CANADIAN PACIFIC RAILWAY COMPANY ET AL (PLAINTIFFS) .. } APPELLANTS;

1952

*Feb. 27, 29
Mar. 3, 4
*Jun. 30

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF SASKATCHEWAN .....

AND

THE MINISTER OF NATURAL RESOURCES AND INDUSTRIAL DEVELOPMENT OF THE PROVINCE OF SASKATCHEWAN (DEFENDANTS) ..... } RESPONDENTS,

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF ALBERTA .. } INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Mineral Taxation—Imposition of tax on owner of minerals—Tax based on acreage and assessed value—Whether direct or indirect—Whether land tax—Whether intention to have it passed on—Severability—Mineral Taxation Act, 1948 (Sask.), c. 24, ss. 3, 6, 22—B.N.A. Act, 1867, s. 92(2).

By virtue of the *Mineral Taxation Act, 1948, c. 24* and amendments, the Province of Saskatchewan purported to impose an annual tax on each owner of minerals within the Province regardless of whether minerals were or were not present within, upon or under the land. "Owner" was defined as a person registered in a land title office as the owner of any minerals. "Mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land.

The *Act* provided that in a "non producing area", the tax would be at the rate of 3 cents per acre of land. The Lieutenant-Governor was given the power to declare any area in the province a "producing area", and provision was made for the assessment at their fair value of minerals in a producing area. Until an assessment was made the owner was liable to pay at the rate of 50 cents per acre of land and fraction thereof in such an area. Following an assessment, the owner would be liable to pay a tax at the rate prescribed from time to time by the Lieutenant-Governor in Council but not exceeding ten mills on the dollar of the assessed value of the minerals. Non-payment of the tax resulted in forfeiture of the minerals to the Crown.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

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The trial judge held that the *Act* was *intra vires* as imposing direct taxation. The Court of Appeal for Saskatchewan held that the 3 cent tax was a direct tax, but that the 50 cent tax and the mill rate tax were indirect.

Held (the Chief Justice dissenting), that the appeal should be dismissed and the cross-appeal allowed.

Each of the three taxes is a land tax, is clearly direct taxation and not imposed with the intention that it should be passed on to someone else.

City of Halifax v. *Fairbanks' Estate* [1928] A.C. 117; *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co.* [1950] A.C. 87; *A.G. for B.C.* v. *C.P.R.* [1927] A.C. 934; *A.G. for Manitoba* v. *A.G. for Canada* [1925] A.C. 561 and *Glenwood Lumber Co.* v. *Phillips* [1904] A.C. 405 referred to.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) which had reversed the judgment of the trial judge and had declared the Act *ultra vires* in part.

E. C. Leslie, I. D. Sinclair and Allan Findlay for appellants. The Act is not in pith and substance in relation to direct taxation and is therefore beyond provincial competence. The tax is imposed upon the owner in respect of mineral rights and in respect of the minerals themselves. A tax thus imposed is analogous to a tax on the producer of a commodity in respect of a commodity and such a tax is indirect taxation: *Bank of Toronto* v. *Lambe* (2); *The Security Export Co.* v. *Hetherington* (3). It appears from the reasoning in the judgment of *Caledonian Collieries* v. *The King* (4) that had the tax been imposed in respect of the coal before its sale or while it was still in the ground, there could have been no question that it would be an indirect tax because an allowance would be made for such a tax in the price charged. This view is also supported by the case of *Esquimalt* (5) in this Court. And in the Privy Council (6) it would have been quite unnecessary for Lord Greene to have drawn the careful distinction he did between a land tax and a tax on standing timber if a tax on standing timber was regarded as a direct tax.

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.
(2) 12 A.C. 575.
(3) [1923] S.C.R. 539.
(4) [1928] A.C. 358.
(5) [1948] S.C.R. 403.
(6) [1950] A.C. 87.

If a tax in respect of minerals which have been removed is an indirect tax, a tax in respect of the right to remove the minerals is also an indirect tax, because here also, an allowance would be made for the tax in the price of sale.

The validity of the submission that the tax is direct because it will not in fact be passed on will disappear when the operation of the legislation is examined. But the fact that it may not be possible in a given case to pass it on does not effect the general tendency of the tax on mineral rights which is that it will be passed on. The legislature contemplated that this would be its normal effect and tendency. *The Security Export Co.* v. *Hetherington* (*supra*), *Esquimalt* (*supra*), *Grain Futures Case* (1); *The A.G. for British Columbia* v. *C.P.R.* (2); *The A.G. for Manitoba* v. *The A.G. for Canada* (3) and the *City of Charlottetown* v. *Foundation Maritime Limited* (4). This is not as contended, a land tax within the case of *City of Halifax* v. *Fairbanks' Estate* (5).

The interest in land in respect of which the tax in question is imposed is the right to extract or produce from the land a commodity which will be the subject of commercial transactions. Such an interest in land cannot be considered as falling within the well recognized class of land taxes that have always been regarded as direct taxes. The situation here is analogous with the tax on growing crops of the Agricultural Land Relief Act case (6).

Licenses which have been held to be a tax may be supported under section 92 para. 9 even though it be an indirect tax: *Lawson* v. *Interior Tree Fruit* (7) and *Shannon* v. *Lower Mainland Dairy Products Board* (8).

The provisions imposing the 3 cent rate are not severable and accordingly if the two other rates are *ultra vires,* the entire enactment is *ultra vires.* It is apparent from a consideration of the Act as a whole that it was intended to work out a single comprehensive scheme of taxation. If parts of it are invalid, the remaining parts cannot stand unless it can be assumed that the legislature would have enacted such remaining parts without the invalid parts and

(1) [1925] A.C. 561.
(2) [1927] A.C. 934.
(3) [1925] A.C. 561.
(4) [1932] S.C.R. 589.
(5) [1928] A.C. 117.
(6) [1938] 4 D.L.R. 28.
(7) [1931] S.C.R. 357.
(8) [1938] A.C. 708.

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the converse is true. *The A.G. for Alberta* v. *The A.G. for Canada* (1); *The A.G. for Manitoba* v. *The A.G. for Canada* (2) and *The A.G. for British Columbia* v. *The A.G. for Canada* (3).

M. C. Shumiatcher, Q.C. for the respondent, Minister of Natural Resources. The Act is clearly a taxing statute intended to raise a revenue for the purposes of the province. The tax is imposed with respect to property or alternatively, the tax is imposed upon property. The cases of *Glenwood Lumber Co.* v. *Phillips* (4), *Macpherson* v. *Temiskaming* (5), *Clarkson* v. *Bouchard* (6) and *Gowan* v. *Christie* (7) are relied on.

