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WALTER REED.....APPELLANT;

*March 6.
*June 18.

AND

THE HONORABLE JOSEPH A. MOUSSEAU, ATTORNEY GENERAL..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

*Constitutional law—Tax upon fylings in Court—Indirect tax—Jurisdiction of Provincial Legislature—43 and 44 Vic. ch. 9, s. 9 (Que.)*

By the *Quebec* Act 43 and 44 *Vic.* ch. 9, sec. 9, it is enacted that "A duty of ten cents shall be imposed, levied, and collected on each promissory note, receipt, bill of particulars, and exhibit whatsoever, produced and fyled before the Superior Court, the Circuit Court, or the Magistrates' court, such duties payable in stamps." The Act is declared to be an amendment and extension of the Act 27 and 28 *Vic.* ch. 5, "An Act for the collection by means of stamps, of fees of office, due and duties, payable to the Crown

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, J.J.

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upon law proceedings and registrations." By section 3, ss. 2, the duties levied are to be "deemed to be payable to the Crown." The appellant obtained a rule *nisi* against the prothonotaries of the Superior Court of *Montreal* for contempt in refusing to receive and fyle an exhibit unaccompanied by a stamp as required by the Act. Upon the return of the rule the Attorney General for the province obtained leave to intervene and show cause.

*Held*,—Reversing the judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), (*Strong* and *Taschereau*, JJ. dissenting), that the Act imposing the tax in question was *ultra vires*, the tax being an indirect tax and the proceeds to form part of the consolidated revenue fund of the province for general purposes.

Per *Strong* and *Taschereau*, JJ. (dissenting).—Although the duty is an indirect tax, yet, under secs. 65, 126 and 129 of the B. N. A. Act, the Provincial Legislature had power to impose it (1).

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) reversing a judgment of the Superior Court for the Province of *Quebec*.

The appellant wishing to test the legality of the taxes imposed by the 43 and 44 *Vic.*, ch. 9 (*Quebec*), obtained a rule *nisi* for contempt against the prothonotaries of the Superior Court of the district of *Montreal*, for refusing to receive and fyle an exhibit unaccompanied by stamps to the amount of ten cents.

After the return of this rule the Attorney-General for the Province of *Quebec* obtained leave to intervene, to sustain the legality of the tax.

The Superior Court held that the tax was unconstitutional, and declared the rule absolute against the prothonotaries, who were condemned to be imprisoned in the common gaol of the district for a period of six months, unless they sooner accepted and fyled the exhibit offered by the appellant. The prothonotaries were further condemned to pay the costs.

(1) Leave to appeal to the Privy Council has been granted.

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From this judgment the Attorney-General appealed to the Court of Queen's Bench, which court reversed the judgment of the Superior Court.

On appeal to the Supreme Court of *Canada*, the sole question submitted was the constitutionality of section 9 of the said Act, 43 and 44 *Vic.*, ch. 9, (*Quebec*).

The Act is entitled: "An Act to amend and consolidate the different acts therein mentioned in reference to stamps."

Section 9 reads thus: "There shall be imposed, levied and collected a duty of ten cents on every writ of summons, issued out of any county circuit court, magistrate's court, or commissioner's court in the province; and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and fyled before the superior court, the circuit court, or the magistrate's court—such duties payable in stamps."

Mr. *Maclaren* for appellant:

As to whether the tax in question should be considered an indirect tax, cited: *Mills* on Political Economy (1); *McCullough* on Taxation (2); Encyclopædia Britannica (3); *Atty.-Gen. of Lower Canada* v. *Queen Insurance Co.* (4); *Say*, Traité d'Economie Politique (5); *Favard de Langlade* (6): *Loughborough* v. *Blake* (7); *Veazie Bank* v. *Fenno* (8); *Glascow* v. *Rouse* (9); *Turner* v. *Smith* (10); *Severn* v. *The Queen* (11).

But the Hon. Mr. Justice *Cross* sustained the tax on

(1) Book 5, ch. 3.
(2) P. 1.
(3) 7 Ed. Vo. Taxation.
(4) 3 App. Cases 1090.
(5) Ch. 10, p. 516.
(6) Rep. Vo. Contributions Indirectes.
(7) 5 Wheat. 317.
(8) 8 Wall. 533.
(9) 43 Mo. 479.
(10) 14 Wall. 533.
(11) 2 Can. S. C. R. 70.

entirely different grounds, viz., under the provisions of sec. 32 of ch. 109 of the Consolidated Statutes of *Lower Canada*, by which the Governor in Council was authorized to impose a tax upon legal proceedings to form part of the building and jury fund in each district.

This ground had been previously well disposed of by Judge *Mackay* in the Superior Court, as follows: "It has also been said that this stamp tax might have been imposed by an Order in Council under *C. S. L. C.*, ch. 109, sec. 32, entitled 'An Act respecting Houses of Correction, Court Houses and Gaols.' But it has been imposed, not by the Lieutenant Governor in Council, but by another body, the Legislature, and its proceeds are to go, not to the building and jury fund, but to the consolidated revenue fund! The question before me is as to the power of the Legislature, not of the Governor in Council."

