Privy Council Appeal No. 135 *of* 1929.

IN THE MATTER OF SILVER BROTHERS, LIMITED, IN BANKRUPTCY.

The Attorney-General of Quebec - - - - - - *Appellant*

v.

The Attorney-General of Canada - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH FEBRUARY, 1932.

Present at the Hearing:
VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD MERRIVALE.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* VISCOUNT DUNEDIN.]

This is an appeal from a judgment of the Supreme Court of Canada pronounced on the 26th September, 1929, allowing an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, dated the 28th June, 1927.

On the 31st day of December, 1923, an order of the Superior Court of the Province of Quebec was made, declaring Messrs. Silver Brothers, Limited, bankrupt.

The Government of the Dominion of Canada duly filed with the trustee in bankruptcy a claim in the sum of $3,707.07 for sales tax imposed in virtue of the Special War Revenue Act, 1915, the said tax having become due subsequent to the 28th June, 1922, the date on which a certain amendment to the Special War Revenue Act, namely, 12 and 13 Geo. V, 1922, chap. 47, came into force.

The Government of the Province of Quebec also duly filed with the trustee a claim in the sum of $527.42 for taxes due by the debtor for the years 1921, 1922 and 1923 under the provisions of Article 1345 *et seq.* of the Revised Statutes of Quebec, 1909, imposing a tax on commercial corporations.

The moneys realized from the sale of the assets of the insolvent estate, after the payment of costs and expenses of the trustee, amounted to $2,353.51, a sum insufficient to pay the two claims aforesaid.

The trustee in his final dividend sheet treated the claim of the Dominion as privileged, according to it the sum of $2,353.51 aforesaid in priority to the claim of the province, and paid over to the Dominion $2,000 out of this sum.

The Attorney-General of Quebec filed in the Superior Court a petition disputing the dividend sheet and claiming that the debt due to the province was privileged as a result of Article 1357 of the Revised Statutes of Quebec, 1909, and that the claim of the Dominion was not privileged and that Section 17 of the Special War Revenue Act as enacted by 12–13 Geo. V, 1922, chap. 47, was *ultra vires*, or that if the said section was *intra vires* that the claims of the respective Governments were equally privileged and should be paid concurrently.

Section 17 of the Special War Revenue Act aforesaid provides as follows :—

> " Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm or corporation for the payment of the excise taxes specified in The Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets."

This provision came into force on the 28th June, 1922, and remained in force until the 1st day of July, 1925, when it was repealed by 15–16 Geo. V, chap. 26, sec. 9.

Article 1357 of the Revised Statutes of Quebec aforesaid provides as follows :—

> " All sums due to the Crown in virtue of this section shall constitute a privileged debt, ranking immediately after law costs."

and came into force in 1906 (6 Edw. VII, Quebec, chap. 10).

The petition of the Attorney-General of Quebec was dismissed by Panneton J. on the 3rd December, 1925, on the ground that Section 17 of the Special War Revenue Act aforesaid accorded to the Dominion claim a priority over that of the province.

The Attorney-General of Quebec appealed to the Court of King's Bench (Appeal Side), which Court (Guerin J. dissenting) on the 28th June, 1927, set aside the judgment of Panneton J. and ordered that the claims of the two Governments should be treated in the dividend sheet as of the same rank and concurrently.

The Court further recommended that the Government of Canada should repay to the trustee whatever sum that would be required to make up the share of the province of Quebec according to the revised dividend sheet.

The Attorney-General of Canada thereupon appealed to the Supreme Court of Canada and, on the 26th September, 1929, the Court, consisting of Anglin, C.J.C., and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ. allowed the appeal (Duff and Rinfret JJ. dissenting) and set aside the judgment of the Court of King's Bench and restored the judgment of Panneton J.

