

THE CONSTRUCTION OF TAXING STATUTES

Lord Cairns, in a frequently-quoted passage in *Cox v. Rabbits*¹ said that "a taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed". Like most legal maxims, this canon, now firmly entrenched in the law, itself needs some interpretation.

CLEAR AND UNAMBIGUOUS LANGUAGE

That a tax must be imposed in clear and unambiguous language, is one form in which this canon of interpretation has been expressed. "Taxing Acts," said Lindley L.J. in *In re Thorley, Thorley v. Massam*,² "are to be read strictly; that is to say, they are not to be extended so as to have the effect of imposing on the subject a tax which Parliament has not clearly made him pay. Those principles are perfectly familiar." In *Oriental Bank Corporation v. Wright*,³ Lord Blackburn spoke of "the rule that the intention to impose a charge on the subject must be shewn by clear and unambiguous language". The *Oriental Bank Case* was referred to in *Brunton v. Commissioner of Stamp Duties*⁴ by Lord Parker who said "the intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shewn by clear and unambiguous language and cannot be inferred from ambiguous words".⁵

Exemptions, it has also been said, must be granted in clear terms. "It is a commonplace that in statutes of taxation the imposition of a duty must be in plain terms. It is true that s. 14 is not a section which imposes a duty; it is a section which exempts from duty, but it is equally within the observation which I have made in the sense that the Act of Parliament has only imposed the duty upon such persons as are plainly indicated as being within the class to be charged."⁶

¹ (1878), 3 App. Cas. 473 at p. 478.

² [1891] 2 Ch. 613 at p. 623.

³ (1880), 5 App. Cas. 842 at p. 856.

⁴ (1913), 82 L.J. P.C. 139 at p. 146.

⁵ See also *Ex parte Lewin* (1885), 11 S.C.R. 484 at p. 489; *The Queen v. J. C. Ayer Co.* (1887), 1 Ex. C.R. 232 at p. 271; *Grinnell v. The Queen* (1888), 16 S.C.R. 119 at p. 136; *O'Brien v. Cogswell* (1890), 17 S.C.R. 420 at pp. 424-5; *Foss Lumber Co. v. The King* (1912), 47 S.C.R. 130 at p. 140; *Can. Northern Ry. Co. v. The King* (1922), 64 S.C.R. 262, affd. [1923] A.C. 714, at p. 275; *The City of Ottawa v. Egan*, [1923] S.C.R. 304 at p. 308; *Re Kemp and City of Toronto* (1930), 65 O.L.R. 423 at p. 428; *Re Lyman Bros.*, [1932] O.R. 419 at p. 425; *The King v. Crabbs*, [1934] S.C.R. 523.

⁶ *C.I.R. v. Gribble*, [1913] 3 K.B. 212 at p. 219.

The plain meaning, moreover, is not a technical, but the natural meaning — so far as language can be said to have a natural meaning. "What we ought to do in this case, it being not free from difficulty is to choose that which I should say is the natural meaning of a word used in a statute, not specially relating at all to the technicalities of real property law or to conveyancing in particular, but relating to a matter of business, for this is a Finance Act, and therefore using language which is to be read from a business point of view."⁷

NO EQUITABLE CONSTRUCTION

The meaning of the maxim has sometimes been said to be that there may not be an equitable construction of a taxing statute. In *Dyson v. Attorney-General*,⁸ Farwell L.J. quotes Lord Cairns in *Partington v. Attorney-General*,⁹ where he said: "If there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." A reading of the complete judgment of Lord Cairns shows that in saying that an equitable construction is inadmissible, he meant that while the words imposing the tax must be clear and unambiguous, if they are so, no considerations of hardship or the like may be entertained. "I am not at all sure," he said,¹⁰ "that, in a case of this kind — a fiscal case — form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If a person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." This passage was quoted by a Canadian Court in *The Queen v. J. C. Ayer Co.*,¹¹ and again in *Grinnell v. The Queen*,¹² to support the proposition that

⁷ *Ibid.*, at p. 220.

⁸ [1912] 1 Ch. 158 at p. 171.

⁹ (1869), L.R. 4 H.L. 100 at p. 122.

¹⁰ At p. 122.

¹¹ (1887), 1 Ex. C.R. 232, Ritchie C.J. at p. 271.

