violation of the necessary principle of equality, making it not a tax but an arbitrary levy. Blackwell on Tax Titles (3); Cooley on Taxation (4).

Casgrain Q.C. Attorney General of Quebec and *Martin* for the respondent.

The tax is of the same nature as that imposed by 45 Vic. ch. 22 (Q.), on commercial corporations, which was held to be within the authority of the local legislature. *Lambe* v. *Bank of Toronto* (5).

The tax in question is a direct tax. Burroughs on Taxation, 146; Jevons Pol. Economy (1878) p. 127; Say, Economie Politique; Merlin (6). Lord Selborne laid down the same doctrine in *Attorney General* v. *Reed* (7).

As to the opinion expressed in *Severn* v. *The Queen* (8), that a brewer's license fee under 37 Vic. c. 22 (O.), was an indirect tax, see the remarks in their Lord-

(1) 9 App. Cas. 132.
(2) 23 Can. S.C.R. 514.
(3) 5 ed. ss. 11, 27.
(4) 2 ed. p. 169.
(5) 12 App. Cas. 575; 10 Legal News 258; 32 L.C.Jur. 1.
(6) Rep. vo. Contributions Publique, p. 1.
(7) 10 App. Cas. 141.
(8) 2 Can. S.C.R. 70.

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ships' judgment in the Privy Council in the case of the commercial corporations (1). The present acts are not prohibitive in their effect.

The true character of the tax is not to be determined by the use of the word "license." The Quebec Legislature made use of the same word in the Act 39 Vic., c. 7, "An Act to compel assurers to take out a license," but in *Attorney General* v. *The Queen Insurance Company* (2), the Privy Council refused to regard it as a license act or the price payable as the price of a license but took it to be a mere stamp act, and the price payable as the price of a stamp, and that this was indirect taxation and *ultra vires*. Looking at the act in question and the true character of the so-called licenses, we submit that the Quebec Legislature imposed here a direct tax just as 45 Vic. c. 22 imposed a direct tax upon commercial corporations.

As to interference with the regulation of trade and commerce the remarks of their Lordships in *Bank of Toronto* v. *Lambe* (1), show that contention to have been too wide when urged by the banks and commercial corporations. It must necessarily follow that the contention has no more force in this case than it had in the cases just referred to.

As to the application of principles laid down by decisions under the constitution of the United States of America, the Privy Council expressed the opinion in *The Bank of Toronto* v. *Lambe* (1), that it is quite impossible to argue from the one case to the other.

It was said that the legislature might crush a bank out of existence and so nullify the power to erect banks, and it is now suggested that the power to regulate trade and commerce may be nullified by crushing

(1) *Bank of Toronto* v. *Lambe*, 12 App. Cas. 584.

(2) 3 App. Cas. 1090; 22 L.C. Jur. 307.

traders out of existence under heavy taxation. The Judicial Committee said as to that (1):

"When the Imperial Parliament conferred wide powers of local self-government on great colonies, such as Quebec, it did not intend to limit them on the speculation that they would be used in an injurious manner. They were trusted with the great power of making laws for property and civil rights, and may well be trusted to levy taxes."

It is said that even supposing the tax is not illegal on other grounds it has not been equally or fairly apportioned over the territory taxed.

Under our system Parliament has absolute sovereignty, and its acts are not subject to be questioned by the courts when within the competence of the legislature. See Cooley on Taxation (2); Potter's Dwarris on Statutes (3); Sedgewick on Statutory & Commercial Law 182; *Hodge* v. *The Queen* (4).

In the commercial corporations cases it was urged that the tax imposed upon them was unjust and inequitable but the courts refused to take this ground into consideration at all. *Bank of Toronto & Lambe* (1).

THE CHIEF JUSTICE.—This judgment is in my opinion free from error. If I was at liberty to do so, I might hold according to the opinion I expressed in *Severn* v. *The Queen* (5), that a license of this kind came within the words "other licenses" in subsec. 9, sec. 92 British North America Act, but I am precluded from doing this by the judgment of this court in that case.

(1) *Bank of Toronto* v. *Lambe*, 12 App. Cas. 586; 32 L.C. Jur. 6.
(2) 2 ed. p. 247.
(3) p. 479.
(4) 9 App. Cas. 117; 7 Legal News 23.
(5) 2 Can. S. C. R. 70.