Minerals being land or an interest in land, a mineral tax of the type here imposed is not new or unusual. Mineral rights have been the subject of taxation for a considerable number of years in Saskatchewan, Alberta, Ontario and British Columbia. The impost under the Act in pith and substance constitutes direct taxation. There is no relation between the tax and the amount of product produced, therefore it cannot be a tax on a commodity. The tax is on capital, i.e. the value of the land. *Bank of Toronto* v. *Lambe* (8). The effect of the judgment in *City of Halifax* v. *Fairbanks' Estate* (9) is that a tax upon land and interests in land is a direct tax. The situation here is somewhat similar to the *Brewers* Case (10). There is a difference between a growing crop and minerals, the time limit being so short in the crop case as to be immaterial. The tax is directed at the crop which is a chattel in contemplation of severance. Timber and minerals are an interest in the land. The crops, whether growing or not, are chattels. The fact that the tax or a portion thereof may be said to be passed on in no way alters the fact that, being a tax upon property or an interest in property, it is direct taxation. The *A.G. for British Columbia* v. *Kingcome Navigation Co. Ltd.* (11); *The King* v. *Caledonian Collieries Ltd.* (12) and the *Agricultural Land Relief Act*

(1) [1947] A.C. 503.
(2) [1925] A.C. 561.
(3) [1937] A.C. 377.
(4) [1904] A.C. 405.
(5) [1913] A.C. 145.
(6) [1913] A.C. 828.
(7) L.R. 2 H.L. 283.
(8) 12 A.C. 575.
(9) [1928] A.C. 117.
(10) [1897] A.C. 231.
(11) [1934] A.C. 45.
(12) [1928] A.C. 358.

case (1). There is no such tendency as in the case of *Charlottetown* v. *Foundation Maritime Ltd.* (2) inherent in the provisions of the present statute since there exists no relationship between the tax and the marketable commodity. The Mineral Tax Act provides for a levy upon or in respect of the land and contemplates payment by the owner of that land. No passing on is contemplated. Furthermore, if the tax was a direct tax when set at 1 cent per acre, it did not become an indirect tax when it was increased to 3 cents per acre. The nature of a tax does not alter with its quantum.

The acreage tax in *R. M. Bratts* v. *Hudson's Bay Co.* (3) was held to be a direct tax. The cases of *Rattenbury* v. *Land Settlement Board* (4) and the *City of Montreal* v. *The A.G. for Canada* (5) are also of assistance.

P. G. Makaroff, Q.C. for the respondent, the A.G. for Saskatchewan. The tax is taken directly from the registered owner of minerals apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making or stand to make profits from the ownership of mineral rights. The difference in the three taxes is not in character but only in the method of assessment. The validity of a taxing statute is not affected by the method of assessment.

There is a presumption at law that the legislature has not exceeded its power.

The principles of severability are well known and reference is made to *Toronto* v. *York Township* (6) and the *Rattenbury* case (4). If there is any doubt as to the constitutional validity of any one of the procedures adopted or capable of adoption and application, such is clearly severable in the event that one procedure is held to be *ultra vires,* that provision ought to be severed from the balance of the statute which, read as a whole, is a taxing statute imposing direct taxation in the province. As the 3 cent tax is a blanket tax over the whole of the province, the two other taxes may be taken away and the Act will still be complete. The legislature would have enacted the Act just for the 3 cent tax.

(1) [1938] 4 D.L.R. 28.
(2) [1932] S.C.R. 589.
(3) [1919] A.C. 1006.
(4) [1929] S.C.R. 52.
(5) [1923] A.C. 136.
(6) [1938] A.C. 415.

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J. J. Frawley, Q.C. for the Intervenant, the A.G. for Alberta, adopted the arguments advanced on behalf of the respondents.

THE CHIEF JUSTICE (dissenting)—The appellants sought to have the Minerals Taxation Acts and Amendments of the Province of Saskatchewan declared *ultra vires*. There were other conclusions in their statement of claim and some of them were passed upon by the Court of Appeal of the Province of Saskatchewan (1), but before this Court the only point discussed was whether the tax imposed ought to be classed as an indirect tax and, therefore, outside the powers of the Legislature of the Province of Saskatchewan.

The task of deciding the point, to my mind, is not an easy one. In *City of Halifax* v. *Estate of J. P. Fairbanks* (2), Viscount Cave, delivering the judgment of their Lordships of the Privy Council, insisted upon the fact that in considering the question raised it was important to bear in mind that the problem to be solved was one of law and that the framers of the *British North America Act* evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described. From this he inferred that the distinction between direct and indirect taxation was well known before the passing of the *British North America Act* and, he says, it is undoubtedly the fact that before that date the classification was familiar to statemen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Viscount Cave stated that the well known formula of John Stuart Mill no doubt was valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed.

That judgment was handed down in 1928, but the Judicial Committee in *Attorney General for British Columbia* v. *Esquimalt and Nanaimo Rly. Co.* (3) said this about Viscount Cave's judgment in the Fairbanks case:—

> Lord Cave, in delivering the judgment of the Board, used expressions which, if not correctly understood, might appear to lay down too rigid a test for the classification of taxes; but, as is pointed out by Lord Simon

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

(2) [1928] A.C. 117.

(3) [1950] A.C. 87 at 119.

L.C. in the judgment of the Board in the later case of *Atlantic Smoke Shops, Ltd.* v. *Conlon* (1943) A.C. 550, those expressions "should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article".

In *Bank of Toronto* v. *Lambe* (1), Lord Hobhouse, delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached, and stated that the drafters of the *British North America Act* "must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies".

This language was approved by the Board in *The King* v. *Caledonian Collieries, Ltd.* (2).

In view of these pronouncements of the Judicial Committee, I feel that Lord Cave's suggested classifications should not be strictly adhered to.

In *City of Charlottetown* v. *Foundation Maritime, Ltd.* (3), this Court said:—

> The question of "direct taxation" as defining the sphere of provincial legislation has often been the subject of pronouncements by this Court and by the Judicial Committee of the Privy Council. The effect of the decisions, when analyzed, is substantially as follows:
>
> In every case, the first requisite is to ascertain the inherent character of the tax, whether it is in its nature a direct tax within the meaning of section 92, head 2, of the British North America Act, 1867 (Attorney General for British Columbia v. McDonald Murphy Lumber Co. Ltd. (1930) A.C. 357 at 363 and 364). The problem is primarily one of law; and the Act is to be construed according to the ordinary canons of construction: the court must ascertain the intention of Parliament when it made the broad distinction between direct and indirect taxation.
>
> These taxes (in 1867) had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies.
>
> As applied, however, to taxes outside these well recognized classifications, the meaning of the words "direct taxation", as used in the Act, is to be gathered from the common understanding of these words which prevailed among the economists who had treated such subjects before the Act was passed (*Attorney General for Quebec* v. *Reed* (1884) 10 A.C. 141 at 143); and it is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy ed. 1886, vol. 11, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2. Mill's definition was held to embody "the most obvious indicia of "direct

(1) 12 A.C. 575. (2) [1928] A.C. 358.
(3) [1932] S.C.R. 589 at 593.

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and indirect taxation" and was accepted as providing a logical basis for the distinction to be made between the two. The expression "indirect taxation" connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And 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 (*The King* v. *Caledonian Collieries, Ltd.*, (1928) A.C. 358). 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.