The appeal before their Lordships was argued upon two grounds. The first, and it is this which bulks almost exclusively in the judgments of the Courts below, was that on the proper construction of the well-known Sections 91 and 92 of the British North America Act the Dominion had no power to enact the Section 17 above quoted so as to prejudice the rights of the Government of the Province of Quebec. As to this question their Lordships have no hesitation in preferring the views of the majority of the Judges of the Supreme Court. It would be of no service to go over again the familiar ground of what may be called the competing claims of the two sections and to re-state what has been so often stated. As lately as 1929 in the case of *The Attorney-General of Canada* v. *The Attorney-General of British Columbia* [1930], A.C. 111, Lord Tomlin, delivering the judgment of the Board, laid down at page 118 four propositions regarding the conflict of Dominion and Provincial jurisdiction in terms which need not here at length be repeated. Now, looking at Section 17 and the way it speaks of the preference, it would not be difficult to hold that it was a rule only applicable in bankruptcy. If that is so, then the matter is ended for bankruptcy is head 21 of Section 91. But let it be assumed that it is rather a natural concomitant of taxation, then the case falls clearly under the fourth head laid down by Lord Tomlin. It runs thus :—

> "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."

As a matter of fact, this is the textual reproduction of what had been said by Lord Dunedin as long ago as 1907 in the case of the *Grand Trunk Railway of Canada* v. *The Attorney-General of Canada* [1907], A.C. 65. Now, here so far as taxation itself is concerned, the field is clear. The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority they cannot stand side by side and must clash ; consequently the Dominion must prevail.

There was, however, another ground of appeal clearly raised by the reasons of appeal and strenuously insisted upon before

their Lordships, and that is based on the effect of Section 16 of the Interpretation Act 1906 a Dominion Act. This section reads as follows :—

> "16. No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

* * * * * *

Relying on that section, counsel for the Province says, Here is a debt due to His Majesty in Quebec. That debt is an asset of His Majesty, to be applied in Quebec for the purposes of Quebec according to the advice of the Quebec ministers. If the claim of the Dominion is upheld the money to satisfy this debt is swept away into the coffers of the Dominion. Therefore by this statute His Majesty is being bound to the detriment of one of his rights and there is no express statement in the statute that His Majesty is to be so bound. Unfortunately, this aspect of the case received but scant consideration in the judgments of the Courts below. It is not that it was overlooked. It was clearly stated in the factum for the Province. Duff J., one of the dissenting Judges, says :—

> "The Crown is not mentioned and the result of what I have just said, having regard to the provisions of the Interpretation Act, is that other pecuniary claims of the Crown '(by which he obviously means other than those created by the Dominion statute itself)' are not prejudiced by the priority declared by Section 17."

Another dissenting Judge, Rinfret J., says :—

> "Mais l'intention de donner à la taxe fédérale précéance sur la taxe provinciale ne résulte pas nécessairement du texte de l'article 17 de Special War Revenue Act, 1915. L'intention 'd'y atteindre Sa Majesté' n'y est pas 'formellement exprimée' (Loi d'interprétation—S.R.C. 1906—Ch. 1, s. 16). Il est à présumer que le législateur fédéral a voulu que sa loi sur The Special War Revenue fut comprise conformément à cette prescription de sa propre loi d'interprétation.
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> "Il en résulterait que l'art. 17 du Special War Revenue Act, 1915, ne porte pas 'atteinte . . . aux droits de Sa Majesté' représentée par la Province de Québec, tels qu'ils sont exprimés dans l'article 1357 des Statuts Revisés de Québec, 1909, et que chaque législation doit recevoir son plein effet."

But assuredly the learned Judges who formed the majority did not deal with the argument in the serious way which it demanded if the plea were to be repelled. The same cannot be said of the argument before their Lordships, for Mr. Tilley for the Dominion strove most manfully against the conclusion which was sought to be forced upon him. Their Lordships will deal with some at least of his contentions.