Judge *Mackay* has also pointed out that the Stamp Act, 27 and 28 *Vic.*, ch. 5, relied upon by the Attorney General, was to apply to the taxes imposed under *C. S. L. C.*, ch. 109, sec. 32, only so long as such fees continue to form part of the "Officers of Justice Fee Fund" or "The Building and Jury Fund" or either of them (sec. 4, ss 2).

Section 126 of the *B. N. A. Act* does not apply to the building and jury fund. The Legislature of *Canada* before Confederation had not, properly speaking, the power of appropriation over it, as the monies levied under it formed a special local fund in each district, which was administered and appropriated by the sheriff for the objects indicated for the benefit of the inhabitants of the particular district and no others. Again, it is not by the *B N. A. Act* reserved to the Government or Legislature of the Province of *Quebec*, and if it is not a direct tax it is not raised in accordance with the

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special powers conferred upon the Provincial Legislature by the *B. N. A Act.*

In addition to the *Quebec* statute referred to by Chief Justice *Dorion* as recognizing the fact that the building and jury fund was not merged by the *B. N. A. Act* in the Consolidated Revenue Fund of the province, (41 *Vic.*, ch. 16) appellant would also refer to the *Quebec* statute 45 *Vic.*, ch 25, "An Act respecting the building and Jury Fund." Section 3 of this Act provides that the local municipalities shall not be called upon by the sheriff for their annual contribution of $12 to this fund when the other sources of revenue in the district are sufficient to meet the charges upon the building and jury fund of such district. If the present tax on exhibits is levied under colour of a law authorizing the imposition of a tax for the building and jury fund of the district, and does not go into that fund at all but into the Consolidated Revenue Fund, as appears from the Act itself and the testimony of Mr. *Honey,* it is such a misappropriation as should render the tax entirely null.

Besides, each of the supply bills since Confederation has recognized the separate existence of this building and jury fund.

Its separate existence has also been recognized by the Parliament of *Canada* in the Insolvent Act of 1869 (32 and 33 *Vic.*, ch. 16, sec. 152) and in the Insolvent Act of 1875 (38 *Vic.*, ch. 16, sec. 145). These sections provided that one per cent. of the proceeds of all sales of real estate under these Acts by assignees, should be paid over to the sheriff of the district to form part of the building and jury fund of such district. A number of suits for the recovery of this tax were brought by sheriffs against assignees, one of which is reported, *Chauveau* v. *Evans* (1).

(1) 3 Leg. N. 78 and 24 L. C. J. 343.

Mr. *Lacoste*, Q C., for the Attorney General:

To justify the Provincial Legislature's action, I rely on sections 92, 65 and 129 of the *British North America Act*, and believe that under these sections, the legislature had the right of imposing the 10 cents tax.

The paragraphs 2, 14 and 16 are the only ones to which we need refer in section 92.

The first of these paragraphs confers upon the Provincial Legislatures the right of imposing direct taxes, in view of raising a revenue for provincial purposes; the second one gives them the administration of justice, including the constitution and maintenance of tribunals, and the third one includes in their jurisdiction all matters of a local and private nature.

As to paragraph 14, could we not allege that the maintenance of tribunals being left to the local governments, the latter can impose taxes by way of indemnification upon the citizens who claim their intervention?

Taking for granted, for argument sake, that these taxes constitute an indirect tax, section 92, paragraph 2, gives the legislature the right to impose a direct tax for merely local purposes, when there is clearly no interference with the powers of the Federal Government

Under paragraph 16, all matters of a purely local nature fall within provincial jurisdiction. Then, a law concerning the maintenance of tribunals is a purely local matter.

How can there be a conflict with the federal power?

Certainly, nobody will contend that the Federal Parliament would have the right of imposing a tax of such a nature.

Several authors do not classify such duties among regular taxes, and among others M. *de Jācob*, in his treatise on "the science of finances" (1), does not, at least so long as the collection does not exceed the costs of

(1) Paragraph 691.

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judiciary establishment and maintenance. See also *Esquirou de Parieu*, in his "Traité des impots" (1). Taxes imposed on legal procedures are not taxes, properly speaking; but are, as says *Jules Mallein*, in his Considérations sur l'enseignement du droit administratif (2) "accidental dues paid as compensation for the direct service rendered by the State to the pleader." See also *McDonell* in his manual, A Survey of Political Economy (3); *M. J. Garnier*, Elements de finance (4); *Ch. Le Hardy de Beaulieu*, in his Elementary Treaty on Political Economy (5); *M. Villiaumé*, New Political Treaty (6); *Cooley* on Taxation (7).

Supposing that this tribunal does not find a sufficient authority in section 92 of the Act of *British North America* to justify the imposition of the 10 cents stamp tax, we pretend that such a power is given by sections 55 and 129 of said Act.

When Confederation was established, chapters 93 and 109 of the consolidated statutes of *Lower Canada*, as modified by 27 and 28 *Vic.*, ch. 5, were in force, and there existed under these Acts a tariff compelling parties to pay stamps on judiciary procedures.

Under sections 18 and 19 of chapter 93, and section 32 of chapter 109 of the consolidated statutes of *Lower Canada*, the Governor in Council was authorized to change and modify this tariff and to impose new taxes, and under section 65 of the *British North America Act*, these powers of the Governor in Council have passed to the Lieutenant-Governor in Council.

