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TAXATION POWERS IN CANADA

The purpose of this article is to reveal, as accurately as it is possible to do in a brief survey, the manner in which taxation powers are allocated as between the Dominion and the Provinces. Though conferred by provisions few in number, and notably lacking in ambiguity, the determination of the exact scope of the respective taxing powers is, nevertheless, a matter of the utmost difficulty. This is true notwithstanding that there is a wealth of judicial decision on the subject. Indeed, the most expert knowledge of that jurisprudence cannot be said to go very far as a guide to the draftsman in preparing taxing statutes or to the lawyer in advising as to their validity.

In addition to the Dominion Parliament and the Legislatures of the several Provinces there are hundreds of municipal and administrative bodies engaged in the annual production of taxation measures. Accordingly, it is a matter of wide-spread concern to determine the exact meaning of the provisions of the British North America Act upon which the validity of each of these numerous measures depends. Every new essay in the field of taxation is fraught with peril, the reality of which is attested by the ghosts of previous measures (some old in type) interred with full judicial rites months or years after the hopeful law-makers sent them on their way. Yet the march of events, and the needs of the present, compel the seeking of new sources of revenue, new types of taxation, in a ceaseless process in which the ingenuity of the lawmaker in devising expedients to cloak a purpose of doubtful legality is pitted against the discernment of the judiciary.

Does the Provincial statute or municipal by-law impose a tax? Is it a "direct" tax? Is it a revenue measure at all or is it a "colourable" attempt to enact "indirect" taxation or to accomplish a non-taxation object by means of pseudo-taxation? What is its "pith and substance"—its "practical effect"? How does the quantum of the impost or its subject-matter bear upon

its true character? Is the subject of the tax "within the Province", actually or by fiction of law? All these are potential questions which the fledgling measure must answer satisfactorily before it can pass the judicial gauntlet if challenged.

The writer believes that perusal of the following pages will demonstrate that the foregoing paragraphs have not overdrawn the realities of the present situation. He hopes that the article as a whole will assist the profession in some small degree. He suggests no remedy; though he believes that some day remedy must be sought.

A. DOMINION TAXING POWER

The Dominion Parliament has power by sec. 91 (3) of the British North America Act, 1867, to make laws in relation to "*the raising of money by any mode or system of taxation*".

There are no degrees of omnipotence; the Dominion's power of taxation is the plenary power of a sovereign legislature. No decision has limited this clause as to the *nature* of the tax.¹ Nor is there any explicit limitation requiring that the tax be for Dominion purposes. There have been, however, suggestions that the power should not extend to direct taxation for the raising of a provincial revenue.² It has yet to be decided whether the Dominion may impose indirect taxes for provincial purposes.³

It is clear that the Dominion, like the Provinces, may impose taxes by way of licences;⁴ that it may give to its own taxes priority over Provincial taxes;⁵ that it may tax the income of Provincial employees and even the salary and sessional indemnity of a Provincial Minister of the Crown.⁶

There are no explicit limitations on this Dominion power save those in section 121 (which is perhaps not directed to Dominion taxes at all)⁷ and in section 125. This latter section

¹ "Upon any view there is nothing in s. 92 to take away the power to impose any taxation for Dominion purposes which is *prima facie* given by head 3 of s. 91. It is not, therefore, *ultra vires* on the part of the Parliament of Canada to impose an income tax for Dominion purposes." —*Caron v. R.*, [1924] A.C. at p. 1004.

² *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. at p. 108; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. at p. 585. Cf. *Forbes v. Attorney-General for Manitoba*, [1937] A.C. at pp. 273-4.

³ *Caron v. R.*, *supra*.

⁴ *Attorney-General for Canada v. Attorney-General for the Provinces*, [1898] A.C. at pp. 713-4.

⁵ *In re Silver Bros.*, [1932] A.C. 514 at p. 521.

⁶ *Caron v. R.*, *supra*. Such power of taxation cannot be so used as to destroy the capacity of provincial officials to act as such. *Caron v. R.*, *supra*.

⁷ See *infra*.

explicitly precludes the Dominion from taxing Provincial lands or property; yet it has been held not to exclude a Dominion customs duty on liquor imported by a Provincial Government.⁸ Even the doctrines confining Dominion legislation to Canadian territory,⁹ and disabling Canada from legislating repugnantly to Imperial statutes, have ceased to operate.¹⁰

In sum, it seems that the Dominion's power of taxation is that of a fully sovereign state and that all persons and property within Canada may be taxed in any way for the raising of a Dominion revenue; provided only the legislation is, in pith and substance, taxation legislation and not something else disguised as taxation for the attainment of an ultra vires purpose.¹¹ Apart from the question of colourable purpose, any levy will constitute a tax if compulsorily imposed by public authority, enforceable by law and imposed for a public purpose.¹²

It may be noted as a matter of interest (though not of strict relevance) that a limitation upon the power of the Dominion to dispose of taxation proceeds is contained in the *caveat* recently uttered by the Privy Council that "assuming that the Dominion has collected *by means of taxation* a fund, it by no means follows that any legislation which *disposes of* it is necessarily within Dominion competence".¹³

B. PROVINCIAL TAXING POWER¹⁴

1. Direct Taxation

By sec. 91 (3) the Dominion has exclusive jurisdiction over "The Raising of Money by any Mode or System of Taxation"; by sec. 92 (2) each Province has similar jurisdiction to legislate

⁸ *Attorney-General for British Columbia v. Attorney-General for Canada*, [1924] A.C. 222.

⁹ Which apparently did not limit Dominion customs legislation, at least. *Croft v. Dunphy*, [1933] A.C. at p. 163.

¹⁰ Statute of Westminster, 1931.

¹¹ *In re Fisheries Act*, [1930] A.C. 111; *In re The Insurance Act of Canada*, [1932] A.C. 41 at pp. 52-3; *R. v. Eastern Terminal Co.*, [1925] S.C.R. 434, at p. 447. Cf. *Forbes v. Attorney-General for Manitoba*, *supra* at pp. 270-1. Cf. *Alberta Bank Taxation Case*, [1939] A.C. 117.

¹² *Lower Mainland Dairy Products Comm. v. Crystal Dairy Ltd.*, [1933] A.C. 168; *Lawson v. Interior Tree Fruit and Vegetable Committee*, [1931] 2 D.L.R. 193 at p. 197, per Duff J.; *Re Agricultural Land Act*, [1938] 4 D.L.R. 28.