¹² (1888), 16 S.C.R. 119, Ritchie C.J. at p. 136.

in cases of doubtful interpretation, the construction should be in favour of the taxpayer.¹³ In *Versailles Sweets Ltd. v. Attorney-General of Canada*,¹⁴ Duff J. after quoting the passage, explained that "Lord Cairns, of course, does not mean to say that in ascertaining 'the letter of the law', you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume 'any governing purpose in the Act except to take such tax as the statute imposes' as Lord Halsbury said in *Tennant v. Smith*".¹⁵

As Duff J. (as he then was) points out in the above passage, the meaning of the language is to be ascertained without ignoring the context, or, as Viscount Haldane has put it "the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such construction cannot be put on the words".¹⁶

To say, therefore, that there is no equitable construction of a taxing statute, is merely another way of saying that while a tax must be imposed in clear and unambiguous language, having regard to the context, if a tax is imposed in plain language, then questions of hardship on the taxpayer, and the like, are not to be considered by the court.

ONUS ON THE CROWN

The canon is sometimes stated as meaning that the onus is on the Crown to show that the persons sought to be taxed fall clearly within the operation of the taxing Act,¹⁷ or as meaning that the benefit of the doubt is in favour of the taxpayer.¹⁸

If the onus is on the Crown to show that a tax is imposed by the statute, in cases of doubt no tax is imposed. To satisfy

¹³ It has also been quoted in *In re McMaster Estate Assessment* (1901), 2 O.L.R. 474 at p. 477; in *Kennedy v. Minister of National Revenue*, [1929] Ex. C.R. 36 at p. 39, and in *The King v. Crabbs*, [1934] S.C.R. 523 at p. 525.

¹⁴ [1924] S.C.R. 466 at p. 468.

¹⁵ *Infra*.

¹⁶ *Lumsden v. C.I.R.*, [1914] A.C. 765 at pp. 896-7, quoted in *The King v. Crabbs*, *supra*, at p. 526; and see Haldane L.C. in *Attorney-General v. Milne*, [1914] A.C. 765 at p. 771.

¹⁷ *Colebrook v. Tickell* (1836), 5 L.J. K.B. 180 at p. 184; *Ingram v. Drinkwater* (1875), 44 L.J.P.C. 83 at p. 86; *Whittley v. Burns*, [1908] 1 K.B. 705 at p. 709; *Rex v. Gooderham & Worts Ltd.* (1928), 62 O.L.R. 218 at p. 221.

¹⁸ *Grinnell v. The Queen* (1888), 16 S.C.R. 119; *In re Studdert*, [1900] 2 I.R. 400 at p. 410 quoted in *The King v. Crabbs*, [1934] S.C.R. 523; *Parry v. Croydon Gas Co.* (1863), 15 C.B.N.S. 568 at p. 576.

its onus, the Crown must affirmatively prove that a tax is imposed, that no doubt exists. In other words, a tax is not imposed unless the taxing Act has clearly and unambiguously imposed it. Both these ways of stating the canon (onus on Crown: benefit of doubt) appear to mean no more than that the tax must be imposed in clear and unambiguous language. If the tax is not shown to be clearly imposed, the taxpayer gets the benefit of the doubt and the Crown has failed to satisfy its onus.

In *Foley v. Fletcher*,¹⁹ however, Baron Bramwell seems to have said that "the onus is on the Crown" is the proper way of stating the maxim, while the "clear and unambiguous language" form is incorrect. "I am desirous," he said,²⁰ "to say that I disclaim in this case acting on the maxim, that a burden shall not be imposed on the public unless by clear and unambiguous language. In *Re Micklethwait*²¹ Parke B. says;—'It is a well established rule that the subject is not to be taxed without clear words for that purpose: and also that every act of parliament is to be read according to the natural construction of its words.' The latter is the main rule, the other subordinate. Construe the statute correctly, if its meaning can be ascertained. Maxims of the sort referred to, as frequently applied, are mere invitations to erroneous construction, though when properly understood they are quite correct. The natural course of things is, that the heir takes on the death of the person last seized; whoever seeks to disturb that rule must make out his right to do so. So, whoever seeks to impose a tax or penalty must establish the right; whoever seeks to punish must establish the guilt. The rule properly understood is, that the burden of proof is on the assertor, not that, whenever there is a doubt, a statute is to be said not to mean what it does mean."

It is submitted that the last phrase of this passage shows that what Baron Bramwell had in mind in rejecting the "clear and unambiguous language" test was a construction which disregarded the context. If one concludes that such a statute is being made to say what it does not mean, the conclusion must be based on the context. But the "clear and unambiguous" rule, correctly understood, includes taking into account the context of the language.

¹⁹ (1858), 3 H.&N. 769.

²⁰ At p. 780, quoted with approval in *Kelly v. St. John River Power Co.*, [1931] S.C.R. 349.

²¹ (1855), 11 Exch. 452 at p. 456.