Moreover, it is said in section 129 that the Acts in force can be revoked, abolished, or modified by the Canadian Parliament or by the Provincial legislature, in conformity to the authority of such Parliament or legislature.

(1) Vol. 3, book 6, ch. 6, p. 274.
(2) Paris, 1857, page 240.
(3) P. 349.
(4) P. 68.
(5) 3 Ed. 1862, Vol. 2, p. 246.
(6) P. 5, in note.

Could chapters 93 and 109 of the consolidated statutes of *Lower Canada*, and chapter 5 of 27 and 28 *Vic.*, be abolished or modified by the Federal Parliament? Nobody can say so. They have remained in force for the benefit of the Province of *Quebec*, and they apply to an object exclusively assigned to the Province of *Quebec*—the administration of justice.

It is also objected that the destination of the tax imposed by the 43 and 44 *Vict.*, chapter 9, is not the same as that of the taxes imposed under the authority of the laws in force when Confederation began. Since Confederation all special funds have been merged into one fund only—the consolidated fund.

RITCHIE, C. J.:

In 1875, the Legislature of the Province of *Quebec*, by the Act 39 *Vic.*, ch. 8, for the first time imposed a tax of ten cents on the fyling of every exhibit in a cause. This tax, payable by means of stamps, was to form part of the Consolidated Revenue of the Province of *Quebec* (secs. 1 and 2).

This Act was repealed by the 43rd and 44th *Vic.*, ch. 9, and the same tax of ten cents on fyling of exhibits was re-imposed (sec. 9). Although this Act does not expressly declare that this tax shall form part of the consolidated revenue of the province, as the repealed statute (39th *Vic.* ch. 8) did, yet it enacts that all the duties therein mentioned shall be deemed payable to the Crown (sec. 3, sub-sec. 2), and they necessarily fall under the provision of 31st *Vic.*, ch 9, sec. 3, which declares that all revenue whatever over which the legislature of the province has power of appropriation, shall form one consolidated fund to be appropriated for the public service of the province.

This special tax has therefore been imposed since the *B. N. A. Act* by the Legislature of the Province of

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*Quebec*, to form part of the consolidated revenue of the province. By the *B. N. A. Act*, 1867, sec. 92, sub-sec. 2, the legislature of each province is authorized to raise a revenue for provincial purposes by means of direct taxation, and from the other sources, such as those mentioned in sub-secs. 5, 10 and 15, which have no application to the present case.

To the Dominion Parliament is given the right to raise money by any mode or system of taxation (sec. 91, sub-sec. 3). This right is exclusive when not coming within the classes of subjects assigned to the provincial legislatures, and as the legislatures of the Provinces are only authorized to raise a revenue by direct taxation and the other sources of revenue already mentioned, it follows that the Parliament of *Canada* has the exclusive right to raise a revenue by means of indirect taxes, and the legislatures of the provinces have no such right.

The terms of the Act seem clear on this point, and the Judicial Committee of the Privy Council have so interpreted them by deciding in the case of the *Attorney General of Quebec* v. *The Queen Insurance Company* (1), that the tax imposed on insurance companies by the Act 39th *Vic.*, ch. 7, of the Legislature of the Province of *Quebec*, was *ultra vires*, as not being a direct tax.

The 43rd and 44th *Vic.*, ch. 9, is clearly a tax act to raise a revenue for provincial purposes, and therefore the only question is—is this a direct or indirect tax?

Stamp duties were introduced into *England* in 1671 by a statute entitled "An act for laying impositions on proceedings at law" for nine years—continued for three years, then expired—revived in 1693, and have always been considered indirect taxes.

This, in my opinion, is clearly an indirect tax levied for no specific purpose, but forms part of the consoli-

(1) 3 App. Cases 1,090.

dated revenue of the province for general purposes. The judgments of *Mackay*, J., and *Dorion*, C. J., are, to my mind, conclusive.

Had this been merely an easy means adopted for the purpose of collecting a fee of office for work actually performed, I might, as at present advised, be disposed to look on the matter in a very different light from what it now strikes me, but this is not a fee or reward for labor, but it is a tax for raising a revenue, pure and simple, and has no more to do with the officer who fyles the paper or with the maintenance of the administration of justice than any other tax or source of revenue of which the consolidated revenue of the province is composed for the support of the government, and to promote the general interests of the people.

I am of opinion the appeal should be allowed and the judgment of the Superior Court affirmed.

STRONG, J.:—

The question presented for our decision by this appeal requires us to determine whether the 9th section of the Act 43 and 44 *Vic.*, ch. 9, was within the powers of the Legislature of the Province of *Quebec*. That section is in these words:

> There shall be imposed, levied and collected a duty of ten cents on every writ of summons, issed out of any County, Circuit Court, Magistrate's Court, or Commissioner's Court in the province, and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars, and exhibit whatsoever produced and filed before the Superior Court, the Circuit Court, or the Magistrate's Court, such duties payable in stamps.

A former statute, the 39th *Vic.*, ch. 8, had imposed a similar tax of ten cents for every exhibit filed in a cause. This Act was repealed and its provisions re-enacted and consolidated with other like provisions by the statute now in question, 43 and 44 *Vic.*, ch. 9.