¹³ *In re Employment and Social Insurance Act*, [1937] A.C. at p. 366; for contrary view expressed by Duff, C.J. (for himself and Davis J.) in the court below, see [1936] S.C.R. at pp. 431 ff.

¹⁴ For useful general surveys see KENNEDY AND WELLS, *THE LAW OF TAXING POWER IN CANADA* (1931); MANNING ON ASSESSMENT AND RATING, 2nd ed., 1937, particularly chapter 3.

in relation to "direct taxation within the Province in order to the raising of a revenue for Provincial purposes". The latter power is to be reconciled with the former by treating the Dominion power as extending to raising revenue by any system, whether direct or indirect; while the Province is confined to direct taxation.¹⁵

Each body has an independent jurisdiction to tax; but the Province is limited as to the *nature* of its taxes (direct), the *area* of its exercise (within the Province), and its *purpose* (raising a Revenue for Provincial purposes), in the sense that the tax must be directed to the raising of revenue and for a Provincial rather than a Dominion purpose.¹⁶ The Dominion can impose all types of taxation which a Province can impose and also others which a Province cannot. The only overlapping would be that each may impose *direct* taxes,¹⁷ but for different purposes; *i.e.*, the Dominion, for Dominion revenue purposes; the Province, for Provincial revenue purposes. Double or treble taxation thus is legally possible, and actually does exist in some Provinces, the citizens of which are liable to pay income taxes to the Dominion and to the Province and/or a municipality.¹⁸ It is immaterial that the imposition of a direct tax for Provincial revenue purposes involves a degree of regulation of trade or that it is discriminatory.¹⁹

Since the Province is confined to "direct" taxation, every case of Provincial taxation involves the determination of the nature of the tax imposed and the application of some criterion

¹⁵ *Dow v. Black* (1875), L.R. 6 P.C. 272. Cf. *Caron v. R.*, [1924] A.C. 999 at p. 1004. Cf. *Forbes v. Attorney-General for Manitoba*, [1937] A.C. at pp. 273-4.

¹⁶ It does not mean that the tax must have a Province-wide application; for it may be applied to one locality only and be for a local purpose. *Dow v. Black*, *supra*.

¹⁷ As to the validity of Provincial and Dominion income taxes see *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260; *Caron v. R.*, *supra*.

¹⁸ Cf. CLEMENT, CAN. CONSTITUTION, p. 641. There is no conflict between Dominion and Provincial income tax legislation because both may be enforced without clashing and therefore the doctrine of the "occupied field" cannot operate to invalidate the latter. *Forbes v. Attorney-General for Manitoba*, *supra*, at p. 274: "The Dominion reaps part of the field of the Manitoba citizen's income. The Province reaps another part of it." Such "clashing" will arise if the question of the *priority* to be given to the income taxes imposed by the respective statutes arises; but in such case that imposed by the Dominion statute will come first. *In re Silver Brothers Ltd.*, [1932] A.C. at p. 521.

¹⁹ *Fortier v. Lambe* (1895), 25 S.C.R. 422; *In re Baines*, [1924] 2 D.L.R. 1191 at p. 1197. Cf. 51 N.B.R. at pp. 317-8. As to discrimination as affecting municipal taxation see *infra*.

to determine when a tax is or is not "direct"; for if it is not direct it must be indirect, and if indirect beyond Provincial competency.²⁰

The Standard of "Directness"

The standard or definition adopted by the Privy Council,²¹ and subsequently applied uniformly,²² was that given by John Stuart Mill: "A *direct* tax is one which is demanded from the very persons who it is intended or desired should pay it. *Indirect* taxes are those demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

This classification is now one of law and the criterion is a permanent one. We are not to take the current and shifting classifications of economists; for the lawyer and economist have different purposes; nor are we to test the character of a tax by reference to any theory as to its ultimate incidence.²³ The law cannot embark on the task of tracing the actual effect of taxation in order to find where its burden ultimately rests.²⁴

The real task of the Courts is to determine what the Imperial Parliament meant when it assigned "*direct taxation*" to the Provinces.²⁵ The use of the word "direct" coupled with the fact that the Act assigned to the Dominion "*any mode or system of taxation*" suggests that Parliament had in mind some then-accepted standard of meaning.²⁶ Thus in 1897 the Privy Council explained that in the earlier cases Mill's definition had been taken as seeming "to embody with sufficient accuracy the common understanding of the most obvious indicia of indirect and direct taxation which were likely to have been present to the minds of those who passed the Federation Act".²⁷

²⁰ Note that it is the *nature of the tax*, as direct or indirect, which is to be determined. The subject-matter of the tax, *e.g.*, person, property or transaction is of importance here only insofar as it bears on the directness of the tax. It is important also on the different issue as to the *situs* of the tax as being "within the Province."

²¹ First in *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. 141; re-affirmed in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 at p. 582.

²² *E.g.*, *Attorney-General for British Columbia v. Kingcome*, [1934] A.C. at pp. 51, 54.

²³ *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117 at pp. 124, 126; *Attorney-General for British Columbia v. Kingcome*, *supra*, at p. 57.

²⁴ *Bank of Toronto v. Lambe*, *supra*, at pp. 581-2.

²⁵ *Lambe's Case*, *supra*, at p. 581; *Fairbanks' Case*, *supra*, at p. 123.

²⁶ *Fairbanks' Case*, *supra*, at p. 124.

²⁷ *Brewers & Maltsters Assn. v. Attorney-General for Ontario*, [1897] A.C. at p. 236.

The law accepts the definition as laying down a uniform permanent objective test of directness. It affords (a) a logical basis for the recognized distinction, and (b) it is a useful guide by which to classify new and unfamiliar taxes. But (c) it cannot be used to disturb the effect of the common understanding in 1867 as to certain species of taxes then recognized as direct or indirect,²⁸ e.g., income taxes were recognized as direct, and customs and excise taxes as indirect. There is thus a large limitation on the application of the definition.²⁹ If the character of a given species of tax was clear to the economists in 1867 it has the same legal character today; it is immaterial that economists do not so view it today, nor that tested now by Mill's definition it might be otherwise classified by the law.³⁰

*"It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity",*³¹ i.e., its general incidence at the time of the payment of the tax.³² "Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test. . . . An exhaustive partition would be an impracticable task."³³ A tax the general tendency of which is direct is not made indirect because of possibilities of evasion or recoupment,³⁴ particularly if the method be obscure and circuitous.³⁵ Thus in one case,³⁶ the Privy Council noted that the burden of the tax would not "in ordinary course" be transferred and that no such transfer could have been contemplated as "the natural result" of the legislation; in another,³⁷ that it was "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";

²⁸ *Fairbanks' Case*, *supra*, at p. 125; *Forbes v. Attorney-General for Manitoba*, *supra*.