In the present case there are really only two sections of *The Mineral Taxation Act* (Chapter 24 of the Statutes of Saskatchewan, 1948, as amended by Chapter 23 of the Statutes of 1949 and Chapter 22 of the Statutes of 1950) which have to be considered. These are section 3 imposing a tax at the rate of three cents for every acre on "every owner of minerals" . . . "not situated within the producing area", and section 22 imposing a tax at the rate of fifty cents for every acre of land on the "owner of minerals within, upon or under any land situated within a producing area".

By force of section 5 of the Act "producing areas" are those which are so declared by order of the Lieutenant Governor in Council, and the latter may designate the mineral or minerals in respect of which the portion of the province therein described is constituted a "producing area". For those areas so designated assessors are provided to assess "at their fair value all minerals, within, upon or under any parcel of land so constituted". They prepare an assessment roll in which shall be set out as accurately as may be a brief description of each such parcel of land, a brief description of the minerals assessed, the names and addresses of the owners of the minerals and the assessed value thereof.

Section 7 deals with the method of assessment and section 6, dealing with the imposition of the tax, states:

> Every owner whose name appears on the assessment roll mentioned in section 7 shall be liable for and shall on or before the thirty-first day of December in each year pay to the minister a tax at such rate as the

Lieutenant Governor in Council may from time to time prescribe not exceeding ten mills on the dollar of the assessed value of his minerals as shown on the assessment roll subject to any changes made on appeal.

We were told that so far no assessment has been made under these sections and we need not trouble ourselves with the question as to how the assessors are to arrive at the "fair value" of minerals which are within, upon or under the land and, indeed, which may not exist at all, for, it should be mentioned, that apparently the *Act* is to apply whether there are or are not minerals within, upon or under the land.

What we have to consider for the purpose of this appeal is, therefore: What is the true nature of the tax imposed under section 3 or under section 22 of the *Act*, the first applying to every owner at the rate of three cents for every acre, and the second to the owners of minerals, within a producing area, at the rate of fifty cents for every acre of land in respect of which they are such owners? Of course, we are not concerned about the question of how the *Act* may be made to work, or even whether it is workable at all. The only point is whether it is *ultra vires* of the Legislature of Saskatchewan. The answer to be given is not helped by the definition of the word "mineral" in the Act. Subsection 4 of section 2 is as follows:—

"Mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land . . .

Then there are certain exceptions with which we need not concern ourselves for the purpose of the present decision.

The peculiarity of that definition is:

(1) It comprises an incorporeal right and a corporeal thing, to wit, the right to work, win and carry away minerals and also the mineral itself.

(2) It proceeds to define "mineral" by the same word.

We are told that "mineral" is a "mineral" and while one might say that such a definition is clearly insufficient, it might also be pointed out that defining a word by the same word is hardly a way of indicating the meaning of the word.

On the other hand, the word "land" is not defined in the *Act* and I fail to see how, for the purpose of knowing what the Legislature had in mind, we may go to some other

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statute where that word may be defined. In the latter case the definition is evidently that given as usual for the purpose of that particular Act and it may not be imported into *The Mineral Tax Act of 1948*. It does not matter that the "certificate of title" as set out in subsection 2 of section 2 is stated to mean "a certificate of title granted pursuant to the provisions of The Land Titles Act". We are asked to say that the tax provided for by the legislation which is the subject of the appeal is a tax on land, and when "land" is not defined in the statute under consideration it seems to me to be contrary to the usual canons of construction to look for the meaning of the word "land" in a different statute.

Here we are dealing with *The Mineral Tax Act, 1948,* and, therefore, with taxation on minerals. The least that we can say is that the attempt to tax a right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, is certainly a tax which, at the time of Confederation, could not find its place in the two categories of taxation spoken of in the Fairbanks case; and from all points of view it should be considered as a new species of taxation, sufficient to satisfy Viscount Cave in the Fairbanks case and obliging the Court to apply the Mill's formula "as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed" (*City of Halifax* v. *Fairbanks' Estate* (1)). It is clearly a tax which does not belong to the "established classification of the old and well known species of taxation" and which "makes it necessary to apply a new test to every particular member of those species".

We are not called upon here to transfer a tax universally recognized as belonging to one class to a different class of taxation in accordance with the Mill's formula. It is undoubtedly a new form of taxation, the nature of which must be ascertained in order to decide whether it is direct or indirect.

As I said before, the obvious intention of the *Act* is to tax minerals. Not only must we gather this from the title of the *Act* itself, but from its whole purport. Of course,

(1) [1928] A.C. 117 at 125.

the owner of the minerals is taxed and that is in accordance with the observations of Lord Thankerton in *Provincial Treasurer of Alberta* v. *Kerr* (1), where he says:—

> Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actings of the taxpayer. It is at least unusual to find a tax imposed on property and not on persons . . .

But it is clear from the Act that the subject matter of the tax is not the person of the owner, but the minerals and, in the circumstances, I find some difficulty in assimilating the tax with which we are concerned to a tax on land. With respect, I repeat that we cannot, for that purpose, look for the definition of the word "land" in some other statute. The Mineral Tax Act does describe the words "parcel of land", but the definition there given applies to a different subject.

If it is correct to look at the tax as a tax on minerals and not as a tax on land, then it cannot be taken as belonging to the obvious category of direct taxation; and the nature of the tax is rather to be assimilated to what was under consideration in the *Caledonian Collieries* case *supra*. Indeed, as it happened in that case, coal was the subject matter of the tax, and both in this Court and in the Judicial Committee the tax was considered to apply to a commodity and to the sale of that commodity. At p. 362 of the judgment of the Privy Council it is stated:—

> Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

Much reliance was placed by the respondents on the decision of the Privy Council in *Attorney General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.* (2). I may say that I am not at all embarrassed by the decision of the Judicial Committee in that appeal. First, it must be remembered that that judgment was given on a reference and it has been invariably stated that judgments on references are not necessarily binding, because in a concrete case the circumstances might alter the general application

(1) [1933] A.C. 710 at 718. (2) [1950] A.C. 87.

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of the principle laid down in such judgments; and, secondly, in the Nanaimo case the reference was not made on existing legislation, but the question was only whether the proposed legislation might be adopted by the Legislature of British Columbia along the lines of the report of Chief Justice Sloan. As to that Lord Greene had this to say at p. 114:—

> In construing questions of this nature, which do not purport to give more than an outline of the proposed legislation, the method applicable in construing a statute must not, in their Lordships' opinion, be too rigidly applied. In the completed legislation many sections of an explanatory or machinery nature would be included. Ambiguities would be cleared up, gaps would be filled, and it may often be necessary in construing what is no more than a "projet de loi" to assume a reasonable intention in that regard on the part of the legislature.

And at p. 113 Lord Greene repeated:—

> The answer to the question whether the tax is or is not a direct tax is to be found in their opinion primarily by an examination of the nature and effect of the tax as collected from the language describing it.

Moreover, the Nanaimo judgment insists upon the fact that the judicial committee is there dealing with what was undoubtedly a tax on land:—

> It will be the owner of the land and not the owner of the timber who will be liable to the Crown for the tax.
> (p. 116).