His first point had been stated by the learned Chief Justice. Inasmuch as the section says that it is to apply notwithstanding the provisions of the Bank Act and the Bankruptcy Act or "any other statute or law," he says it escapes the provision of the Interpretation Act. Now, first of all, the Interpretation Act is a general Act meant to apply to all future as well as to all present

legislation, and their Lordships doubt whether it could be excluded except by special reference. But, apart from that, the Bank Act and the Bankruptcy Act both deal with preferences, and that is the reason why they are particularly mentioned; and it follows that "any other statute or law" must be *ejusdem generis;* that is to say, dealing with preferences. Their Lordships have accordingly no difficulty in rejecting this contention. It is perhaps right here to mention the method in which the learned Trial Judge got rid of the effect of Section 16, though it was not adopted by any of the Judges who formed the majority in the Supreme Court. He says that Section 17 is in a later statute than Section 16, and, therefore, in view of the maxim *posteriora prioribus derogant,* Section 16 must give way. But this entirely misses the point that the maxim only applies when the two statutes cannot live together. There is no difficulty in the statute that enacts Section 17 living with the Interpretation Act. The clause of the Interpretation Act is, so to speak, written into every statute. Thus the later statute gives perfectly good priority against all and sundry, but says that this priority does not affect the Crown right in the province.

Next it was said that inasmuch as the Bank Act and Bankruptcy Act not only dealt with preferences, but *inter alia* with Crown preferences, there is an "irresistible implication" that the Act was meant to deal with all Crown preferences. The simple answer to this is to fix one's eyes on Section 16, and it becomes apparent that it is a contradiction in terms to hold that an express statement can be found in an "irresistible implication."

The next point made was that the provisions of Section 16 do not apply when what is being done is not to affect the Crown prejudicially, but to give a benefit to the Crown, and along with this it is urged that there is only one Crown and reference is made to the case of *The Attorney-General of Quebec* v. *Nipissing Central Railway Company* [1926], A.C. 715. It is quite true that the section refers to cases where the Crown would be "bound," *i.e.*, subjected to liability, and not to those where the Crown is benefited. But the fallacy lies in the application of this truth to the case in question. *Quoad* the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but *quoad* the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different. The *Nipissing* case (*supra*) is quite on all fours with this doctrine. What was decided there was that when a statute *ex hypothesi intra vires* had said that a railway with consent of

the Governor-General could take on paying compensation Crown lands, that meant Crown lands in the Province as well as in the Dominion. It will be at once observed that the point raised here could not be raised there. There was no doubt as to the mention of the Crown, and the only question was one of interpretation. Did the term "Crown lands" mean Crown lands everywhere or only in the Dominion? There was no reason for limiting the interpretation. Crown lands in the Province were just as much Crown lands as Crown lands in the Dominion. The Crown in the Province was not prejudiced. The compensation money would be paid to the Provincial Exchequer except in the cases where there was a special purpose or trust under which the lands were vested in the Crown, and in that case there was a special direction under Subsection 4.

Upon the whole matter, therefore, their Lordships think that the plea of the appellant is good. The effect of Section 16 is, so to speak, to add to the words of Section 17, "but this priority shall not operate against any right in the Crown in a Province, where such right would be diminished by the priority being asserted against it." Whether the strict result of this view should be to give to the Province an over-riding priority need not be discussed. Counsel for the Province did not ask for such relief; he was content that the two debts should rank *pari passu*.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, recall the judgment of the Supreme Court, and revert to the judgment of the Court of King's Bench except so far as it provides for the payment of costs. As regards costs, although the decisive factor here has been the Interpretation Act, the judgments of the Courts below turned on a consideration of the respective legislative powers of Dominion and Province under the British North America Act.

Their Lordships are of opinion that in these circumstances there ought to be no costs awarded as between the Dominion and the Province of the proceedings in any of the Courts in Canada or here; and that any costs already paid under any previous order should be repaid.

In the Privy Council.

In the Matter of Silver Brothers, Limited, in Bankruptcy.

THE ATTORNEY-GENERAL OF QUEBEC

v.

THE ATTORNEY-GENERAL OF CANADA.

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