²⁹ For criticism of this method of construction as creating unfortunate rigidity in meeting new conditions see Martin J.A. in *Attorney-General for British Columbia v. Col*, [1934] 3 D.L.R. at pp. 495-6.

³⁰ *Per Fairbanks' Case*, *supra*, at pp. 125-6. For an apparent departure from the rule as to the binding effect of the established classifications see under "Customs and Excise Duties", *infra*.

³¹ *Fairbanks' Case*, [1928] A.C. at p. 126; *The King v. Caledonian Collieries, Ltd.*, [1928] A.C. at p. 362.

³² *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. at p. 144.

³³ *Attorney-General for British Columbia v. C.P.R.*, [1927] A.C. at p. 938.

³⁴ *Lambe's Case*, *supra*, at 583.

³⁵ KENNEDY AND WELLS, *op. cit.*, p. 52.

³⁶ *Brewers & Maltsters Assn. v. Attorney-General for Ontario*, [1897] A.C. at p. 236.

³⁷ *Attorney-General for Manitoba v. Attorney-General for Canada*, [1925] A.C. at p. 568.

in another,³⁸ it was said that when in its normal incidence a tax was indirect it was immaterial that particular market conditions might prevent the exporter from passing it on; and in another,³⁹ that when in its general tendency a tax is indirect it is immaterial that in particular circumstances it might be economically undesirable or practically impossible to pay it; and in another,⁴⁰ adjustment and expense levies imposed on farmers on the sales of milk were held indirect as having "a tendency to enter into and affect the price which the taxpayer will seek to obtain for his commodities".

The doctrine of "general tendency" as the criterion of classification of taxes has been well described in the following terms:⁴¹ "Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but *the incidence of the tax in its ordinary and normal operation*. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on. It is the normal or general tendency of the tax that will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed, or from the results which, in the ordinary course of business transactions, must be held to have been contemplated".

No statutory declaration that the tax is "direct", nor any statutory description of the tax, *e.g.*, as being on "gross revenue", is binding; for "the question of the nature of the tax is of one substance and does not turn only on the language used by the legislature".⁴² "In every case the first requisite is to ascertain the real nature of the tax."⁴³

³⁸ *Attorney-General for British Columbia v. McDonald Murphy Lumber Co.*, [1930] A.C. at pp. 364-5. "The Court is not concerned with whether or not in particular cases it may be well-nigh impossible to pass on the tax." *Spooner Oils Ltd. v. Turner Valley Conservation Board*, [1932] 4 D.L.R. at p. 766.

³⁹ *The King v. Caledonian Collieries, Ltd.*, [1928] A.C. 358.

⁴⁰ *Lower Mainland Dairy Products Comm. v. Crystal Dairy Ltd.* *supra*. See also *Security Export Co. v. Hetherington*, [1923] S.C.R. 539, where a tax, imposed on persons having liquor for export, was held indirect because of its general tendency to be passed on to the purchaser.

⁴¹ *City of Charlottetown v. Foundation Maritime Co.*, [1932] S.C.R. at pp. 594-5, *per curiam*.

⁴² *The King v. Caledonian Collieries, Ltd.*, [1928] A.C. at p. 497; *Attorney-General for Manitoba v. Attorney-General for Canada*, *supra*, at p. 566.

⁴³ *Attorney-General for British Columbia v. McDonald Murphy Co.*, *supra*, at p. 363.

Examples of General Tendency

The following instances of the application of the criterion of "general tendency" are typical and suggestive :

(1) The imposition on mine-owners in Alberta of a percentage tax on the "gross revenues" of their mines *held* indirect, because the general tendency would be to seek to recover the amount of the tax by adding it to the selling prices of coal sold to purchasers.⁴⁴

(2) A Manitoba Act imposing a tax on persons selling grain for future delivery *held* indirect, because imposed in a form contemplating "that some one else than the person on whom it was imposed should pay it" and because "the class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of property of the owner for whom they were acting".⁴⁵

(3) A tax imposed by a British Columbia Act upon every person purchasing within the province fuel-oil for the first time after its manufacture in, or importation into the province, *held* indirect, because of its tendency to be recovered out of the re-sale of the commodity taxed, and this being so it was immaterial that in a particular case the tax-payers did not in fact resell the oil purchased, it being enough that they might do so.⁴⁶

(4) A British Columbia Act which imposed a tax on every consumer of fuel-oil according to the quantity consumed *held* direct, because demanded from the very persons intended or desired should pay it and because a tax exacted in respect of *consumption* and not in respect of any *transaction* by which the tax-payer acquires title to the oil nor in respect of any contract under which the oil is used, and this was so notwithstanding that a tax-payer might recoup himself by such a contract.⁴⁷

(5) A civic by-law, which imposed on non-resident contractors as a tax on every contract for work to be done within the City a percentage of the contract price graduated according to the amount of the contract, was *held* to be "the exaction of a percentage duty on services", and indirect taxation as such a tax would invariably be an element in fixing the price of the contract and normally would be passed on as enhancement of the cost.⁴⁸

(6) A Provincial levy of 7/100 undivided parts of all marketed agricultural products making it the property of the Crown to be retained in kind by every primary dealer as property of the Crown which would convert it into a trust fund for municipal purposes and crop loss insurance was *held* an indirect tax as tending to affect the price of the products and be payable ultimately by the consumer.⁴⁹

⁴⁴ *The King v. Caledonian Collieries, Ltd.*, *supra*.

⁴⁵ *Attorney-General for Manitoba v. Attorney-General for Canada*, [1925] A.C. 561.

⁴⁶ *Attorney-General for British Columbia v. C.P.R.*, [1927] A.C. 934.

⁴⁷ *Attorney-General for British Columbia v. Kingcome Navigation Co., Ltd.*, [1934] A.C. 45. Followed in *Atlantic Smoke Shops Ltd. v. Attorney-General for New Brunswick* (1940), 15 M.P.R. 278. Cf. *Parsons v. Court of Sessions*, 78 Que. S.C. 377.

⁴⁸ *City of Charlottetown v. Foundation Maritime Ltd.*, *supra*.

⁴⁹ *Reference re Agricultural Land Relief Act*, [1938] 4 D.L.R. 28.