NO GOVERNING INTENTION

While the maxim of strict construction of taxing statutes has been stated in a number of forms, they are all equivalent to saying that a tax must be imposed in clear and unambiguous language — not excluding the context — and if so imposed, no considerations of hardship or unfairness may permit the subject to avoid the tax. That is the principle of strict construction and it may be expressed more concisely, and perhaps more exactly, by saying that in construing a taxing act, no governing intention may be assumed.

Lord Wensleydale (Baron Parke as he then was) in *In re Micklethwait and C.I.R.* said:²² "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and, also, that every Act of Parliament must be read according to the natural construction of its words". Before quoting this passage, as a basis for his own statements, Lord Halsbury, in his usual lucid style, enunciated the rule of strict construction in *Tennant v. Smith*.²³ "This is an Income Tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed', I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

"Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

Lord Halsbury put the principle more succinctly a few years later in *Lord Advocate v. Fleming*:²⁴ "It appears to me that in this case there is a plain interpretation to be put upon plain

²² *Supra*.

²³ [1892] A.C. 150 at p. 154, quoted in *Attorney-General v. Selbourne*, [1902] 1 K.B. 388 at p. 399; in *Versailles Sweets Ltd. v. Attorney-General of Canada*, [1924] S.C.R. 466 at p. 468; *The King v. Crabbs*, [1934] S.C.R. 523 at p. 525; *Re Kemp and the City of Toronto* (1930), 65 O.L.R. 423 at p. 428. See also *Attorney-General v. Milne*, [1914] A.C. 765 at p. 771; *Attorney-General v. Seccombe*, [1911] 2 K.B. 688 at p. 703.

²⁴ [1897] A.C. 145 at p. 151.

words. I am only reiterating what has been said over and over again in dealing with taxing Acts, when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted."

If a type of case is found to fall within the governing principle of the taxing Act, but not within its language, then it is the business of Parliament, not of the Courts, to remedy the situation. As Lord Atkinson remarked in *Attorney-General v. Milne*:²⁵ "To succeed the Crown must bring the case within the letter of that enactment. It is not enough to bring the case within the spirit of it, or to show that if the section be not construed as the Crown contends it should be construed property which ought to be taxed will escape taxation, or will enjoy, under s. 5, sub-s. 2, an immunity from successive levies of estate duty. These evils, if such they be, must, if they exist, be cured by legislation. Judicial tribunals must in interpreting these taxing Acts stick to the letter of the statute."

How, in fact, has this form of the maxim worked out? *Tennant v. Smith*,²⁶ for example, was an Income Tax case. Under the Act there considered,²⁷ any person who proves that his "total income from all sources" is less than £400 shall be exempt from tax on £120 thereof. This exemption was claimed by a bank employee who, however, was permitted, and indeed obliged, to occupy a house owned by the bank rent-free. The House of Lords held that the annual value of the house could not be included by the taxing authorities in estimating the yearly income of the employee. It was not "income" whatever the general intention of the Act may have been.

In a general way, the occupation of a house rent-free is income, or the equivalent of income. But, upon the wording of the Income Tax Act considered in *Tennant v. Smith*, it was not subject to tax, although if the intention of the Legislature in enacting the Act were to be considered, then in all likelihood the right would have been taxable.

The intention to tax must be carried into language which plainly effects the intention²⁸ and this is so even in the case of the construction of the Customs Act which contains a general

²⁵ [1914] A.C. 765 at p. 771 and see *Attorney-General v. Selbourne*, [1902] 1 K.B. 388 at p. 396.

²⁶ *Supra*.

²⁷ Customs and Inland Revenue Act, 1876, s. 8.

²⁸ Anglin J. in *McLeod v. Windsor*, [1923] S.C.R. 696 at p. 709 quoting Taft C.J. in *Smietanka v. First Trust and Savings Bank*, 257 U.S. 602.

provision²⁹ that the expressions of that Act or of any customs law shall receive such fair and liberal construction as will best insure the protection of the revenue and the attainment of the purpose for which that Act, or such law, was made, according to its true intent, meaning and spirit. Ritchie C.J. said that he did not "understand from this that laws imposing duties are to be construed beyond the natural import of their language, or that duties or taxes are to be imposed upon terms of vague and doubtful interpretation".³⁰

"No doubt," he continued, "revenue laws are to be construed as will most effectually accomplish the intention of the legislature in passing them, which simply is to secure the collection of the revenue. But it is clear that the intention of the legislature, in the imposition of duties, must be clearly expressed, and in cases of doubtful interpretation the construction should be in favour of the importer."³¹

NO SPECIAL RULE

In a judgment which has been referred to a number of times in Canadian courts³² Lord Russell of Killowen in *Attorney-General v. Carleton Bank*³³ seems, at first sight, to have rejected the canon of strict construction: "In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act." The sweeping effect of this statement, however, is cut down by the words which follow and which set out the canon of strict construction as it has been suggested above to be, namely, that the intention is to be given effect where it is expressed in suitable language: "The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular

²⁹ R.S.C. 1927, c. 42, s. 2, sub-s. 2.