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I am, however, of opinion that this is the case of a direct tax and is governed by the decision of the Privy Council in the *Bank of Toronto* v. *Lambe* (1), and that it is not an indirect tax within *Attorney General* v. *Queen Insurance Co.* (2). I quite agree with the courts below in the definition which they give of a direct tax. In order that a tax may be indirect it must appear clearly that it was one not to be ultimately borne by the person by whom it is to be paid in the first instance. I cannot say that a tax upon a man's business is one which must necessarily be borne by the persons who make purchases from him.

This distinction between a direct and an indirect tax depending on the incidence of the tax is well pointed out by Professor Sidgwick in his work on Political Economy (3), where he says:

> We have now to note a new element of imperfection and uncertainty in the equalization of taxation due to the fact that we can only partially succeed in making the burden of either direct or indirect taxes fall where we desire; the burden is liable to be transferred to other persons when it is intended to remain where it is first imposed, and on the other hand when it is intended to be transferred the process of transference is liable to be tardy and incomplete. Indeed this process is often so complicated and obscure that it is a problem of considerable intricacy and difficulty to ascertain where the burden of a tax actually rests; and it is not even a simple matter to state accurately the general principle for determining the incidence of a tax supposing all the facts to be known.

And in a note he adds:

> The common classification of taxes as direct and indirect appears to me liable to mislead the student by ignoring the complexity and difficulty of the problem of determining the incidence of taxation.

If this tax was imposed without the device of a license it would be precisely identical with that in question in *The Bank of Toronto* v. *Lambe* (1), and I cannot see that the circumstance that the persons affected

(1) 12 App. Cas. 576. (2) 3 App. Cas. 1090.
(3) Ed. 2, p. 571.

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by the tax are, for convenience of the government in collecting it, required to take out a license can make any difference. It is a direct tax to all intents and purposes, and within the powers expressly conferred upon the legislature.

The objection of want of uniformity which was so strongly pressed is no legal objection. Granting that the legislatures have the power of imposing such taxes it is for them to say how it is to be distributed.

We have not in the British North America Act any such provision as that contained in the constitution of the United States, which requires that all taxes, excises and imposts shall be uniform throughout the United States (1).

The cases cited in support of this contention were principally American authorities which had reference to this express constitutional provision requiring uniformity.

The appeal must be dismissed with costs.

TASCHEREAU J.—The contention of the appellant based on the ground that this tax has not been legally apportioned, and is null for want of uniformity and equality, is, in my opinion, untenable. Whatever political economists and other writers may say on this subject I know of no law in the Dominion that in any way puts any restriction, limitation or regulation of that kind on the powers of the federal or provincial authorities in relation to taxation within their respective spheres.

In the United States a provision on the subject is to be found in the federal constitution, but there is no similar enactment in the British North America Act.

The appellant's other contention, that this tax involves a regulation of trade and commerce, and is

(1) Const U.S. art. 1, sec. 8, no. 1.

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therefore *ultra vires*, is also untenable. A similar point was urged in *Citizens Ins. Co.* v. *Parsons* (1), and in *Bank of Toronto* v. *Lambe* (2), and declared unfounded. The reasoning of their Lordships of the Privy Council upon that point in those cases applies here. In fact, if this is a direct tax, *cadit questio*, this statute is *intra vires*; the fact that it might involve in a certain degree a regulation of trade and commerce cannot deprive the provincial legislature of the right to raise a revenue by means of direct taxation, or impair such right in any way.

The cases of *Almy* v. *The State of California* (3); *Lin Sing* v. *Washburn* (4); *Brown* v. *Maryland* (5); and *Leloup* v. *The Port of Mobile* (6) cited by the appellant, do not support his contention. He here again seems not to have given sufficient attention to the differences between the British North America Act and the United States constitution on the subject. Is this a direct tax? is therefore the first question that presents itself in this case, and if the question is answered affirmatively there is an end of the appellant's case.

The cases of *Reg.* v. *Taylor* (7); *Severn* v. *The Queen* (8); *Attorney General* v. *The Queen Ins. Co.* (9); *Attorney General* v. *Reed* (10); *Bank of Toronto* v. *Lambe* (2), though not directly in point, contain all that can be said, and almost all the authorities and writers that can be cited, on this question. It would be, however, useless for me, in the view I take of the present case, and fettered by authority as I deem myself to be, to enter into a renewed consideration of the different aspects of the question in relation to the British North America Act. I mean, of course, as a question of law,

(1) 7 App. Cas. 96.
(2) 12 App. Cas. 575.
(3) 24 How. 169.
(4) 20 Cal. 534.
(5) 12 Wheat. 419.
(6) 127 U. S. R. 641.
(7) 36 U.C.Q.B. 183.
(8) 2 Can. S.C.R. 70.
(9) 3 App. Cas. 1090.
(10) 10 App. Cas. 141.

not as one of statesmanship or political economy. Assuming that licenses, generally speaking, constitute indirect taxation, a proposition that in law I would now very much doubt as applicable to the British North America Act, I hold that though the Quebec legislature has resorted to a system of licenses as a means to raise the tax in question yet this statute is not to be taken as a license Act.