Illustrations of directness and indirectness may be found in succession duty cases :

- (a) In *Cotton v. Regina*⁵⁰ the attempt was to collect a tax on property outside Quebec but belonging to a testator domiciled there. The machinery for its collection included a declaration by the executor, notary, etc., on the basis of which the amount of the tax was determined and the tax was to be collected from the declarant with the obvious intent that he should recoup himself from the beneficiaries.
- (b) In *Alleyn v. Barthe*⁵¹ the tax was payable by the executor only in his representative capacity and without personal liability, and was therefore direct taxation.
- (c) In *Erie Beach Co. v. Attorney-General for Ontario*⁵² a succession duty was imposed on property in Ontario but any person or company allowing a transfer of it before the duty was paid was made liable for it *without any right of reimbursement from anybody*, and the tax, therefore, was direct.
- (d) In *Provincial Treasurer of Alberta v. Kerr*⁵³ the duties were payable by the executor personally with the obvious intent that he should indemnify himself out of the estate and, therefore, were indirect taxes.⁵⁴

Statutory Devices

It does not necessarily follow that the person who has the duty of paying the tax to the Province is the person upon whom the tax is imposed. Many Provincial statutes imposing sales or amusement taxes or succession duties, etc. make use of the device of requiring the vendor or theatre-operator or trustee to collect and remit the tax (inferentially as the agent of the Province) or specifically appoint such person as the agent of the Province to receive the tax on its behalf. This device is unobjectionable if the statute makes sufficiently clear that the tax is levied upon some person or subject-matter in such a way as to be "direct" taxation upon the principles discussed. Thus, as was said with reference to the otherwise valid imposition of an amusement-patronage tax, "the fact that the legislation casts upon the owners of places of amusement the duty of collecting the tax does not affect in any manner the character of the tax itself".⁵⁵ It would be different, however, if, for

⁵⁰ [1914] A.C. 176.

⁵¹ [1922] 1 A.C. 215, 227-8.

⁵² [1930] A.C. 161.

⁵³ [1933] A.C. 710.

⁵⁴ Followed in *Attorney-General for British Columbia v. Col*, [1934] 3 D.L.R. 488. Cf. also *City of Windsor v. McLeod*, [1926] S.C.R. 450.

⁵⁵ *Clarke v. City of Moose Jaw*, [1923] 2 D.L.R. at p. 218. For a recent instance of legislation making retail vendors of tobacco agents for collection of a consumer-tax, see *Atlantic Smoke Shops Ltd. v. Attorney-General for New Brunswick*, *supra*.

example, the tax is imposed, in reality, upon the vendor or theatre operator or trustee, personally. Statutes of these types raise difficult questions of construction.

The device just described is only one of the expedients which the Provinces have devised in the attempt to ensure that much-needed types of taxation shall be upheld as "direct taxation". The reality of this need, on the one hand, and the underlying doubt as to the validity of such taxes, on the other hand, were both revealed in a Resolution passed by the House of Commons in 1936. This Resolution was directed to securing an amendment to the British North America Act to give the Provinces jurisdiction to legislate in relation to :

"*Indirect taxation within the province in respect of :—*

- (i) retail sales, other than of all alcoholic beverages, spirits, malts, tobacco, cigarettes and cigars which are subject to customs and excise duty or tax in Canada or other than of all goods and articles for delivery without the province :
- (ii) the patronage of hotels, restaurants and places of amusement or entertainment.

in order to the raising of a revenue for provincial purposes".

The Resolution, however, was not concurred in by the Senate.⁵⁶

Subject-matter of Tax

The definition of direct taxation stresses the fact that the tax is expected *to be paid by the person* of whom it is demanded; but this does not mean that the tax must be imposed *on a person*. It may be imposed on property, or on the transmission to, or succession of, a person to property. The chief concern is then as to whether the tax is to be paid directly by the owner or person acquiring the property by transmission or succession and not by some intermediate person likely to recoup or indemnify himself from the owner or beneficiary. That is, when the tax is imposed on property, transmission or succession, it must still be demanded from the person expected to pay it, *i.e.*, the owner or beneficiary or possessor of the property for the time being, and who in the natural course will not be able to pass it along.⁵⁷

⁵⁶ Much useful discussion of these topics is to be found in a study prepared by Hon. L. M. Gouin, K.C. and Brooke Claxton, M.P., Appendix 8 to Report of Royal Commission on Dominion-Provincial Relations (King's Printer, Ottawa).

⁵⁷ KENNEDY AND WELLS, *op. cit.*, pp. 59-61.

The tax may be a tax on a person or his property though based upon *transactions* in which he or his property are involved. A tax on every sale of grain for future delivery and payable by the seller on the basis of the quantity sold was held to be a tax on a person in respect of a transaction.⁵⁸ Similarly in *Attorney-General for British Columbia v. C.P.R.*,⁵⁹ persons were taxed in respect of their purchase or possession of fuel oil; in *Attorney-General for British Columbia v. McDonald Murphy Co.*, *supra*, the tax was held to be an export tax, "levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions". In the *Kingcome Case*,⁶⁰ Lord Thankerton speaks of "a tax imposed in respect of a transaction" and of a "tax imposed in respect of some dealing with commodities, such as their importation or sale". Again in *Fairbanks' Case*,⁶¹ the tax, though called a "business" tax and required to be paid by occupiers of property, was a "property" tax. A tax may also be a tax on a person in respect of his consumption,⁶² or retail purchase^{62A} of an article, or of his patronage of a place of amusement,⁶³ or "on the proceeds of particular transactions".⁶⁴

"Within the Province."

The clause defines also the area of its operation—i.e., the physical *locus* of the subject-matter taxed. The taxing power is territorially limited; it can apply only to a person or property within the province. "The subject of taxation must be within the Province."⁶⁵

(A) PERSONS WITHIN THE PROVINCE

Any person, living or artificial, found within the Province may be taxed; it is not necessary that he or it be domiciled or even resident in the Province. Thus a tax on the corporate

⁵⁸ *Attorney-General for Manitoba v. Attorney-General for Canada*, [1925] A.C. 561.

⁵⁹ [1927] A.C. 934.

⁶⁰ [1934] A.C. 45.

⁶¹ [1928] A.C. 117.

⁶² *Attorney-General for British Columbia v. Kingcome Navigation Co.*, *supra*.

^{62A} *Atlantic Smoke Shops Ltd. v. Attorney-General for New Brunswick*, *supra*.

⁶³ *Clarke v. City of Moose Jaw*, [1923] 2 D.L.R. 216.