> The conclusion, therefore, at which their Lordships have arrived is that the tax is in reality a tax on land and not a timber tax.
> (p. 118).

> This case, in their Lordships view, affords a good example of the caution with which the "pith and substance" principle ought to be applied. The object of that principle is to discover what the tax really is; it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result could have been obtained by using the technique of indirect taxation. The use of the word "camouflage" in the argument of the respondents appears to their Lordships to be due to a misapplication of the principle.
> (p. 120).

It will be seen, therefore that the foundation of the judgment in the Nanaimo case was that their Lordships came to the conclusion that it was the land which was to be assessed and that the tax was imposed on the land; and

they quoted from the judgment of O'Halloran J.A., who dissented in the Court of Appeal for British Columbia, as follows:—

> Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products, and that such a tax is not in truth a tax on the land itself.

All that was said because the contention on behalf of the respondent, the Esquimalt and Nanaimo Rly. Co.—a contention which found favour in this Court (1), was that it was in reality a tax on timber and not a tax on land. On the contrary, in the present case there is no question of taxing the land. The acreage tax under section 3 is upon the owner of minerals and not upon the owner of land, and so it is under section 5 and still more so under sections 6 and 7, because what the assessor is to ascertain is the "fair value of all minerals within, upon or under any parcel of land situated within a producing area". The assessor is to give a "brief description of the minerals assessed"; and the tax prescribed by section 6, if the occasion should occur, is to be at a certain rate "not exceeding ten mills on the dollar of the assessed value of his minerals as shown on the assessment roll". Then, if we turn to section 22, we find that "every owner of minerals . . . . shall be liable for and shall, on or before the thirty-first day of December in each year in which such minerals have not been assessed under the provisions of this *Act*, pay to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner". This remark is strengthened by the very definite definition of the word "mineral" in subsection 4 of section 2, where it is stated to mean "the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land . . . ."

I would think that it is significant that the *Act* itself does not give any definition of the word "land". It is to the "minerals" and not to the "land" that the *Act* is directed. I am of the opinion, therefore, that the present case is distinguishable from the *Nanaimo* judgment and, on the

(1) [1948] S.C.R. 403.

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contrary, falls within the *Caledonian Collieries* judgment. If that be so, as I think it is, I would agree with Gordon J.A., in the Court of Appeal for Saskatchewan, and declare the *Act in toto ultra vires* of the legislature of the Province of Saskatchewan. Of course, incidentally I also agree with that part of the judgment of Martin C.J., concurred in by Proctor J.A., insofar as they declare *ultra vires* that part of the *Act* which relates to the "producing area."

In view of my conclusion it becomes unnecessary to pass upon the question of severability.

I would, therefore, allow the appeal with costs throughout and dismiss the cross-appeal with costs against the respondent.

The judgment of Kerwin, Taschereau, Cartwright and Fauteux, JJ. was delivered by:

KERWIN J.:—The appellants are the Canadian Pacific Railway Company and certain other companies who brought an action against the respondents, the Attorney General for the Province of Saskatchewan and the Minister of Natural Resources and Industrial Development of the Province of Saskatchewan, in the King's Bench in Saskatchewan, for a declaration that *The Mineral Taxation Act of Saskatchewan,* being chapter 27 of the Statutes of 1944 (2nd Session) and amendments were *ultra vires* the legislature of the province, and for certain other relief. At the date of the trial this *Act* and the amendments thereto had been repealed and replaced by *The Mineral Taxation Act,* being chapter 24 of the 1948 Statutes and the appellants were permitted to amend their statement of claim so that the important question raised was whether the last mentioned *Act* (as amended in 1949, after the commencement of the action but before the trial) was *ultra vires.* In 1950, after the conclusion of the trial and before judgment, other amendments were enacted but it is not contended that the latter are not relevant since, by express provision, they were made retroactive. What we are called upon to decide, therefore, is whether the 1948 *Act* as thus amended in 1949 and 1950 is *ultra vires.*

The trial judge and the Court of Appeal (1) dealt with several other matters raised by the parties who, however, have now abandoned their contentions with respect thereto. The appellants no longer claim (*a*) that the delegation of certain powers to the Lieutenant-Governor in Council by subsections 1 and 2 of section 5, is *ultra vires;* (*b*) that even if the 1948 Act is *intra vires* in all respects, it is inoperative in respect of the appellant Canadian Pacific Railway Company. On the other hand, the respondents abandoned their claim that the action was not properly brought against the Attorney General and the Minister of Natural Resources and Industrial Development.

The *1948 Mineral Taxation Act* and the amendments thereto of 1949 and 1950 (hereafter referred to compendiously as the *Act*) provide for the imposition of taxes. Under the general scheme of the Act all the land in the Province of Saskatchewan may be divided into two categories, one of which, for convenience, may be termed the non-producing area, and the other of which will mean producing areas or a producing area. In the non-producing area a tax is imposed by section 3 on the owner of minerals within, upon, or under any land, at the rate of three cents per acre or fraction thereof.

A producing area is established by a declaration of the Lieutenant-Governor in Council under the authority of subsection 1 of section 5, which also delegates to that body the power to increase, decrease or abolish any producing area. In any such declaration, the Lieutenant-Governor in Council may, by virtue of subsection 2 of section 5, designate the mineral or minerals in respect of which the designated area is being, or was, constituted a producing area. Provision is made for the appointment of an assessor who, by section 7, is to assess at their fair value all minerals upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced. By section 6, everyone whose name appears on the assessment roll, prepared by the assessor, shall be liable for and shall on or before the thirty-first day of December in each year pay

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

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to the Minister a tax at such rate as the Lieutenant-Governor in Council may from time to time prescribe, not exceeding ten mills on the dollar of the assessed value of his minerals. By section 22, every owner of minerals within, upon or under any land situated within a producing area shall be liable for and shall, on or before December 31st, in each year *in which such minerals have not been assessed,* pay to the Minister a tax at the rate of fifty cents per acre or fraction thereof. What happened was that by successive orders of the Minister of Natural Resources and Industrial Development upon whom the powers were conferred by the 1944 Act (and also the 1948 Act before amendment), a certain area was declared a producing area; that area was increased; coal was designated as the only mineral; and, finally, the producing area was decreased. No assessment was ever made in the producing area. In the result, therefore, under section 22 a tax was imposed of fifty cents per acre on every "owner" of the "mineral" coal in the producing area, while in the non-producing area, in which is included all other owners, a tax of three cents per acre became payable under section 3. However, the terms of the *Act* providing for a tax at an annual rate on the dollar must be considered together with the other relevant provisions.