It has been argued that this was a direct tax which

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the legislature had power to impose under sub-sec. 2 of sec. 92 of the *B. N. A. Act*. I am, however, clearly of opinion that this contention must fail. Taxes on legal proceedings are invariably classed by scientific writers on taxation and political economy as indirect, and even though such a tax may not be indirect in the sense that the burthen of it is ultimately to be borne by a person other than he who originally pays it, it is clearly so according to the well founded definition of Mr. *McCulloch* (1), who thus distinguishes direct and indirect taxes:

> A tax (he says) may be either direct or indirect, it is said to be *direct* when it is taken directly from property or income, and *indirect* when it is taken from them by making individuals pay for liberty to use certain articles or exercise certain privileges.

Subjected to this test, which has the sanction of a great number of similar authorities, it is apparent that the tax in question must be classed amongst indirect taxes.

The decision of the Privy Council in the case of the *Attorney General of Quebec* v. *The Queen Ins. Co.* (2) is also conclusively in favor of this view.

It is there said that there is nothing in the *B N. A. Act* prohibiting provincial legislatures from imposing indirect taxes; that all that sub sec. 2 of sec. 92 does, is to confer on the provincial legislatures exclusive powers to impose direct taxes, and that it does not follow that the legislatures may not have implied powers of indirect taxation.

To say that the provincial legislatures have powers of indirect taxation, either generally, as an inherent power without reference to any authority derived from the *B. N A. Act*, or as implied from the powers expressly conferred upon them, is to assume that they have, to some extent, concurrent powers with parliament, and that their

(1) McCulloch on Taxation, p. 1. (2) 3 App. Cases 1,090.

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powers of legislation are not limited by the subjects particularly enumerated in sec. 92. In other words, that whilst sec. 92 gives certain exclusive powers, it does not restrict provincial legislatures to those subjects. This important question was referred to, but not decided, in the case of *The Union St. Jacques* v. *Belisle* (1), in the Privy Council. I do not think, however, we are called upon to consider it for the purposes of this appeal, for assuming that no such power exists, and that the legislation now impugned cannot be referred either to any concurrent authority to impose indirect taxes, or to a power of taxing incidental to the express authority to legislate on the subjects comprised in sub-secs. 14 and 16 of sec. 92, it appears to me that under other provisions of the *B. N. A. Act*, and apart altogether from those contained in sec. 92, the imposition of this stamp duty on exhibits was not *ultra vires*.

By ch. 109 of the Consolidated Statutes of *Lower Canada*, which was in force at the time the *B. N. A. Act*, 1867, was passed and came into operation, the Governor in Council of the late Province of *Canada* was authorized to impose taxes or duties upon legal proceedings had in any of the courts of *Lower Canada*, and these taxes were to form part of the building and jury fund of the district in which they were collected. Subsequently by an Act passed in 1864 (27th and 28th *Vic.*, ch. 5, sec. 4) it was enacted that these taxes or duties should be paid by means of stamps.

By the 65th sec. of the *B. N. A. Act*, 1867, it was enacted that—

> All powers, authorities and functions which under any Act of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain and Ireland* or of the Legislature of *Upper Canada, Lower Canada*, or *Canada*, were or are before or at the union vested in or exercisable by the respective Governors or with the advice and consent of the respective executive councils

(1) L. R. 6 P. C. 31.

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thereof, or in conjunction with those governors, or with any number of members thereof, or by those governors, or lieutenant-governors individually, shall, so far as the same are capable of being exercised after the Union in relation to the Government of *Ontario* and *Quebec* respectively, be vested in and shall and may be exercised by the Lieutenant Governor of *Ontario* and *Quebec* respectively, with the advice or with the advice and consent of or in conjunction with the respective executive councils or any members thereof, or by the lieutenant governor individually as the case requires, subject nevertheless (except with respect to such as exist under the Acts of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the respective Legislatures of *Ontario* and *Quebec*.

By the 126th section of the *B. N. A. Act*, it was also provided that:

Such portions of the duties and revenues over which the respective Legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, had before the union power of appropriation, as are by this Act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province.

It is clear, therefore, that by force of the 65th section, the power which, by Cons. Stats. of *Lower Canada*, ch. 109, was vested in the Governor in Council of the former Province of *Canada*, of imposing taxes and duties on legal proceedings, passed to and vested in the Lieutenant-Governor in Council of the Province of *Quebec*. There cannot be a question as to this; it was originally a power exclusively concerning and relating to that portion of *Canada* which constituted the new Province of *Quebec*, and one the exercise of which did not involve any interference with any other portion of the Dominion, or any extension of authority beyond the territorial limits of *Quebec*, and therefore it was, according to the most strict and narrow construction which could be given to the language of the 65th section, a

power capable of being exercised after the union in relation to the government of *Quebec*. It follows, that prior to and at the time of the passing of the Provincial Act, 39 *Vic.*, ch. 8, the Lieutenant-Governor in Council of the Province of *Quebec* had the power of imposing a tax or duty upon each exhibit filed in the courts pursuant to the authority conferred by Cons. Stats. of *Lower Canada*, ch. 109.