⁶⁴ *Lower Mainland Dairy Products Comm. v. Crystal Dairy Ltd.*, [1933] A.C. 168.

⁶⁵ Per Anglin, J. in *The King v. Cotton* (1912), 45 S.C.R. 469, quoted. in *Provincial Treasurer of Alberta v. Kerr*, *supra*.

person of a bank is valid though it varies with the capital^{65A} of the bank and the number of offices within and without the Province.⁶⁶ An income tax has been held to be a tax upon a person in respect of his income and to be valid though it covered income earned outside the Province.⁶⁷

Taxation of Dominion Companies

Any company exercising any of its corporate powers in a Province may be taxed there. This applies to Dominion companies with one important limitation;⁶⁸ a Province may by a law of general application impose taxes on Dominion companies provided such legislation does not destroy their *status and corporate powers*.⁶⁹ This is a branch of the general rule that Dominion companies are subject to the general laws of the provinces, such as laws as to taxes or mortmain or as to the requirement of licences or as to the forms of contracts, etc., and as to the regulation of the business in which they are engaged.⁷⁰ Such laws are good notwithstanding that they may seriously affect the business of Dominion companies; for they do not strike at, or derogate from, the corporate status of Dominion companies as such. Thus, a Province can tax a Dominion company provided it does not destroy its corporate status and capacity; it may, *e.g.*, impose the same tax as on its own or foreign companies and penalties for failure to pay such tax; *semble* the quantum of the tax or the size of the penalty would not affect the result, provided it really is a general

^{65A} Different consideration may arise if the subject of the tax is the capital of a foreign corporation. See D. W. Gunn, *Provincial Taxation of Paid-up Capital of Foreign Corporations*, (1941), 19 Can. Bar Rev. 31.

⁶⁶ *Bank of Toronto v. Lambe*, *supra*. Cf. *Forbes v. Attorney-General for Manitoba*, *supra*. As to what constitutes presence, or the carrying on of business, within a Province of a corporation see KENNEDY AND WELLS, *op. cit.*, pp. 66 ff.

⁶⁷ *Kerr v. Supt. of Income Tax*, [1939] 1 D.L.R. 149.

⁶⁸ Another limitation is that a Province cannot by its own enactment establish the *situs* of a company as being within the Province if it does not carry on business therein in fact. Cf. *The King v. National Trust Co.*, [1933] S.C.R. 670.

⁶⁹ See cases cited in *R. v. Arcadia*, [1932] 2 D.L.R. 475 at pp. 482-3, 487-91 and in *Motor Supply Co. v. Attorney-General for Alberta*, [1939] 3 D.L.R. 660.

⁷⁰ *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91. Thus Dominion companies dealing in liquors are subject to Provincial liquor laws. *Lukey v. Ruthenian*, [1924] 1 D.L.R. 706. A company formed to deal in securities is subject to provincial law concerning the business of all who trade in securities. *Lyburn v. Mayland*, [1932] A.C. 318. A law requiring coal mine operators to furnish security for wages has been held to be a general law applicable to Dominion companies operating coal mines. *R. v. Arcadia*, *supra*.

taxing measure.⁷¹ It may even require a Dominion company to take out a licence with a pecuniary penalty for its failure to do so; but it cannot prescribe that the company cannot carry on business or resort to the courts without such a licence⁷² or prohibit it from selling its shares in the Province.⁷³

Colourable Purpose

Even as to a taxing Act, however, the courts will require to be satisfied that it is legislation "in relation to" taxation and not really in relation to something else under the guise of taxation.⁷⁴ The object of the statute must be "the raising of a Revenue" in order to bring it within sec. 92 (2). If the object is something else, such as the regulation of trade, the statute may be valid under some other head of jurisdiction; but it can derive no validity from sec. 92 (2). Indeed, "the mere fact that revenue to a greater or smaller amount would be raised in the Province" is not enough to bring the exacting statute within sec. 92 (2) as a taxing statute.⁷⁵ Indeed even a statute imposing a tax, which regarded as a taxing measure would be valid, may nevertheless be held invalid; "for if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fail."⁷⁶ Accordingly the Privy Council has held legislation for the taxation of banks *ultra vires* as directed not to the securing of revenue but rather to the control of banks and banking.⁷⁷ In connection with this doctrine of colourable purpose it is to be noted that jurisdiction is not to be tested by reference to its capacity for abuse, and that mere discrimination, or the size of the tax, do not *per se* invalidate it. Nevertheless legislation in the guise of a taxing enactment may in reality be directed to a non-revenue object; and this fact may be revealed when it is seen that the tax is imposed on Dominion institutions alone, and is of such magnitude as practically to destroy their capacity to carry on business.⁷⁸

⁷¹ *Bank of Toronto v. Lambe*, *supra*, at p. 586.

⁷² *John Deere Plow Co. v. Wharton*, *supra*; *Great West Saddlery Co. v. The King*, *supra*.

⁷³ *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260.

⁷⁴ *Great West Saddlery Co. v. The King*, *supra*; *In re Insurance Act of Canada*, [1932] A.C. at p. 53.

⁷⁵ *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. at p. 128.

⁷⁶ *In re Insurance Act of Canada*, *supra*, at p. 52.

⁷⁷ *Attorney-General for Alberta v. Attorney-General for Canada*, *supra*.

⁷⁸ As to this doctrine of "colourable legislation" and "practical effect", in general, see MacDonald, *Constitutional Interpretation and Extrinsic Evidence* (1939), 17 Can. Bar Rev. 88 *et seq.*

Dominion Officials

There is no doctrine in Canada as to the immunity of instrumentalities of government, and so a Province may tax the salary of a Dominion civil servant;⁷⁹ or the income (wages, allowances, etc.) of officers of the Dominion militia,⁸⁰ and of Judges appointed by the Dominion, as part of an enactment of general application.⁸¹ This power is subject to the rider that it cannot be so used as to undermine the Dominion public service⁸².

Basis or Rate of Tax

If the tax is levied on a person or property within the Province it is permissible to calculate its amount by reference to property owned by him within or outside the Province or both.⁸³ Thus, for example, in Succession Duty Acts the amount payable in respect of property within the Province may be calculated by reference to the gross amount passing on the death whether in respect of property within or without.⁸⁴

(B) PROPERTY WITHIN THE PROVINCE

The property which is the subject of the tax must have a *situs* within the Province (a) in fact, or (b) in accordance with some recognized principle of law.⁸⁵

Since jurisdiction to tax property depends on its *situs* within the Province according to general law, no Province can acquire jurisdiction by any mere declaration that any particular kind of property shall be deemed to be within the Province; for to permit that would be to nullify the limitation on its taxing power contained in the phrase "within the Province".⁸⁶

⁷⁹ *Abbott v. City of St. John*, 40 S.C.R. 597; *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260.