The trial judge, Thomson J., declared that all classes of taxation were valid and in the Court of Appeal (1), Culliton J.A. (with whom McNiven J.A. agreed) came to the same conclusion. The Chief Justice (with whom Proctor J.A. agreed) considered that only the taxation in the non-producing area was valid while Gordon J.A. considered the *Act ultra vires in toto.*

The main contention is that the *Act* does not impose direct taxation within the Province under section 92(2) of the *British North America Act* but in my view that argument is not sound. Dealing first with a non-producing area, section 3 imposes the three cents per acre tax upon "every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land". By paragraph 6 of subsection 1 of section 2, " 'owner' means a person who is registered in a land titles office as the owner

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

of any mineral or minerals whether or not the title thereto is severed from the title to the surface;" By paragraph 4 of subsection 1 of section 2:—

> "mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land,

By paragraph 2 of subsection 1 of section 2:—" 'certificate of title' means a certificate of title granted pursuant to The Land Titles Act". *The Land Titles Act* is presently R.S.S. 1940, chapter 98, and under section 2(1) thereof " 'certificate of title' means the certificate (Form A) granted by the registrar and entered and kept in the register". By section 10 of *The Land Titles Act*:—

> 10. "Land" or "lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements, appertaining thereto, and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted;

These provisions make it plain that the tax in the non-producing area is imposed upon the owner of any mineral or minerals within, upon or under any land, or the owner of the right to work, win and carry away such minerals. Where a person appears from a certificate of title under *The Land Titles Act* as the owner of the mines or minerals or has the right to work, win and carry them away, he is liable to the tax of three cents per acre whether there be minerals in the land or not. This is a land tax and is clearly direct taxation: *Halifax* v. *Fairbanks* (1); *Attorney General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.* (2). In substance this is the view of all, save one, of the members of the Courts below who have considered the matter.

If, in the *Act*, no provisions had been made in producing areas for an assessment roll and the imposition of a tax at an annual rate on the dollar, and section 22 had merely provided that every owner of minerals within a producing area should pay a tax at the rate of fifty cents per acre, the same result would follow. The mere fact that provision is made for an assessment roll, etc., does not in my opinion

(1) [1928] A.C. 177. (2) [1950] A.C. 87.

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change the character of the tax. Section 7 provides that the assessor is to assess at their fair value all minerals within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced, or to the knowledge of the assessor have at any time been produced. In such assessment roll there is to be set out, among other things, a brief description of each such parcel of land and of the minerals assessed. "Parcel of land" is defined by paragraph 7 of subsection 1 of section 2 as meaning:—

> 7. "parcel of land" means all the separately described areas, within the boundaries of a section according to the system of surveys under The Land Surveys Act or within the boundaries of a river lot, which are contiguous and in respect of which the same person is the owner of the minerals. For the purpose of this paragraph, separately described areas which have at least part of their boundaries in common or which are separated only by a highway, road or railway right of way shall be deemed to be contiguous, and separately described areas adjoining at only one point shall be deemed to be not contiguous;

This is not a tax on production. In the *Esquimalt* case, (1), Lord Greene, speaking for the judicial committee, adopted, at page 115, as correct what had been said by O'Halloran J.A. in that case:—

> Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products, and that such a tax is not in truth a tax on the land itself.

These remarks apply with equal force to the problem now under consideration and it was for these reasons that the trial judge and McNiven J.A. and Culliton J.A. came to the same conclusion.

Finally, there is nothing to indicate that the legislature was not in truth doing what it purported to do, that is, impose a direct tax for the raising of a revenue for provincial purposes. On this point I am content to adopt the reasoning of those members of the Courts below who so held.

The appeal of the plaintiffs should be dismissed with costs and the cross-appeal of the defendants should be allowed with costs. The judgment at the trial should be restored. The defendants are entitled to the costs of the appeal by the plaintiffs to the Court of Appeal but there should be no costs of the cross-appeals to that Court.

(1) [1950] A.C. 87.

RAND J.:—This is an appeal arising out of *The Mineral Taxation Act, 1948, of Saskatchewan.* The province has purported to tax all minerals within its boundaries except those within, upon or under railway lands, the land within any city, town or village, or within any registered subdivision of lots for residential or business purposes or for a cemetery.

"Mineral" is defined by sec. 2(4) as meaning "the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land."

The tax scheme imposes, first, a general annual levy of three cents on every taxable acre or fractional part of an acre not within what may be declared to be a "producing area". The language of sec. 2, providing this initial tax, is:—

> Every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land not situated within a producing area, shall be liable for and shall on or before the thirty-first day of December in each year pay to the minister a tax at the rate of three cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

Then, by sec. 5, the Governor-in-Council is authorized from time to time to declare any portion of the province to constitute a "producing area", and, in any manner, to modify or abolish such an area.

Sec. 7 directs an assessment each year "at their fair value" of all minerals "within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced, and shall prepare an assessment roll in which shall be set out as accurately as may be a brief description of each such parcel of land, a brief description of the minerals assessed, the names and addresses of the owners of the minerals and the assessed value thereof". Subsection (2) authorizes him to resort to all available information pertinent to that value. Section 2(7) defines "parcel of land" to mean:—

> . . . . all the separately described areas, within the boundaries of a section according to the system of surveys under The Land Surveys Act or within the boundaries of a river lot, which are contiguous and in

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respect of which the same person is the owner of the minerals. For the purpose of this paragraph, separately described areas which have at least part of their boundaries in common or which are separated only by a highway, road or railway right of way shall be deemed to be contiguous, and separately described areas adjoining at only one point shall be deemed to be not contiguous;

Finally, by section 22, it is provided that:—

Subject to subsection (2) of section 5, every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land situated within a producing area shall be liable for and shall on or before the thirty-first day of December in each year in which such minerals have not been assessed under the provisions of this Act, pay to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

The appellants are the owners of minerals, both severed and unsevered in title from the fee simple, and have brought this action for a declaration that the statute is *ultra vires;* and the narrow question presented is whether the annual tax of mineral *in situ,* as a component of the soil, having a special discrete value to be realized upon some manner of removal from the soil, is direct taxation within the meaning of these words as used in head 2 of section 92 of the *British North America Act.*

The argument assumed that there is mineral of some nature and quantity in all lands, and the tax has, therefore, in fact in all cases a real subject-matter. The contention of the appellants is, moreover, that the three categories of tax must stand or fall together. Mr. Leslie, in his able and frank argument, urged that, although for the purposes of taxing land as such, the value of all its component parts, ascertained by some means or other, may be reflected, yet when a mineral component is segregated as a subject-matter of tax, that becomes equivalent to the taxation of an article in commerce, an article, in effect, on its way to market, in which the tax is gathered up as part of the charges intended and expected to be recouped in the price.

That, for the purposes of a land tax, the assessed value of land can reflect the value of its products, such as timber, even though the timber represents substantially the entire value, was laid down by the judicial committee in the case of *British Columbia* v. *Esquimalt & Nanaimo Railway Company* (1). This Court (2) had held the proposed imposts to be a tax in substance on the timber as and when

(1) [1950] A.C. 87. (2) [1948] S.C.R. 403.

severed, but that view was rejected. I can see no difference, for this purpose, between the reflected value of a "growing" product and one, such as mineral, of a somewhat desparate character and of a limited quantity or existence: they are all, in contemplation of law, part of the soil.