Then, as the produce of such a tax would be in the words of section 125, a duty or revenue reserved by the *B. N. A. Act*, to the Government of the Province of *Quebec*, it would, under the express provision of the last-mentioned section, form part of the consolidated revenue fund of that province. It was therefore up to 1875, when the 39 *Vic.*, ch. 8, was passed, quite within the competence of the Lieutenant-Governor in Council, not merely to impose this tax or duty on the filing of exhibits, but further to provide that the proceeds of the tax, instead of being paid as before confederation, into the jury and building fund of each district, should be paid into the consolidated revenue fund of the province; indeed, it was not merely within the power of the Governor in Council to order the monies so collected to be thus disposed of, but they were by law bound to make such a disposition of them, since the tax would come under the denomination of a tax or duty reserved to the government of the province, and was also a revenue over which the Legislature of the Province of *Canada*, before the union, had a power of appropriation; for there can be no doubt or question that although the building and jury fund was kept apart from the consolidated revenue fund of the Province of *Canada*, and was to some extent a local fund, it was nevertheless a fund produced by taxes payable to the Crown, over which the Legislature of the old Province of *Canada* had absolute powers of

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control and disposition. It can, therefore, be demonstrated that the Lieutenant-Governor in Council could, under the Consolidated Statutes of *Lower Canada*, ch. 109, have done precisely what the legislature did by the Act of 1875 (39 *Vic.*, ch. 8), have imposed a tax of ten cents on every exhibit filed in a cause, such tax to be payable by stamps, and the proceeds of the sale of the stamps to be paid into the consolidated revenue of the province.

Then, can it be said that it was any usurpation on the part of the provincial legislature when they assumed to themselves this same power which the provincial executive could under the express provisions of the Confederation Act have exercised without further legislative authority? The answer to this is also to be found in the very words of the 65th section of the *B. N. A. Act*, which expressly provides that the powers of that section transferred to the provincial governments shall be "subject to be abolished or altered by the respective Legislatures of *Ontario* and *Quebec*." That the transfer from the executive to the legislative department of the government of the authority which had been in the manner already indicated, reserved to the Lieutenant-Governor in Council, was an alteration within the meaning of the authority given to the legislature to alter powers thus vested, is surely too plain to require or even to be susceptible of argument; having the right to abolish the power altogether, it must have been competent to the legislature, under the lesser authority given to alter, to assume the exercise of it themselves, and thus to provide that these functions of legislation and taxation which, in the old Province of *Canada* had been delegated to the Governor in Council, should in the future be attributed to and exercised by the appropriate constitutional depository of such power, the legislature itself. Under the express authority to

alter, contained in the 65th sec., and also under sub-sec. 1 of sec. 92, authorizing constitutional changes, the legislature could therefore have passed an Act expressly and formally revoking the authority given to the Governor in Council by Consolidated Statutes of *Lower Canada*, ch. 109, and providing that thereafter, the taxes, authorized by that statute to be imposed by Order in Council, should only be levied under the authority of the legislature itself. And if it could have thus expressly revoked or transferred the power in question, it could also do so by implication as well; and this it did, when by 39 *Vic.*, ch. 8, and the subsequent statutes 43 and 44 *Vic.*, ch. 9, by which the provisions of the first mentioned Act are renewed and consolidated, it imposed the tax now called in question.

The foregoing is in accordance with the view taken in the Court of Queen's Bench by Mr. Justice *Cross*, in whose judgment I agree in every respect.

I am therefore of opinion that the 9th section of the statute 43 and 44 *Vic.*, ch 9, was not *ultra vires* of the Legislature of the Province of *Quebec*, and that this appeal must consequently be dismissed with costs.

FOURNIER, J.:—

This question has been so fully treated by Sir *A. A. Dorion* that I do not see what I could add. In my opinion this is an indirect tax, and therefore the local legislature had no right to impose it. I also agree with the reasons given by the Chief Justice of this Court.

HENRY, J.:—

Under the *B. N. A. Act*, the local legislatures were not authorized to impose any indirect tax, and it is for us to consider now whether this Act (43 & 44 *Vic.*, ch. 9) and this Act only (for that is the only one before us) was within the powers of the *Quebec* Legislature since 1867. The first question is—is it a direct or an indirect

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tax? I have no hesitation in saying that it is an indirect tax. That tax was not for the payment of juries or other purposes connected with the court, but it was to be paid into the consolidated revenue fund of the province. Now, carrying out the principle that is involved, if that is within the powers of the local legislature, where is the limit to be? We might go on to any extent. The Judicial Committee of the Privy Council have decided in *Attorney General of Quebec* v. *Queen Ins. Co.* (1), that they could not impose a duty by stamps, because it was an indirect tax. This court decided that the Legislature of *Ontario* had no right to levy an indirect tax on brewers, because it is taken indirectly from the pockets of the consumers. Now, this tax is to be taken out of the pockets of suitors and placed in the general revenue of the province. That is to all intents and purposes an indirect tax, and therefore I think the legislature exceeded its powers. As to whether the legislature had that power or not, and many of the matters argued, we have already had under the consideration of this court, and the decisions we have given on this very question, render it unnecessary that I should say much. I think the appeal ought to be allowed, and the judgment below reversed.

