Privy Council Appeal No. 102 *of* 1919.

G. H. Burland and others - - - - - - *Appellants*

v.

The King - - - - - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Privy Council Appeal No. 31 *of* 1921.

Dame Margaret Alleyn and others - - - - - - *Appellants*

v.

Ulric Barthe - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
VISCOUNT CAVE.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD PHILLIMORE.]

The British North America Act of 1867, in sections that have been the subject of much criticism and explanation, defined and apportioned as between each province and the Dominion of Canada, the various powers of taxation that each element of the Constitution was to exercise and enjoy. With regard to the provinces, the powers were conferred by Section 92 in words which had the appearance of simplicity, and by these exclusive

power was given to the provinces to make laws for "Direct taxation within the province in order to the raising of a revenue for provincial purposes."

This power knows no limits save those prescribed in the section, but the endless variety of methods by which taxation can be imposed have from time to time caused the attempted use of this authority to be challenged, and the resulting decisions have not been free from criticism. One of such cases has recently come before the Board for consideration—*Cotton* v. *The King*—and its bearing on the present dispute will be plain when the facts of that case are once more analysed and compared with the circumstances in which the present appeals have arisen.

These appeals are two in number, independent in their history, but both have been heard together before this Board and can be dealt with together in one judgment although the considerations affecting their decision are not the same.

George Burland died on the 22nd May, 1907, at and domiciled in Montreal in the Province of Quebec and appointed Jeffrey Hale Burland, the appellants in the appeal No. 102 of 1919, which for convenience will be referred to as the Burland appeal, and William M. Walbank, executors of his will and codicil. The said J. H. Burland was one of the universal legatees under the will, and he made the declaration required by Article 1191 g (1) of 6 Edward VII, c. 11, as to the value of the property owned by the deceased that was situate both within and without the province. He was accordingly required to pay a sum for succession duty on the whole estate by the deputy collector of provincial revenue and this amount was paid by the executors under protest.

On the 23rd September, 1909, the executors preferred a Petition of Right claiming payment back of the duties paid in repect of the properties that were situate outside the province, and also further sums representing the higher rate at which property within the province had been taxed by reason of its being aggregated with that outside. The petition was part heard by the Superior Court on the 20th July, 1911, but it was ordered that the proceedings should be suspended until the decision of the Supreme Court of Canada on the appeal taken from the decision in the case of *Cotton* v. *The King*. The case of *Cotton* v. *The King* ultimately came before the Board, who, on the 11th November, 1913, decided against the Crown. Burland's case then came again before the Superior Court on the 26th June, 1914, when the petition was dismissed, and on appeal to the Court of King's Bench this judgment was affirmed—Mr. Justice Cross and Mr. Justice Pelletier dissenting from the other judges. The appeal in Burland's case is brought from that decision.

With regard to the other appeal, which will be referred to as Sharple's appeal, it relates to the property of the Hon. J. Sharple, who died on the 30th July, 1913, also domiciled in Quebec; he appointed the appellant, Dame Margaret Alleyn Sharple, his universal legatee and executrix of his will jointly with the other two appellants.

On the 15th October, 1913, the executors lodged their declaration, enumerating the property of the deceased, and including therein shares in various companies whose head offices were outside the Province of Quebec. A claim was made on the 26th May, 1915, for duties in respect of the whole estate similar to the claim that was made in the case of Burland. These claims, so far as they related to the property outside the province, were resisted and proceedings were instituted on the 12th August, 1915, by the respondent as Collector of the Revenue against the executors to recover payment. Chief Justice Lemieux, by whom the action was tried in the Supreme Court, decided against the appellants, who appealed to the Court of King's Bench, and that Court by a majority of three to two decided in the appellants' favour. The respondent then appealed to the Supreme Court of Canada, who on the 3rd February, 1920, unanimously decided against the appellants, and from their judgment this second appeal has been brought.

In order that the narrative of facts may be perfectly clear, their Lordships have hitherto avoided consideration of the statutes under which the taxes were claimed, and these must now be examined in detail. Though, as will be seen, different considerations apply to the two cases, owing to the difference in the relevant dates, yet the defence of the appellants is in each case identical, and is that the taxing statutes under which the money is claimed are *ultra vires* of the provincial government.

So far as Burland's case is concerned, the relevant statute is that of 6 Edward VII, c. 11, amended by 7 Edward VII, c. 14. Article 1191 b enacted by Section 1 of the former statute, provides that :

> " All transmissions, owing to death, of the property in, or the usufruct or enjoyment of, moveable and immoveable property in the Province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death,"

and by Article 1191 C the word " property " is defined as follows :—

> " 1191 C. The word ' property,' within the meaning of this section, shall include all property, whether moveable or immoveable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, or whether the transmission takes place within or without the Province, and all moveables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.'

By 7 Edward VII, c. 14, assented to on the 14th March, 1907, Article 1191 b was amended by replacing the words " in the province " by the words " as defined in Article 1191 C."