The reflected value of a severable portion of land can only be determined, in a practical sense, by estimating its worth *in situ* in relation to its market worth as a commodity, after making allowance for all costs and risks: to which, for the total tax on the land, would be added the residual value of the soil, that is, of such part as was not involved in realizing the value of the severable portion: at least, counsel could suggest no other means or method by which, as in the *Nanaimo* case, the land tax could be computed, and none has occurred to me; and the market price of the land as an entirety would be based on the same factors. If, then, these can be so combined and treated as a single tax on the land, what is there in the nature of taxation or the subject-matter of taxation to prevent the two components from having their individual value ascertainments carried right into the same or different assessments so long as the tax is against each only as it is *in situ*? Since a mineral occupies space, its taxation includes the space it fills, and in every sense is directed against the land.

In *Esquimalt,* Lord Greene takes as a significant consideration the fact that the tax was charged upon the land only and did not attach to the severed timber. That is the effect of section 23(*a*) here: the tax is in respect of materials *in situ,* and only against them as they form part of the land does the charge apply.

Lord Greene in the same case speaks of the "fundamental difference" between the "economic tendency" of an owner to try to shift the incidence of a tax and the "passing on" of the tax regarded as the hallmark of an indirect tax. In relation to commodities in commerce, I take this to lie in the agreed conceptions of economists of charges which fall into the category of accumulating items: and the question is, what taxes, through intention and expectation, are to be included in those items? If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the

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tax tends to cling as a burden to the unit or the transaction presented to the market. However much, in any case, these may be actually "intended" or "expected" to be passed on, it is now settled that they are to be so treated: *Attorney-General for British Columbia* v. *C.P. Railway Company* (1); *R.* v. *Caledonian Collieries* (2).

In the case, on the other hand, of any large public undertaking, the taxes on its fixed assets might wipe out any operating profit and its revenue have to be increased to avoid such a result; but that, obviously, would not convert them into indirect taxes.

Here we have an intermediate case: a capital asset which, in the course of its business exploitation, becomes used up. The tax is not in any way related to the course of that exploitation. It is an annual levy on the total quantity then existing; and that capital tax could not, in the sense of a general tendency, be taken to be intended and expected to be passed on to the consumer as an element of the price: it might be paid for years before a ton of mineral was removed. There might be the "economic tendency" to transfer some of it to price, but that is as irrelevant here as in *Esquimalt*.

The tax, at the moment of imposition, is in fact against land; it is an annual impost; the charge securing it is limited to land; and it is not an item related to or recognized as reflected in the cluster of charges intended and expected to be recouped in the price of the marketed commodity. It is of the nature of a fixed asset tax rather than a transaction tax; and it is therefore direct. That being so in the case of the tax based on an annual assessment of value, it is much more clearly so in the cases of the flat acreage rates.

I would therefore dismiss the appeal, allow the cross-appeal and restore the judgment at trial. The respondents will be entitled to their costs in this Court and in the Court of Appeal.

(1) [1927] A.C. 934. (2) [1928] A.C. 358.

KELLOCK J.:—In my opinion, the question involved in this appeal does not lend itself to extended discussion and it is unnecessary to re-state the nature of the legislation under which it arises. The legislation is said to be *ultra vires* the provincial legislature on the ground that, properly understood, its effect is to impose taxation on an article of commerce and is thus indirect.

It is well settled that ownership of mineral *in situ* as an interest in land may be severed from ownership of the "surface" rights. There is in principle no reason, in my opinion, why, although taxation in respect of the unity of ownership is direct, and taxation of the "surface" rights is also direct, taxation in respect of the mineral rights should be regarded in any other light. The tax here in question is an annual levy, payable notwithstanding that the mineral never becomes a commodity. Such a tax, in my opinion, is simply a land tax.

I would dismiss the appeal of the plaintiffs and allow the appeal of the defendants, both with costs. The defendants should have the costs of the appeal by the plaintiffs to the Court of Appeal. There should be no costs of the cross-appeals to that court.

ESTEY J.:—The appellants, owners of the mineral rights under a large acreage in Saskatchewan, submit that by the enactment of *The Mineral Taxation Act* (S. of S. 1948, c. 24, as amended 1949, c. 23, and 1950, c. 22) the Province of Saskatchewan has imposed indirect taxation and, therefore, acted beyond its authority within the meaning of s. 92(2) of the *British North America Act*. Section 92(2) reads:

> 92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—
>
> 2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

Under the foregoing section, therefore, the Province can impose only those taxes which are properly classified as direct. Since 1887 (*Bank of Toronto* v. *Lambe* (1)), John Stuart Mill's definition of direct and indirect taxes has been adopted as an appropriate basis upon which, in a legal

(1) 12 App. Cas. 575; 1 Cam. 378.

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sense, particular taxes may be classified under one or other of these headings. This definition reads:

> 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 which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. Such are the excise or customs.

Whether a tax is direct or indirect within the meaning of Mill's definition is determined "primarily by an examination of the nature and effect of the tax as collected from the language describing it." *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry Co.* (1).

The statute imposing the tax is entitled *The Mineral Taxation Act.* In s. 2(4) the word "mineral" is defined and the material part thereof reads as follows:

> 4. "mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land, ...

The certificate of title here referred to is that defined in s. 2(1) of *The Land Titles Act* (1940 R.S.S., c. 98) as "the certificate (form A) granted by the registrar and entered and kept in the register." By s. 61 of the same act, once "a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land . . ." "Land" is then defined by s. 2(10) to include mines and minerals.

Sections 3, 6 and 22 are the charging sections of this Mineral Taxation statute. In each the tax is imposed upon the owner of minerals. "Owner" is defined in s. 2(6) and the relevant portion thereof reads:

> 6. "owner" means a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface; . . . .

Section 3 imposes a flat rate of three cents per acre upon the owner of minerals in a non-producing area of the province. This area includes the entire province except that which from time to time may be declared by the Lieutenant-Governor in Council, under s. 5, a producing area.

(1) [1950] A.C. 87.

When an area has been declared to be a producing area the statute contemplates that each owner of minerals therein shall pay the tax computed upon one or other of two methods. Under s. 7

> the assessor shall . . . . . assess at their fair value all minerals within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced . . .

Then under s. 6

> Every owner whose name appears on the assessment roll mentioned in section 7 shall . . . . pay to the minister a tax . . . . not exceeding ten mills on the dollar of the assessed value of his minerals . . . .

However, any owner in a producing area whose name does not appear on the assessment roll mentioned in s. 7 and, therefore, not subject to the tax under s. 6, comes within the provisions of s. 22, under which he shall pay

> to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

Section 23(*a*) provides that the tax imposed shall be a special lien upon the mineral or minerals in respect of which it is payable. This feature was regarded as of great significance by the judicial committee in *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co. supra* at p. 115.

Under s. 27, if the owner leases any mineral or minerals to another person, or grants the right to work the minerals in his land, he shall remain liable for this tax and any agreement to the contrary "shall be null, void and of no effect." It is then provided that any such lessee or other person in the section mentioned may pay the tax and realize the same as a debt owing to him from the owner.