TASCHEREAU, J.:—

I am of opinion, with the Superior Court of *Montreal*, and the learned Chief Justice of the Court of Queen's Bench, that the tax in question here is not a direct tax, and that it is by direct taxation only that the provincial legislatures can raise a revenue for provincial purposes. I am also of opinion that the said tax is what the statute itself calls it, really a tax or duty, and not a fee of office under ch. 93 of the *Consolidated statutes L. C.* The fees of the officers of the court have not been increased, and

(1) 3 App. Cases 1090.

were not intended to be increased by the Act impugned; they do not collect it, neither does it inure to their benefit in any way. On these three points, we are, I believe, unanimous. I am, however, of opinion that the section of the Act 33 and 34 *Vic.*, ch. 9, imposing this duty of ten cents on each exhibit, is not *ultra vires*, and this upon the following ground.

Before confederation the Governor in Council could clearly, under sec. 32, ch. 109, of the C. S. L. C., have imposed such a tax or duty, payable in stamps by the Act of 1864. Under secs. 65 and 129 of the *B. N. A. Act*, this power was continued to the Lieutenant Governor in Council, and under these two sections the exclusive power to repeal or alter the said provisions of the said chapter of the consolidated statutes, or of the said Act of 1864, was vested in the provincial legislature. The provincial legislature, consequently, must have, and alone have, complete control over the building and jury fund created under the said chapter of the consolidated statutes, including the power to abolish it, and to enact that it shall form part of the consolidated revenue. Before confederation, under the union of the two *Canadas*, the consolidated fund was, of course, a fund common to both of these provinces, so that, in order to prevent local revenues raised for special local expenses, expenses personal to one province, from inuring to the benefit of the other province, it was necessary to create special funds of the kind in question. Each province levied such taxes for itself alone, and not at all for the benefit of the other, nor, in other words, for the consolidated general revenue fund, which belonged to the two provinces jointly. But, since confederation, this reason does not exist. The consolidated fund of each province belongs, in its integrity, to that province and is under exclusive provincial control.

And if the Province of *Quebec* has, either expressly

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or impliedly, by the provisions of the 31 *Vic.*, ch. 9, sec. 3, or by those of the particular enactment now impugned, abolished the building and jury fund, and thrown the proceeds of it into its consolidated revenue fund, it has, it seems to me, dealt with nothing but what is under its legislative control, or done nothing but what it had full power to do under the *B. N. A. Act.* It has imposed an additional tax, it is true, but has it not the power—and the exclusive power—to do so (not for general provincial purposes, but for the same purposes as those for which the said provisions of the consolidated statutes were enacted) and this, as a consequence of the power to alter or amend them. It might be that, if in a proper case, it was alleged and proved that, for the whole province, the expenses of the administration of justice are more than covered by the duties imposed on the law proceedings, and, if it was demonstrated that the legislature, under pretence of providing for these expenses, has attempted, in evasion of the provisions of the *B. N. A. Act*, to raise a revenue for general provincial purposes by indirect taxation on these law proceedings, the courts would then interfere and declare that these legislatures cannot in violation of the law so enlarge the powers conferred upon them. But there is no issue of that kind raised here. What Mr. *Honey*, the prothonotary of *Montreal*, examined as a witness in this case, says on this subject, does not relate to all the expenses connected with the *Montreal* Court House, and, moreover, has no application to the province at large, in which it is notorious that the deficit in the revenues connected with the administration of justice is very large. Then, it seems to me, the difference between the building and jury fund and the consolidated revenue is merely one of book-keeping. What has been paid to the building and jury fund before confederation, under the Act of

of 1864, was deemed payable to the Crown, though for a special purpose only, and what was due to it was recoverable by the Crown. And that this tax of ten cents is *ultra vires*, because it is also, by the Act imposing it, declared to be deemed payable to the Crown, is what I cannot see. On the contrary, it seems to me clear that the provincial legislature alone had the power to pass an enactment like the one impugned, and to enact, as a matter of procedure, as it did by the same statute, that no exhibit shall be received in the courts of justice if not bearing this ten cent stamp. The Dominion Government has certainly not that power. So, if the Provincial Government did not have it, it would follow that, since confederation there would be no power anywhere to provide for the expenses of the administration of justice in the Province of *Quebec*, on the system and basis existing before confederation. It would follow that if a new procedure was introduced as, for instance, has been done by the introduction of the writ of injunction in 1878, the province would have no power to impose any duty on that particular proceeding or act of procedure, or that if a new court was created, as was, for instance, the District Magistrates Court, all the proceedings in that court would be entirely free from all such tax.

These Acts of the consolidated statutes and of 1864 formed part of what was, at confederation, known as the Acts concerning the administration of justice in the province and the procedure in civil matters in the courts of the province, and as such they have been by the *B. N. A. Act* left under the exclusive control of the provincial legislature.

The Act 31 *Vic.*, ch. 2, imposed for the building and jury fund before confederation, repealed by the Act now impugned, re-enacted that all such duties and taxes were to be deemed payable to the Crown. Then before

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confederation, the Act of 1864, as to these very duties, is entitled: "An Act for the collection, by means of stamps of fees of office, dues and duties payable to the Crown"—and its preamble says: "Whereas it is expedient that all fees and charges payable to the Crown." By sec. 9 thereof, "it specially enacted that all the fees, dues, duties, taxes and charges payable under the said Acts and parts of Acts (including those for the building and jury fund) shall be considered to be fees, dues, duties, taxes and charges payable to the Crown for the purposes of this Act." Is it not clear that all these duties, since they have been first enacted, have always been considered to be deemed payable to the Crown? They are received and paid to certain officers, but these officers receive it for the Crown; what is so paid them is paid to the Crown.