It is evident, by its terms, that it contains no prohibition whatever as to manufacture or trade. Therefore no license, no permit (*lices licere*) is necessary in the province as a condition precedent to legally manufacture or legally trade, and all contracts entered into by the manufacturer or trader in the course of his business are perfectlylawful and enforceable at law (1). The Liquor License Acts, on the contrary, as did also the Act under consideration in *Severn* v. *The Queen* (2) absolutely prohibit the selling of any liquor without having first obtained a license to do so. Under that class of statutes, every time a sale without license is made the penalty is incurred; each sale is a distinct offence, and is altogether unlawful. Under the statute now under consideration the double license fee is exigible only once a year, and the sale or manufacture without a license is not unlawful in the sense that a sale of liquor without a license is under a prohibitory law. This is, it seems to me, as direct a tax as the tax under consideratien in the Bank of Toronto case, which by the Privy Council has been declared to constitute direct taxation. In fact it is nothing else but an extension to private individuals of that statute which applied only to corporations. Now, if this tax was a direct one when imposed upon commercial corporations, is it the less direct when imposed upon private

(1) Cooley on Taxation pp. 385, 406, and cases there cited.

(2) 2 Can. S.C.R. 70.

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individuals? And can the form of collecting the tax alter its nature? We have the high authority of the Privy Council in *Attorney General* v. *The Queen Insurance Co.* (1) for the proposition that it does not. And in the same sense Mr. Justice Clifford, delivering the judgment of the United States Supreme Court in *Scholey* v. *Rew* (2), in answering negatively the argument, that the tax in question in that case was a tax on land because the act creating it made it a lien on the land, said: "Nor is the tax in question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction."

In my opinion the license in question here is likewise merely an appropriate regulation to secure the collection of a direct tax.

I would dismiss the appeal. If the question was *res integra* I would be inclined to think that the words "direct taxation" in subsec. 2 of sec. 92 of the British North America Act were not intended to give to the provinces the very large powers of taxation that are claimed by the respondent here, and which the judgments of the courts below concede them, either directly or inferentially. However, in view of the decision of the Privy Council, I have to refrain from giving my own opinion on the question submitted.

GWYNNE J.—It is sufficient, in my opinion, in this case to say that the Act of the Province of Quebec, 55 & 56 Vic. ch. 10, as an Act for the purpose of imposing "direct taxation within the province for provincial purposes" is upon the authority of the judgments of their Lordships of the Privy Council in *Bank of Toronto* v. *Lambe* (3), *intra vires* of the provincial legislature. Upon this ground I think the Act is maintainable, and that the appeal should therefore

(1) 3 App. Cas. 1090. (2) 23 Wall. 331.
(3) 12 App. Cas. 575.

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be dismissed with costs. As to the contention of the appellant on the one side that the Act was *ultra vires* of any jurisdiction conferred by item 9 of sec. 92, and that of the respondent on the other hand that the Act was *intra vires* of that item, and that the authority of *Severn* v. *The Queen* (1), was so shaken by the judgment of this court in *Molson* v. *Lambe* (2) that it should no longer be followed, I decline to express any opinion, for the reason already given, as to whether this case is or is not governed by *Severn* v. *The Queen*, (1), or whether that case was well or ill decided. It certainly has not been judicially overruled, and until it shall be it is, I presume, binding upon this court, and it is not necessary for the decision of the present case to bring it within *Severn* v. *The Queen* (1), and as to its being shaken by *Molson* v. *Lambe* (2), a perusal of the report of that case will show that the only question raised and submitted to the court in that case was as to the right of a party to proceedings in an inferior jurisdiction, by the law of the province of Quebec, to prohibit the judge of the inferior jurisdiction from proceeding to judgment upon issues joined in the matter before him; and the judgment of the court was that as the matter in which the issues were joined was within the jurisdiction of the Superior Court proceedings in prohibition could not be instituted according to the law of the province of Quebec to prevent the judge proceeding to judgment in the case, and that if he should render an erroneous judgment in the matter it could be reviewed upon a *certiorari*.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *Maclaren, Leet & Smith.*
Solicitors for the respondent: *Beaudin & Foster.*

(1) 2 Can. S.C.R. 70.
(2) 15 Can. S.C.R. 253.