This statute imposes a tax upon every person "registered in a land titles office as the owner of any mineral." As "land" is defined in *The Land Titles Act* (R.S.S. 1940, c. 98, s. 2(10)) to include mines and minerals, it follows that the language of the statute imposes a tax upon an interest in land. The intention of the legislature to levy a tax upon an interest in land is found not only in the language adopted in this act, but by the fact that at the same session it amended the City, Town, Village and Rural Municipality Acts (respectively chapters 126, 127, 128 and 129, R.S.S. 1940), by which the municipal bodies could no longer impose a tax upon that interest in land subject to

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taxation under *The Mineral Taxation Act*. As minerals are, in effect, presumed to exist within, upon, or under the areas described in the certificates of title throughout the province, there is here created a provincial tax upon an interest in land, while the municipal bodies continue to impose taxes upon the remaining interest therein.

The appellants contend that granting the ownership of minerals *in situ* constitutes an interest in land and, in that sense, a tax imposed upon that interest is a land tax, it does not necessarily follow that the tax here in question is a direct tax. The mere designation of a tax as a tax on land, or an interest therein, does not, of course, make it a land tax, but if, in substance, it is a tax upon land or an interest therein then it has consistently been classified as a direct tax. The appellants, in support of their contention, submit that the mineral, as an interest in land, has no value until such time as it may be removed from the land and become a commodity of commerce. It is true that a mineral has no value in use until it is extracted, but a contention that it has no value while a constituent part of the land cannot be accepted as accurate. It is rather more in accord with fact to suggest that with respect to such a mineral *in situ* it is in itself a matter of value which increases as the certainty of the quantity and the quality of the mineral becomes known. This value, so long as the flat rates of three and fifty cents per acre are imposed (and these alone have so far been imposed), would not enter into the computation of this tax. It would, of course, where the computation is upon the assessment basis, as provided under ss. 6 and 7. Even if we assume that this assessment value reflects the productive value of the land, that would not preclude its remaining a taxation upon land. *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co. supra.*

The tax here in question is a tax upon an interest in land and, both within and without the producing area, is imposed irrespective of whether the mineral is being removed or not. The tax within the producing area is higher and in that area may be computed upon an assessment basis or a flat rate of fifty cents per acre, but no distinction is made in either case between the owner removing the mineral and the owner allowing it to remain *in situ*.

Four of the learned judges in the Court of Appeal (1) were of the opinion that the tax, as here imposed in a non-producing area, of three cents per acre was direct, Chief Justice Martin stating:

> The tax of three cents per acre imposed in Section 3 of the Act is in respect of the taxpayer's particular interest in the property and it is intended and desired that he should pay it though it may be possible for him to pass the burden to someone else.

The majority of the learned judges were of the opinion that the tax as imposed in a producing area, whether computed on either the assessed value or as a flat rate of fifty cents per acre, was, however, indirect. Neither the increase from three to fifty cents, nor the change to a computation of the tax upon an assessment basis, with the greatest possible respect, alters or affects the true nature and character of the tax, which remains the same in both the producing and non-producing areas, which, as already stated, include the entire province. The majority of the learned judges appear to have been influenced by the decision of *The King* v. *Caledonian Collieries, Limited* (2). There the province of Alberta imposed a percentage tax upon the gross revenues from coal mines and this gross revenue was interpreted to mean "the aggregate of sums received from sales of coal," and to be "indistinguishable from a tax upon every sum received from the sale of coal." The parties contesting the validity of the tax in that case were producers of coal and the tax was, therefore, upon coal as a commodity in commerce rather than as it rested undisturbed in the soil. In the case at bar the tax is in relation to the mineral or minerals which constitute an interest in land and is imposed upon the owners without regard to whether that interest, or any part of it, will ever be removed from the land. It would, therefore, appear, with great respect, that the *Collieries* case is quite distinguishable.

Counsel for the appellants argues that the taxpayer of this tax will seek to pass it on. That may well be true. It is usually true that the taxpayer seeks to do so, but that is not the test. The true test is whether, by virtue of its nature and character, the tax is of a type such that,

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

(2) [1928] A.C. 358; 2 Cam. 494.

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having regard to its normal tendencies, it will be passed on. As stated by Lord Hobhouse in *Bank of Toronto* v. *Lambe supra* at p. 582:

> The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

In *The King* v. *Caledonian Collieries, Limited supra* it was contended that the tax there imposed upon the gross revenue received by the mine owner was not indirect, *inter alia* because it could not be passed on. Their Lordships stated:

> Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

An analysis of *The Mineral Taxation Act* indicates that the legislature here imposes a tax upon an owner of an interest in land rather than in relation to any commodity or commercial transaction. Taxes in respect of the latter have been held *ultra vires* the provinces. *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (2); *The King* v. *Caledonian Collieries, Limited supra; Attorney-General of British Columbia* v. *McDonald Murphy Lumber Co. Ltd* (3). Taxes in relation to the former have been held to be direct and, therefore, within the competence of the province to impose. *City of Halifax* v. *Fairbanks' Estate* (4). In the latter case Lord Cave, speaking on behalf of the Privy Council stated at p. 126:

> 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; and, judged by that test, the business tax imposed on an owner under s. 394 is a direct tax.

Newcombe J., writing the judgment of the majority of the Court, stated in *Rattenbury* v. *Land Settlement Board* (5):

> Therefore, within the authority of the Fairbanks case, 1928 A.C. 117, as I interpret it, taxation upon land and upon the owner of the land is within the category of direct taxation, ...

(1) [1925] A.C. 561; 2 Cam. 381.
(2) [1927] A.C. 934; 2 Cam. 441.
(3) [1930] A.C. 357; Plax. 43.
(4) [1928] A.C. 117; 2 Cam. 477.
(5) [1929] S.C.R. 52 at 73.

Both parties cited *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co. supra.* In that case their Lordships of the Privy Council stressed the fact, as already intimated, that the nature and character of the tax should be determined from the language of the statute creating it.

There was a distinction, in their Lordships' opinion, between the tax there in question and an ordinary land tax, in that it was an impost to be discharged once and for all. Here, however, that distinction is not present and the tax is in its nature identical with the ordinary land tax. As stated by Mr. Justice Thomson:

> It is a re-occurring tax against the "owner of minerals" levied annually against the same person as long as he continues the owner and without regard to whether any attempt is ever made to lease or work the minerals or not.

The references of their Lordships to a timber tax must be read in relation to the contention there made that, though the language creating the tax described it as a land tax, in effect it was a tax upon timber as and when cut. Their Lordships did not accept this contention and in the course of their reasons stated at p. 117:

> It is natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land.

and at p. 118:

> . . . . the tax is in reality a tax on land and not a timber tax. The existing land tax imposed by provincial legislation is imposed on both timber-bearing lands and non-timber-bearing lands.

Once it is determined that the true nature and character of the tax is in relation to land, that case holds that the mere fact it is computed upon the productive capacity of the land does not alter or change its nature and character.

The appeal on the part of the appellants should be dismissed with costs, the respondents' cross-appeal should be allowed with costs and the judgment at trial restored. In the Court of Appeal the respondents should have their costs upon the appeal but no costs as to their cross-appeals.