³⁰ *The Queen v. J. C. Ayer Co.* (1887), 1 Ex. C.R. 232 at p. 271.

³¹ Repeated by Ritchie C.J. in *Grinnell v. The Queen* (1888), 16 S.C.R. 119 at p. 135; quoted in *Foss Lumber v. The King* (1912), 47 S.C.R. 130 at p. 140.

³² See *infra*.

³³ [1899] 2 Q.B. 158 at p. 164.

tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said." The penultimate sentence of this passage indicates that Lord Russell of Killowen, in rejecting special construction of taxing statutes, was referring to the suggestion of counsel that "the Crown's contention leads to hardship. A Revenue Act ought to be construed liberally in favour of the subject."

In short, Lord Russell's judgment merely means that there is no equitable construction of a taxing statute, that considerations of hardship or the like play no part in construing such Acts, that the duty of the Court is "to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context." These remarks may be applied to the Canadian judgments which have followed *Attorney-General v. Carleton Bank*.³⁴

In *Cartwright v. Toronto*,³⁵ Duff J. said: "The effect of the judgment of the Judicial Committee³⁶ is that particular provisions in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole." *Cartwright v. Toronto*, however, dealt with a tax sale, as did the judgment of the Privy Council to which Duff J. referred. In such cases the tax, of course, has already been imposed and the purpose of the statute is not to impose a tax but to quiet the title of those who have purchased land at a tax sale, the requirements as to the mode in which such sales should be conducted not having been perfectly complied with.³⁷ In a case above referred to³⁸ Duff J., in speaking of Acts which seek to impose taxation, adopted Lord Halsbury's canon that no governing intention is to be assumed.

REASON FOR RULE

Earl Cairns, whose words in *Cox v. Rabbits and Partington v. Attorney-General*³⁹ have been frequently quoted in regard to the canon of strict construction of taxing statutes, later suggested

³⁴ *The King v. Algoma Central Ry.* (1902), 32 S.C.R. 277, affd. [1903] A.C. 478, at p. 283. *The King v. Robitaille* (1909), 12 Ex. C.R. 264 at 269.

³⁵ (1914), 50 S.C.R. 215.

³⁶ In *Toronto v. Russell*, [1908] A.C. 493.

³⁷ See Lord Atkinson in *Toronto v. Russell*, at p. 501.

³⁸ *Versailles Sweets Ltd. v. Attorney-General of Canada*, *supra*.

³⁹ *Supra*.

the basis for the canon:⁴⁰ "The cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was no *à priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequence".

Whether Lord Cairn's theory that taxing Acts are to be construed strictly because the imposition of taxes arises solely from such statutes, and not from any antecedent relationship, or the idea expressed by the Supreme Court of Canada that "a law imposing taxation should always be construed strictly against the taxing authorities, since it restricts the public in the enjoyment of its property"⁴¹ be adopted, it appears at any rate that the canon of strict construction, properly understood, is now embedded in the law of statute interpretation.

There are two aspects of the canon. The first is that which is advantageous to the public and is emphasized by saying that taxes are to be imposed by clear and unambiguous words only, and that the Court may not consider the governing intention of the Act. The second aspect is that which is advantageous to the taxing authority, namely, that there is no equitable construction of a taxing Act, that the Court may not consider questions of hardship or unfairness.

To impose a tax, the words of the Act, including the context, must be clear and unambiguous, but if they are so, no considerations of hardship or the like may be entertained; that is, the wording only (including the context) of the taxing Act may be regarded, and not the general purpose of the Legislature to impose taxation on income or whatever it may be, and if the subject falls within the wording (including the context) then a tax is imposed. In a word, taxes are imposed by the letter of the law and not the spirit.

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⁴⁰ *Pryce v. Monmouthshire* (1879), 4 App. Cas. 197 at pp. 202-3.

⁴¹ Brodeur J. in *Can. Northern Ry. Co. v. The King* (1922), 64 S.C.R. 264, affd. [1923] A.C. 714, at p. 275; see also *Nicholls v. Cumming* (1877), 1 S.C.R. 395 at p. 422.