And the argument, that because 31 *Vic*, ch. 9, sec. 3, enacts that all revenues subject to provincial control are to form part of the consolidated fund, this new tax must also fall in that fund, seems to me, untenable. Ever since the 9 *Vic.*, ch. 114, confirmed by 10-11 *Vic.*, ch. 71, of the Imperial statutes (ch. 14, of the *Consolidated Statutes of Canada*) it had been likewise for the old provinces enacted that all revenues subject to provincial control should form a consolidated revenue fund. Yet this did not and could not prevent the Legislature of *Canada* (before confederation) from creating for the Province of *Quebec* the building and jury fund and its revenues. If the appellant's contention that this new tax is illegal simply because it is declared to be deemed payable to the Crown was to prevail, it would follow that all such taxes of the same kind levied since confederation are also illegal, and have been illegally levied, since they also were all deemed payable to the Crown, and I do not believe that the appellant would be prepared to go so far.

As a matter of fact, I may remark here, both the *Quebec* Provincial Legislature and the Dominion Parliament have, since confederation, recognized the existence of this building and jury fund, the former by, amongst others, 41 *Vic.*, ch. 16, and 45 *Vic.*, ch. 25, and the latter by the Insolvency Act of 1869, sec. 152, and the Insolvency Act of 1875, sec. 145.

It must also be observed that this Act 43 and 44 *Vic.*, ch. 9, is under one of its special provisions (sec. 20) to be read as forming part of the said Stamp Act of 1864, which, in its turn, must be read in connection with the said ch. 109 of the Consolidated Statutes. But whether or not this building and jury fund has been abolished seems to me immaterial. I say that if it still exists, the proceeds of this new tax must go to it, though they are, by the Act, deemed payable to the Crown the same as all similar taxes imposed before confederation, which, though also deemed payable to the Crown, go to that fund; and if there is now no such special fund, it is no objection to the legality of this tax that it goes to the consolidated revenue, wherein that special fund has merged, the same as similar taxes imposed before confederation, which, must now all go to that consolidated fund.

As to the ground that this is a new or an additional tax, I have already said:

1st. That, although an indirect tax, it is not a tax for the general revenue of the province.

2nd. That the provincial legislature has the power, under secs. 65 and 129 of the *B. N. A. Act* to alter amend the Acts under which similar taxes existed on law proceedings at confederation.

3rd. That, consequently, the provincial legislature could impliedly, as it has done by the enactment objected to, (as it can expressly) take away from the Lieutenant Governor in Council the powers he had in virtue of the

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said Acts, and itself exercise these powers; that, therefore, the provincial legislature has the power not only to abolish or diminish the said taxes, or to transfer a particular tax from one proceeding to another, but that it can also legally impose a tax or duty of a similar nature on proceedings or acts of procedure on which none were imposed at the time of confederation, and I presume, though unnecessary to decide for the purposes of the present case, on any new act of procedure created since confederation, provided that the province, in the exercise of this power, confines itself to the raising of a revenue to meet the expenses of the administration of justice, on the system and basis in existence before confederation.

GWYNNE, J.:—

The real question involved in this case appears to me to be, whether any limit, and if any to what extent, is set by the *B. N. A. Act* to the power of the provincial legislatures to raise revenue by taxation. The scheme of the framers of our Federal Constitution, to provide means for the support of the provincial governments and legislatures, consisted primarily in a subsidy to be paid to each province in proportion to its population, as ascertained by the census of 1861. Accordingly by the 118th sec. of the *B. N. A. Act*, such subsidy is provided to be paid by the Dominion of *Canada* to the respective provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*. By this subsidy, supplemented by such revenue raised by taxation, as is authorized by the 92nd sec. of the Act, together with the public property and assets assigned to each province, all the expense attending the carrying on the several provincial governments must be defrayed. Now, by the second item of sec. 92, the legislatures of each province are authorized to make laws in relation to direct taxation

within the province, in order to the raising of a revenue for provincial purposes; by the 9th item of the same section they are authorized to make laws in relation to shop, tavern, auctioneer and other licenses, in order to the raising a revenue for provincial, local or municipal purposes; and by the 15th item they are authorized to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in sec. 92. These are the only sections which expressly authorize the raising, by any act of the provincial legislatures, any revenue whatever by any system of taxation. The public property and assets transferred to each province constitute an additional source of revenue, but at present we have to deal only with the power of the respective legislatures to raise by taxation a revenue for provincial purposes.

The express provision made by item 2, which while it authorizes the legislatures to make laws, in order to the raising of a revenue for provincial purposes by taxation, limits the exercise of the authority thus conferred to direct taxation, very clearly excludes, in my judgment, the power of raising a revenue by any species of taxation other than direct; but it is contended that this is not so, and that as there is no express clause in the Act prohibiting indirect taxation, the provincial legislatures have implied power to raise revenue by indirect taxation to defray the expenses attending the exercise of their jurisdiction over each and every subject placed by the 92nd section under their exclusive control, and that the particular tax in question here being a stamp tax on legal proceedings, even though it be not a direct tax, is authorised by the 14th item of section 92, which places the administration of justice, and among other things, the maintenance of provincial courts, under the control