⁸⁰ *Attorney-General for Manitoba v. Worthington*, [1936] S.C.R. 40.

⁸¹ *The Judges v. Attorney-General for Saskatchewan*, [1936] 4 D.L.R. 134, [1937] 2 D.L.R. 209, 53 T.L.R. 464.

⁸² *Abbott v. City of St. John*, *supra*; *Caron v. R.*, *supra*; *Forbes v. Attorney-General for Manitoba*, *supra*.

⁸³ *Cf. Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, where the tax was calculated partly by reference to the paid-up capital of the bank, whose head office was in another Province, and partly by reference to its places of business in the Province.

⁸⁴ See *Falconbridge*, (1934), 12 Can. Bar Rev. at p. 78; *Royal Trust Co. v. Minister of Finance*, [1922] 1 A.C. at p. 93. See also *infra*.

⁸⁵ *R. v. National Trust*, [1933] S.C.R. 670. *E.g.*, land is within the Province because locally and physically situate there, while a company share physically present outside may be "within the Province" by virtue of the principle that such a share has its legal *situs* at the place where it can be effectively dealt with, *i.e.* where the share registry is situated. *Erie Beach Co. v. Attorney-General for Ontario*, [1930] A.C. 161.

⁸⁶ *R. v. National Trust Co.*, *supra*, at p. 670; *Falconbridge*, (1934), 12 Can. Bar Rev. at p. 74; *Lovitt v. The King*, 43 S.C.R. at p. 160, per Anglin J.

Tangible immovables and movables have their legal situs where they actually are, and if they are physically outside the Province they cannot be taxed. As regards movables there was for a long time a persistent idea that the maxim "*mobilia sequuntur personam*" operated to give them a situs in the Province of the owner's domicile. But it is now clear that as regards tangible movables the domicile of their owner has no bearing on their situs for taxation purposes, and that a Province cannot tax such movables locally situate outside the Province.⁸⁷

The situs of *intangible property*, e.g., debts, shares, bonds, etc., is to be determined by reference to the law of England which has evolved rules for attributing situs to every variety of such property.⁸⁸ Thus, for example, simple contract debts have their situs in the Province of the debtor's residence.⁸⁹ The situs of bank shares and shares of trading companies is in the Province where they can be effectively dealt with, i.e., where the share registry office is.⁹⁰ Specialties, such as bonds, debts due from the Crown, and debts arising under statutes, have their situs where found.⁹¹ Similarly as to mortgage debts under seal.⁹²

*Succession Duty Acts*⁹³

Each Province has statutes imposing taxes on the occasion of the death of owners of property. In England death duties are of two classes :

⁸⁷ *Prov. Treasurer of Alberta v. Kerr*, [1933] A.C. 710 at pp. 721-2; Falconbridge, *op. cit.* at pp. 69, 74.

⁸⁸ KENNEDY & WELLS, *op. cit.*, 93 ff; some of these rules are reviewed in *Royal Trust Co. v. Attorney-General for Alberta*, [1930] A.C. 144. For a fuller treatment see Falconbridge in (1935), 13 Can. Bar Rev. 265. As to the right of a beneficiary to receive payments from a trust fund and the situs thereof see *Attorney-General for Nova Scotia v. Davis*, [1937] 3 D.L.R. 673, noted in (1937), 15 Can. Bar Rev. 664.

⁸⁹ *R. v. Lovitt*, [1912] A.C. 212.

⁹⁰ *Brassard v. Smith*, [1925] A.C. 371; *Untermeyer v. Attorney-General for British Columbia*, [1929] S.C.R. 84; *R. v. Cutting*, [1932] S.C.R. 410; *Erie Beach Co. v. Attorney-General for Ontario*, *supra*. As to companies having more than one share registry see *Re Macfarlane*, [1933] O.R. 44; *Cf. Re Thorburn, Ivey v. R.*, [1939] 1 D.L.R. 631; *Williams v. The King*, [1941] 1 D.L.R. 22; *Toronto General Trusts Corp. v. The King*, [1938] 1 D.L.R. 40.

⁹¹ *R. v. National Trust Co.*, [1933] S.C.R. 670; *Royal Trust Co. v. Attorney-General for Alberta*, *supra*; *Schmidt v. Prov. Treasurer of Alberta*, [1935] 4 D.L.R. 752; *The King v. Sanner*, 74 Que. S.C. 42.

⁹² *Toronto-General Trusts Corporation v. The King*, [1919] A.C. 679; wherein, however, the rule was modified because the mortgage was made in duplicate. As to the situs of these and similar intangibles see QUIGG on SUCCESSION DUTIES IN CANADA (1937), 2nd ed., chap. 9; Falconbridge, *Situs and Transfer of Intangibles in the Conflict of Laws* (1935), 13 Can. Bar Rev. 265-78, wherein all the authorities are discussed; also Anderson in (1937), 15 Can. Bar Rev. pp. 626-32.

⁹³ Generally see QUIGG, *op. cit.* particularly chapter 2.

(a) *Probate or estate duties, i.e.,* the price paid for the protection afforded by the state to the property included in the local administration, and therefore payable only upon or in respect of property situate within the country, regardless of the domicile of the *de cujus* or beneficiaries;

(b) *Legacy or succession duties, i.e.,* tolls taken by the state on the transmission of property from the *de cujus* to the beneficiaries and therefore payable only upon or in respect of property passing under or by virtue of the law of the country.

The Provincial Acts do not clearly observe the above distinction and impose taxes partaking of the nature of both classes.⁹⁴

Various decisions and dicta once seemed to sanction the view that the maxim *mobilia sequuntur personam* operated to attract to the Province of the domicile of the deceased or beneficiary the movable property passing on the death and thereby to confer on that Province jurisdiction to tax movables as property "within the Province". This view was repudiated, definitely, in *Provincial Treasurer of Alberta v. Kerr*.⁹⁵

In that decision, however, the proposition was laid down that "a Province on the death of a person domiciled in it may impose taxation on persons domiciled or resident in the Province *in respect of the transmission* to them under Provincial law of personal property locally situate outside the Province". The result has been that most of the Provincial Acts have been amended to take advantage of the proposition as to taxing transmission so as to reach personalty situate outside. It would seem that a tax on transmission is really a tax on persons and the condition is that they be resident or domiciled within the Province.⁹⁶ For a statutory definition of "transmission" see section 1 (s) of the Ontario Succession Duty Act, 1939.