The first only of these two statutes was applicable in the case of *Cotton* v. *The King*, for Henry Cotton, whose estate was the subject of the dispute, had died on the 26th December, 1906, domiciled in Montreal, and the question raised was whether or no

the property outside the province was liable to the tax imposed by the statute 6 Edward VII, c. 11. It was decided that the property was not so liable for two distinct reasons—the one that Article 1191 b of Section 1, 6 Edward VII, c. 11, was the real taxing section, and imposed duties upon moveable property "In the Province"—the extended meaning given to the word "property" in Article 1191 c, being held by the Board to be insufficient to bring property outside the province within the operation of the tax expressly imposed by the earlier section on property within the province. Had the decision rested only on this ground, it would have provided little help towards reaching a right conclusion in Burland's case, as the subsequent statute 7 Edward VII, c. 14, struck at the root of this part of the decision by deliberately incorporating the definition in the taxing articles. But there was a further and wholly independent ground of decision, and that was that by Article 1191 g, the tax might be payable in the first instance by a class of persons, who recouped themselves for the payment from the legatees; and, therefore, in accordance with a distinction between direct and indirect taxation traceable to a definition given by John Stuart Mill, and acted upon by the Board in the cases of *The Attorney-General for Quebec* v. *Reed* (10 App. Cas. 141), *The Bank of Toronto* v. *Lambe* (12 App. Cas. 575), and *The Brewers' and Maltsters' Association of Ontario* v. *The Attorney-General for Ontario* ([1897], A.C. 231), the taxation was held to be indirect and outside the power of the province.

In the course of the judgment of the Board, it was stated that the provisions of the statute entitled the Collector of Inland Revenue "to collect the whole of the duties on the estate from the person making the declaration, who may (and, as we understand, in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or, more accurately, from the person interested therein." Now the statute though mentioning the notary exempts him from obligation to transmit the declaration, and consequently from the liability to pay, which by Section 3 is imposed on the declarant; but it appears from the report that their Lordships were informed that in point of practice the notary frequently did make the declaration himself, and so bring himself within the provisions of the statute. It is now stated that this information was not accurate and that it is not a common practice for the notary to make the declaration, if indeed, he ever makes it; and so, the illustration drawn from the case of the notary cannot be taken to have been a reliable one. But the principle remains the same and could equally well have been illustrated by the cases of the executor, or administrator, or legatee by a particular title. The error does not affect the force of the decision, though their Lordships have thought it right to make this explanation, as it has evidently given rise to misunderstanding in the province.

Unless, therefore, the case can be distinguished, it completely covers the appeal in Burland's case. The respondent tries to escape down two avenues of reasoning; the

one that the point was not necessary for the decision in Cotton's case, which had already been determined by other independent considerations, and the other that subsequent legislation made retrospective removes the protection which Cotton's case affords. As to the first, the road is not open. The decision that the statute was *ultra vires* was in no sense a wayside dictum; it was just as complete and fundamental as the decision that bore on the construction of the statute: the words used in the judgment itself make this clear. After stating the nature of the two questions, it continues in these words:—

> "These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case and that they should base their judgment equally on the answers to be given to the one and to the other."

As to the second, the position is less clear. Legislation followed swiftly upon the decision of *Cotton* v. *The King*, and three statutes —4 George V, c. 9, 4 George V, c. 10, and 4 George V, c. 11— received the Royal assent on the 19th February, 1914. They will need examination in Sharple's appeal, but so far as Burland's case is concerned the critical statute is 4 George V, c. 11, as in each of the other two statutes there is a provision that, so far as regards property transmitted before the passing of the statute, they only apply where the taxes previously imposed remained unpaid. The statute 4 George V, c. 11, after reference to the mistake in the case of *Cotton* v. *The King*, and a series of recitals which make it obvious that the purpose of the Act is as far as possible to remedy the provisions of former statutes which had led to the decision and to prevent the inequalities which might arise as between those who had paid and those who had not paid the taxes declared by Cotton's case to be unlawfully imposed, enacted that—

"The intent and meaning of all the acts of the Legislature imposing succession duties, was and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government direct, and without having a recourse against any other person, a tax calculated upon the value of the property so transferred"; and after a provision to prevent action for recovery of taxes paid on the ground that such taxes were not direct provided by Section 3 that—

"This Act shall not apply to pending or decided cases."

The question, therefore, is whether Burland's case was a "pending case" within the meaning of Section 3. Lemieux, C.J., regarded the point as closed to the appellants, as they had in fact paid taxes on the property within the Province, and did not ask for their repayment. In his words:—

> "Les pétitionnaires n'ont, en aucune manière, directement ou indirectement, soutenu que la taxe était illégale, parce que cette taxe était indirecte, c.-à-d., contraire à l'acte constitutionnel qui ne permet aux législatures de n'imposer que des taxes directes.