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of the provincial legislatures; the contention being that for the maintenance of the courts and the administration of justice, the provincial legislatures have by force of this item, No. 14, implied authority to raise a revenue by indirect taxation. But that the maintenance of provincial courts and the administration of justice are provincial purposes there can be no doubt, they are therefore comprehended within the purview of item 2 of section 92, which in express terms prescribes direct taxation as the mode of taxation to be adopted for raising revenue for provincial purposes, so that upon the principal of *expressum facit cessare tacitum*, there can be no such implied power involved in this item 14 as is insisted upon; moreover, if the contention were sound, then upon the same principle they could equally pass an Act imposing a special tax of an indirect character for the payment of provincial officers under a power implied under item 4 of this 92nd section, and another Act imposing another special tax, also of an indirect character, to defray the expense attending the establishment, maintenance and management of public and reformatory prisons, under the powers conferred by item 6, and another to defray the expense attending the establishment, maintenance and management of hospitals, asylums, &c., under the powers conferred by item 7; and, as in fact is boldly contended, other Acts imposing indirect taxation to defray the expenses attending the maintenance and management of all matters of a merely local and private nature, and so the effect would be, that this implied power of raising revenue by indirect taxation, which it is contended the legislatures have, being exercised as it might be if they have the power, to raise sufficient revenue to defray all the expenses of the government and legislatures in respect of all the several matters under their control and jurisdiction, it would be quite unnecessary for them to exer-

cise the power conferred by item 2, raising by direct taxation a revenue for provincial purposes, or to draw upon the revenue created by the subsidy paid by the Dominion or by sale of the public property, or other income arising therefrom, or from the assets assigned to each province, such a contention appears to me to involve so palpable a *reductio ad absurdum* as to carry with it its own refutation ; and indeed the judgment of the Privy Council in the *Attorney General of Quebec* v. *The Queen Insurance Co.* (1), in effect decides that the provincial legislatures cannot by any act of theirs authorize the raising a revenue by any mode of taxation other than direct.

It was further argued that inasmuch as (as was contended) the Lieutenant Governor of *Quebec* could under the 129th sec. of the *B. N. A. Act* impose the very tax which the *Quebec* Statutes 39 *Vic.*, ch. 8, and 43 and 44 *Vic.*, ch. 9, profess to impose, therefore it must be competent for the legislature by an act of legislation to impose a tax which the Lieutenant Governor by an Act in Council could impose. Independently of the objection, which I have already urged, that there being given by the *B. N. A. Act* express power to the provincial legislatures with reference to taxation, and that being of a particular and limited character, no power of a different and an unlimited character can be implied, the contention under consideration, which, however is not, in my opinion, raised before us in this case, proceeds upon the assumption that the Lieutenant Governor could impose the tax in question—a position which as it appears to me requires for its establishment something more than its assumption—for if the legislature of the province has only power to impose direct taxation, and if the tax in question be not a direct tax, it would seem to be inconsistent that the Lieutenant Governor, could since

(1) 3 App. Cases 10, 90.

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confederation, impose indirect taxation as a source of revenue for a provincial purpose which by the Constitutional Charter, under which both Lieutenant Governor and Legislature exist, the Legislature has no power to impose. The question which in such case appears to me to arise is, whether the Acts in virtue of which the Governor General of the late province of *Canada* had, before confederation, power to impose taxes of the nature of the tax in question, can be Acts whose provisions are continued by the 129th sec. of the *B. N. A. Act*, which enacts that *except as otherwise provided* by the *B. N. A. Act*, all laws in force, &c., shall continue, &c., &c., whether in fact, if the legislature is prevented by the provisions of the *B. N. A. Act*, from raising a revenue by indirect taxation, the imposition of such a mode of taxation by the Lieutenant Governor in Council is not prevented also; and whether the provision limiting the power of the legislature to the imposition of direct taxation is not such a provision *otherwise* as would exclude the Act, under which such taxes had been imposed by the Governor in Council before confederation, from the operation of the 129th section of the *B. N. A. Act*? The 65th section appears to me to relate to acts of the Lieutenant Governor, necessary for carrying on the government merely, and that unless the Lieutenant Governor has authority to impose this tax under section 129, he cannot have it under section 65. Unless the law or Act authorizing the imposition is continued by section 129, it is plain the Lieutenant Governor could not impose it under section 65. Here the question, however, is, whether the Acts or Act of the Legislature of *Quebec*, professing to impose the tax in question are or is *ultra vires*? and the answer to that question depends upon the single point, namely: whether the tax is or not a direct tax? for the legislatures have not, as it appears to me, any power to raise a

revenue for any provincial purpose by any mode of taxation otherwise than direct. The whole expense of government and legislation for provincial purposes, which terms comprehend the whole expense attending all provincial purposes placed under the control of the Provincial Government and Legislature, must be defrayed out of the produce of the public property, and assets assigned to each province, and the subsidy paid to the province by the Dominion—supplemented, if these sources of revenue should be insufficient, by taxation of a direct character only, in addition to the money raised under the special authority given by clauses 9 and 15 of section 92. And as I am of opinion that the tax in question is not a direct tax, a point in my opinion, concluded by the judgment of the Privy Council in the *Attorney-General* v. *The Queen Insurance Co.*, the appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitors for appellant: *MacLaren & Leet*

Solicitor for respondent: *A. Lacoste*