⁹⁴ As to the hybrid character of such legislation see *Report on Uniform Succession Duty Act* in 8 Proc. Can. Bar Ass. (1923) p. 503. The case law on Succession Duty Acts in Canada is bulky and confusing. The Acts have been altered frequently to keep pace with judicial pronouncements, and in the attempt to bring more and more classes of persons and property within their scope. For discussion of recent decisions and recent statutory changes see the *Supplement to QUIGG, SUCCESSION DUTIES IN CANADA*, (Toronto, 1937) 2nd ed., issued in 1940.

⁹⁵ [1933] A.C. at pp. 721-2 holding, inter alia, that a section which charged "all the property of the owner thereof situate in the Province, and in the case of an owner domiciled in the Province all the personal property of the owner situate outside the Province", imposed a tax on property locally situate outside the Province and the tax was therefore invalid (besides being "indirect" as well).

⁹⁶ Falconbridge, *Administration and Succession in the Conflict of Laws* (1934), 12 Can. Bar Rev. at p. 77.

*Rules as to Succession Duty Acts*⁹⁷

Dean Falconbridge⁹⁸ states that valid Provincial taxation in connection with the administration of, or the succession to, the estate of a deceased person falls into three classes :

(a) A Province may, without regard to the domicile or residence of the beneficiaries, impose a *tax upon administration* payable by the executor or administrator out of the corpus of the property within the Province as a condition of the grant of probate or administration and without regard to the mode of distribution of the beneficial interest in the surplus.⁹⁹

(b) A Province may impose a direct tax upon the *property*, movable or immovable, of the decedent *situate within the Province* and transmitted on the owner's death.¹⁰⁰

(c) A Province may impose a direct tax *on persons* domiciled or resident in the Province in respect of the *transmission* to them of property under or by virtue of Provincial law.¹⁰¹

Double Taxation; Basis of Rate

It would seem to be possible for a Province, in effect, to tax property outside by means of a graduated scale whereby the amount payable in respect of a tax on property or persons "within the Province" is fixed by reference to the total amount of the estate including property situate outside. This is not regarded as a matter of indirect taxation but simply as "the fixing of a basis of domestic assessment in certain varying circumstances, domestic and foreign".¹⁰² And as the property outside may also be taxed by another Province upon the basis of its *situs* there, the result is that the total amount payable to the two Provinces may be greater than if all the property were situate in one Province only.¹⁰³

⁹⁷ See Quigg, *Constitutionality of Succession Duties* (1938), 16 Can. Bar Rev. 344.

⁹⁸ *Op. cit.*, at pp. 73-5.

⁹⁹ This is a probate duty and is limited to property in the Province and the tax is a charge for the local administration—a charge for services by the Province in *re* the administration of the estate.

¹⁰⁰ The property must be in the Province, and the *situs* of every kind of property must be determined on principle and in accordance with fact without regard to the domicile of the decedent or the domicile or residence of the beneficiary.

¹⁰¹ Since a tax on transmission is really a tax on the *person* to whom it takes place the rule that the subject-matter must be within the Province is satisfied if the beneficiary is resident or domiciled within. For similar rules by another Canadian authority see QUIGG, *SUCCESSION DUTIES IN CANADA*, 2nd ed., at p. 40.

¹⁰² See *Minister of Finance v. Royal Trust Co.* (1921), 61 S.C.R. 12, reversed on construction, [1922] 1 A.C. 87, where however the statement quoted above is approved.

¹⁰³ As to double taxation generally under succession duty statutes see Anderson, *Succession Duties—Double Taxation* (1937), 15 Can. Bar Rev. 620.

2. Provincial Taxation by Licences

Sec. 92 (9).—Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes.

The writer has discussed elsewhere¹⁰⁴ the fiscal powers of the Provinces under this head of jurisdiction. It is sufficient here to mention the effect of the last pronouncement of the Privy Council on its interpretation, namely, *Shannon v. Lower Mainland Dairy Products Board*.¹⁰⁵ This decision appears, inter alia, to hold (a) that sec. 92 (9) need not be interpreted narrowly by reference to the *ejusdem generis* rule, and (b) that the taxes, in the form of licence fees, imposed under it need not be "direct" in character.

C. MUNICIPAL TAXATION

By virtue of the doctrine of the plenary nature of Provincial powers enunciated in *Hodge v. The Queen*¹⁰⁶ any Provincial Legislature may confide to a municipal body the power to make laws as to subjects specified in a valid Provincial statute. Accordingly, whatever taxing power is within Provincial competence may be conferred upon a municipality; and by numerous statutes the Provinces have conferred taxing powers of various kinds to enable such local bodies to raise revenue. No. 9 of section 92 expressly contemplates that the Provinces may by licences raise money for "local and municipal purposes" and that power, clearly, is delegable to local or municipal bodies. Section 92, no. 2, speaks of direct taxation in order to the raising of a revenue for "*Provincial purposes*". Accordingly it was once contended that the tax must be for a *general Provincial purpose* and not merely for a *local purpose*. This contention, however, was decisively rejected in *Dow v. Black*,¹⁰⁷ which held that the clause enabled the Provincial legislature "to impose direct taxation for a local purpose upon a particular locality within the Province".¹⁰⁸ Municipalities, therefore, if so authorized by a Provincial statute, may exercise for their local

¹⁰⁴ MacDonald, *The Licensing Powers of the Provinces* (1939), 17 Can. Bar Rev. 240.

¹⁰⁵ [1938] A.C. 708; Cf. *Motor Car Supply Co. Ltd. v. Attorney-General for Alberta*, [1939] 3 D.L.R. 660.

¹⁰⁶ (1883), 9 App. Cas. at p. 132. Cf. *Shannon v. Lower Mainland Dairy Products Board*, *supra*, at p. 722.

¹⁰⁷ (1875), L.R. 6 P.C. 272.

¹⁰⁸ As CLEMENT, CANADIAN CONSTITUTION, p. 649 remarks, this decision "is sufficient warrant for the whole system of municipal taxation now operative throughout Canada".

purposes the powers of taxation embraced by nos. 2 and 9 of section 92.¹⁰⁹

D. MISCELLANEOUS

(a) *Interference with Sources of Revenue*

Provincial legislation which imposes a tax by way of licence in addition to a tax required by the Dominion, or which suppresses transactions from which the Dominion derives taxes is not incompetent for that reason merely.¹¹⁰ Conversely, the fact that Dominion legislation as to a commodity interferes with revenue derived by a Province from taxing transactions therein by way of licences does not invalidate that legislation.¹¹¹

(b) *Freedom of Inter-provincial Trade*

Sec. 121.—All articles of the growth, produce or manufacture of any of the Provinces, shall, from and after the Union, *be admitted free* into each of the other Provinces.