> " Au contraire, la succession Burland admet aussi formellement que possible que la taxe est directe et valable, car elle a payé pour taxes sur les biens dans la province la somme de $71,522.65 dont elle de demande pas la répétition,"

and again :—

> " Si la question de la taxe directe n'est pas contestée, mais au contraire admise, le tribunal n'a guère à faire de s'occuper de cette question."

It is undoubtedly the fact that the appellants in Burland's appeal did not raise in express terms the ground of the taxation being indirect and base their relief on this contention but they stated that the Government had no right to charge taxes on property outside the province, and that the laws and statutes which authorised the Government to raise such taxes were *ultra vires* and of no effect. This was the exact position in the case of *Cotton* v. *The King* ; there also the claim was only for repayment of the taxes on the extra territorial property, and the claim was in similar words, but the fact that the authority to pass the law was challenged, though only associated with a limited relief and a special cause, was regarded as sufficient to compel the Board to consider the question of *ultra vires* in its widest application and not to bind themselves to consider only the one assigned reason of invalidity. According to the rules of pleading, an allegation of infirmity in any statute on the ground of *ultra vires* is sufficient without assigning further reasons.

Their Lordships cannot, therefore, agree with Lemieux, C.J., and equally they differ from Archambeault, C.J., Lavergne, J., and Carroll, J. The first of these learned Judges bases his judgment, not indeed on the ground of admission of liability, but on that of defect in the pleadings. He says :—

> " La cause actuelle était pendante lorsque la loi a été passée.
>
> " Comme je le disais dans la cause *Oliver vs Jolin* (25 B.R., p. 537), la loi de 1914 a eu pour objet d'interpréter les lois antérieures sur les taxes de succession, et de déclarer que ces taxes étaient directes et non indirectes. L'article 3 ne doit, en conséquence, s'appliquer qu'aux seules causes où cette question a été expressément soulevée. Dans la cause actuelle, les appelants ont obtenu de la couronne une pétition de droit où la question n'est aucunement invoquée,"

and Carroll, J., appears to regard the reservation as inoperative (*vide* page 133), and no reasons were filed by Lavergne, J. Pelletier, J., who differed, does not deal with the effect of the statute 4 George V, c. 11, and Cross, J., the other learned Judge who dissented, assigned no reasons.

Their Lordships think that Burland's appeal was a pending case within the meaning of Section 3. It was a case in which the claim for repayment was being made and the validity of the statute was in issue.

This being so the case cannot be distinguished from *Cotton* v. *The King*, and the appeal must be allowed, and the judgments of the two Courts below set aside and judgment entered for the appellants with costs here and in those Courts, and they will so humbly advise His Majesty.

Turning now to Sharple's appeal, different considerations and different statutes are involved.

Proceedings there commenced on the 12th August, 1915, and they were, therefore, not pending when 4 George V, c. 11, became operative, and it becomes necessary to examine the effect of that and the preceding statutes.

4 George V, c. 9, provides by Article 1375, that all property moveable or immoveable, the ownership, usufruct or enjoyment whereof, is transmitted owing to death, shall be liable to certain taxes calculated upon the value of the transmitted property. Article 1376 says that the word "property" included all property moveable or immoveable actually situate within the province, and that whether the deceased was domiciled within or without, or the transmission took place within or without: an exemption was given by Article 1380 to a notary, executor, trustee or administrator from personal liability for the duties imposed. This, as will be seen, does not affect moveable property outside the province, and of course does not touch the property in the present instance: but by 1 George V, c. 10, it is expressly provided by Article 1387 b that:—

> "1387 b. All transmissions within the Province, owing to the death of a person domiciled therein, of moveable property locally situate outside the Province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned."

and by Article 1387 g, it is provided that the person to whom as heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, moveable property outside the province is transmitted, is personally liable for the duties in respect of such properties, and no more; and it concludes:—

> "No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

These statutes have effectively met the difficulty which was pointed out in the case of *Cotton* v. *The King* as to the taxation imposed by the earlier statutes being indirect, and it only remains to be considered whether the taxation is within the province. For this purpose 4 George V, c. 10, is the relevant statute. The conditions there stated upon which taxation attaches to property outside the province are two: (1) That the transmission must be within the province; and (2) That it must be due to the death of a person domiciled within the province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily

resident within the province; for in the connection in which the words are found no other meaning can be attached to the words "within the province" which modify and limit the word "transmission." So regarded the taxation is clearly within the powers of the province. It is, however, pointed out that Article 1387 g refers to "every person" to whom moveable property outside the province is transmitted as liable for the duty, but this must refer to every person on whom the duties are imposed, and those persons are, as has already been shown, persons within the province.

On this construction the statute is clearly within the powers conferred by the British North America Act and the taxes in dispute were rightly claimed. Their Lordships, therefore, are of opinion that this appeal should fail, and they will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

G. H. BURLAND AND OTHERS

v.

THE KING.

ALLEYN AND OTHERS

v.

BARTHE.

DELIVERED BY LORD PHILLIMORE.

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