LOCKE J.:—The appellant companies are the owners of the mineral rights in something more than three and a half million acres of land in the province of Saskatchewan. With unimportant exceptions, these lands are part of those

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conveyed to the various companies by the Crown as grants in connection with the construction of the lines of railway forming part of the Canadian Pacific Railway system. To what extent the title to these properties originally vested in the companies by letters patent from the Crown have been brought under the provisions of the *Land Titles Act* (cap. 98, R.S.S. 1940) is not disclosed by the evidence. As shown by one of the exhibits filed, the letters patent vested in the grantee an estate in fee simple reserving only to the Crown the free use, passage and enjoyment of all navigable waters flowing through the land. As to such parts of the land as were brought under the operation of the *Land Titles Act,* a certificate of title filed shows that when the surface rights were sold a new certificate of title was issued to the purchaser, the title of the railway company to the minerals being then evidenced either by the certificate of title bearing an endorsement showing it to be cancelled as to the surface rights or by the issue of a new certificate of title for the mineral rights. Not all of the mineral rights remained in the companies in all of the lands but the rights retained in all are such that would be affected by the taxation imposed by the *Mineral Taxation Act 1948.*

Section 3 of that *Act* imposes a tax of three cents an acre and every fraction of an acre upon the:—

> owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land, not situated within a producing area.

By section 22 a tax of fifty cents for every acre and fraction thereof is imposed upon every such owner of minerals situated within a producing area, in each year in which such minerals have not been assessed under the provisions of section 7 of the *Act.* Where the Minister has declared that any portion of the province shall constitute a producing area, the mineral or minerals to be assessed in such area may be designated by him, and after their value has been assessed under the provisions of section 7 every owner whose name appears on the assessment roll shall be liable to a tax at such rate as the Lieutenant-Governor in Council may prescribe, not exceeding ten mills on the dollar of the assessed value.

"Owner" is defined by subsection 6 of section 2 as a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface. Subsection 4 of section 2 defines "mineral" as meaning:—

> the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land.

I respectfully agree with the learned trial judge that whatever may be the meaning of the first part of this so-called interpretation section, it cannot restrict the effect of the latter part, and that the words "mineral or minerals within, upon or under any land," must be construed in their natural and ordinary sense. In view of the fact that the appellants are the owners of some or all of such minerals as may be contained in all of the lands in question, nothing is to be gained by considering the question as to whether a tax upon the right to work, win and carry away such minerals can be supported as direct taxation.

The right of the owner of minerals found on or under the surface of land, whether held in conjunction with the ownership of the surface rights or separately from such rights, is an interest or estate in land. It is in respect of the ownership of such interest that this taxation is imposed. A tax so imposed is not to be distinguished, in my opinion, from a tax upon the interest of the owner of the surface of the land in the sense of being direct unless, under the guise of taxing that interest, the legislature is really attempting to impose a tax upon the minerals as commodities after they have been mined. The question is not, in my opinion, concluded by the language of the taxing section and the fact that the tax is imposed in respect of an interest in land, since, as was said by Viscount Haldane in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), the question of the nature of a tax is one of substance and does not turn only upon the language used by the local legislature which imposes it, but on the provisions of the Imperial Statute of 1867.

(1) [1925] A.C. 561 at 566.

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This is on the face of it a tax upon land and thus a tax of a kind which was at the time of the passing of the *British North America Act* everywhere treated as a direct tax. The tax is imposed annually and whether or not such minerals as exist may ever be mined or removed. In like manner the taxes imposed by municipalities upon owners of surface rights are payable, whether or not the land be put to any use. While it may well be true that as and when the minerals or the right to mine them are sold by the present owners, the tendency will be to endeavour to obtain recoupment of the amounts paid as mineral tax to the province by increasing the price demanded this fact does not of itself establish that the legislation contemplated that the tax be thus borne in whole or in part by others or be in any sense imposed upon the minerals or commodities as and when they were removed.

Taxes of a like nature have been imposed by several of the provinces of Canada and in one for a long period of years. By the *Placer Mining Act of British Columbia* (sec. 152, cap. 136, R.S.B.C. 1897) there was imposed upon the owner of every mineral or placer claim of which a Crown grant had been issued an annual tax of twenty-five cents on every acre and fractional part of an acre conveyed by the grant. Taxation of this nature has been continuously imposed in that province since that time and is now imposed upon every owner of a mineral claim, with certain defined exceptions by the *Taxation Act* (sec. 55 and 56, cap. 332, R.S.B.C. 1948). An acreage tax was imposed upon the owners of all mining rights in Ontario by the *Mining Tax Act* (cap. 26, R.S.O. 1914, sec. 15). In Manitoba, by the *Mining Tax Act,* the owner, holder, lessee or occupier of every mineral claim is liable to an annual tax of $5.00 (sec. 3 cap. 207, R.S.M. 1940). In Alberta, by the *Mineral Taxation Act 1947,* taxation of a similar nature to that imposed by the Saskatchewan Statute here in question is imposed. The fact that the legislation in British Columbia, Ontario and Manitoba has not, so far as I am aware, been attacked on the ground that it is *ultra vires* as being indirect taxation, does not, of course, establish its validity. It is not without significance, however, that a tax of this nature is apparently regarded by those engaged in the mining industry as a proper exercise of provincial powers to tax land and interests in land and as a direct tax.

I think the decision of the judicial committee in *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Company* (1), does not assist in determining the present matter. The proposed taxes referred to in Questions 5 and 6 which are mentioned at pages 93 and 94 of the report were to be imposed upon the land but in the case of Question 5 to be payable only as and when the merchantable timber was cut and severed from the land, and in the case of Question 6 at the election of the taxpayer only as the timber was cut. The time at which these taxes were to become payable and the fact that if the timber was not cut they would never become payable lent support to the view that, while expressed as a land tax, the real intention was to impose taxation upon the commodity after it had been severed from the land. Had it been proposed that the taxes be levied annually and upon the owner in respect of its ownership of the timber and the right to cut and remove it as an incidence of that ownership and thus a tax upon an interest in land (*Glenwood Lumber Company* v. *Phillips* (2)), the decision in the matter would have directly touched the question with which we are concerned.

With great respect for the contrary opinion of the majority of the learned judges of the Court of Appeal, it is my view that each of the three taxes in question is a direct tax and not imposed with the intention that it should be passed on to someone else and that the province is not by this legislation attempting indirectly to impose a tax on the minerals as and when they are mined and sold. I would accordingly dismiss the appeal with costs and allow the cross-appeal with costs. There should be no costs of the cross-appeal in the Court of Appeal.

Appeal dismissed and cross-appeal allowed; both with costs.

Solicitor for the appellants: *E. H. M. Knowles.*

Solicitor for the A.G. of Saskatchewan: *Makaroff, Carter and Carter.*

Solicitors for the Minister of Natural Resources and Industrial Development: *Schumiatcher & McLeod.*

Solicitor for the A.G. for Alberta: *H. J. Wilson.*

(1) [1950] A.C. 87.

(2) [1904] A.C. 405, 408.