The few judicial pronouncements on this section do not imply that importation into a Province cannot be prohibited, e.g., as aid to liquor law enforcement; but hold rather that no Province can impose customs duties on such articles on the occasion of their importation. Their admission must be "free", simply in the sense that no tax or duty can be imposed as a condition of such admission.¹¹² Whether the section operates to prevent a similar imposition by the Dominion has yet to be decided.

(c) *Statutory Restriction upon Dominion and Provincial Taxing Powers.*

Sec. 125.—No lands or property belonging to Canada or any Province shall be liable to taxation.

This section constitutes an express limitation upon the scope of the taxing powers of the Provinces and of the Dominion.

¹⁰⁹ When exercising a power to tax by way of licences the municipal regulation will be invalid if discriminatory, unless expressly so authorized. *Jonas v. Gilbert*, 57 S.C.R. 356; *R. v. McDonald*, [1935] 2 D.L.R. 605; *Attorney-General for Canada v. Toronto* (1893), 23 S.C.R. 514; *Paulowich v. Dankochuk*, [1940] 2 D.L.R. 106; *R. v. Pope*, 4 W.L.R. 278.

¹¹⁰ *Brewers & Malsters' Assn. v. Attorney-General for Ontario*, [1897] A.C. 231; *Attorney-General for Manitoba v. Man. Liquor Licence Holders' Assn.*, [1902] A.C. 73.

¹¹¹ *Russell v. The Queen* (1882), 7 App. Cas. at pp. 837-8.

¹¹² *R. v. Nat. Bell, Ltd.*, [1922] 2 A.C. at p. 138; *Gold Seal Ltd. v. Attorney-General for Alberta* (1921), 62 S.C.R. at pp. 426, 466, 469; Cf. *Lawson v. Interior, etc. Committee*, [1931] S.C.R. at pp. 372-3 for a contrary view by Cannon J. For a suggestive interpretation of the phrase "absolutely free" in an analogous section of the Australian Constitution see *James v. Commonwealth*, [1936] A.C. at pp. 627 ff.

It has been held that, while no such taxation can affect any interest held by the Crown in such property, it is nevertheless competent to a Province to tax a private person in respect of any interest held by him in Crown lands, *e.g.*, under a lease or agreement of sale.¹¹³ Nor is a tax on the owner of premises let to the Crown a tax on the property of the Crown within the prohibition in the section.¹¹⁴ The same immunity attaches to the Boards and incorporated bodies which hold or enjoy property as servants or agents of the Crown for governmental purposes, *i.e.*, which are "emanations of the Crown".¹¹⁵ The immunity of Provincial Crown property to Dominion taxation does not apply to protect such property from customs and excise duties upon goods imported into Canada, imposed by the Dominion Parliament under its powers as to taxation and the regulation of trade and commerce.¹¹⁶

(d) *Customs and Excise Duties*

Sec. 122.—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.

The imposition of *customs and excise* duties is within the exclusive competence of the Dominion as appears from sec. 122 of the British North America Act; "the reason for this being 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".¹¹⁷

A British Columbia Act imposed a tax on all timber cut within the Province (except that on which a royalty was payable), but provided for a rebate of nearly the whole tax when the timber was manufactured or used in the Province and also provided that no timber should be exported unless the tax was

¹¹³ CLEMENT, CANADIAN CONSTITUTION, p. 643; *Calgary & Edmonton Land Co. v. Attorney-General for Alberta* (1911), 45 S.C.R. 170; *Smith v. Vermillion Hills Rural Municipality*, [1916] 2 A.C. 569; *Southern Alberta Land Co. v. Rural Municipality of McLean* (1916), 53 S.C.R. 151; *G.T.P. Ry. v. City of Calgary* (1917), 55 S.C.R. 103; *City of Montreal v. Attorney-General for Canada*, [1923] A.C. 136; *Cf. Re Taxation of University of Manitoba Lands*, [1940] 1 D.L.R. 579.

¹¹⁴ *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117.

¹¹⁵ See *City of Halifax v. Halifax Harbour Commissioners*, [1935] S.C.R. 215, and MANNING, ASSESSMENT AND RATING, 2nd ed., at pp. 187-90.

¹¹⁶ *Attorney-General for British Columbia v. Attorney-General for Canada*, [1924] A.C. 222, holding alcoholic liquors imported by a Province liable to such duties.

¹¹⁷ *Attorney-General for British Columbia v. McDonald Murphy Co.*, [1930] A.C. at p. 364. See also *Attorney-General for British Columbia v. Attorney-General for Canada*, [1924] A.C. at p. 225.

paid. It was held that export duties are classed as customs and excise duties and that, apart from this, a tax which is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions is indirect, because its burden is normally passed on as an element in the fixing of prices.¹¹⁸ In *Attorney-General for British Columbia v. Kingcome*¹¹⁹ it was contended that the tax imposed by a Provincial Act on consumers of fuel oil in the Province was invalid, inter alia, because it was an import duty or an excise tax. The Privy Council said that "the customs and excise duties on commodities, ordinarily regarded as indirect, . . . are duties . . . which are imposed in respect of commercial dealings in commodities. . . . Customs and excise duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted. Section 122 merely provided for the temporary continuation of the then existing legislation as regards customs and excise." Therefore, the tax in question was to be tested by Mill's definition, and as it was imposed on the consumer in respect of its consumption and not in respect of any commercial transaction in the commodity, it was not a customs or excise duty, but a direct tax, and therefore valid.¹²⁰ It is possible, therefore, that sec. 122 is to be regarded purely as a transitional clause whose operative effect is gone.¹²¹

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¹¹⁸ *Attorney-General for British Columbia v. McDonald Murphy Co.*, *supra*, at p. 225.

¹¹⁹ [1934] A.C. 45.

¹²⁰ For comment on this reasoning see F. R. Scott in (1934), 12 Can. Bar Rev. 303.

¹²¹ See *P.A.T. Assn. v. Attorney General for Canada*, [1931] A.C. at p. 326, where the section is spoken of as "affirming" the Dominion's power under s. 91 (3); and cf. the case discussed above.