

Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Charles S. Cotton and another v. The King; and of The King v. Charles S. Cotton and another, from the Supreme Court of Canada (P.C. Appeal No. 62 of 1912); delivered the 11th November 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.

LORD ATKINSON.

LORD MOULTON.

[DELIVERED BY LORD MOULTON.]

In the principal Appeal now before their Lordships the Appellants are the Executors under the last will and testament of Henry H. Cotton, late of Cowansville in the Province of Quebec. It raises the question whether the moveable property of the Testator situate outside the Province of Quebec is liable to duty under the Quebec Succession Duty Act of 1906. In the Cross-Appeal the Crown is Appellant and the above-mentioned Executors are Respondents, and it raises the question whether the moveable property belonging to Charlotte Leland Cotton, the wife of Henry H. Cotton (who died on the 11th April 1902), situated outside the Province of Quebec was liable to Succession Duty under the statutes then in force regulating such duty. The history of the litigation is as follows:—

At all material times Henry H. Cotton was domiciled in the Province of Quebec. His wife, Charlotte Leland Cotton, by her last will and testament, after making certain special bequests

left all the residue of her estate to her said husband, whom she appointed Executor of her will. The value of the estate was proved to be \$359,441.00. With the exception of property valued at \$24,490, which was locally situate in the Province of Quebec, the estate consisted substantially of bonds, debentures, shares, &c. and it was locally situate in the United States of America. The Government of the Province of Quebec claimed duties upon the whole of the estate of the Testatrix, and not only upon the portion situate in the Province of Quebec, and such duties amounting to \$11,193.25 were accordingly paid by the said Executor.

Henry H. Cotton died on the 26th December 1906, and by his last will appointed the Appellants his Executors. The value of his estate was proved to be \$341,385.38, of which, property to the value of \$11,074.46 and no more was locally situate in the Province of Quebec. The balance of the estate (consisting for the most part of bonds, debentures, shares, &c.) was locally situate in the United States of America. He also left debts to the amount of \$4,659.90, for which his estate was liable. The Government of the Province of Quebec claimed from the Appellants as Executors the sum of \$21,360.42, being the duties calculated upon the whole net property passing under the will, and this sum the Appellants were accordingly compelled to pay as such Executors.

On July 12th, 1909, the Appellants filed a petition of right praying for a return of \$10,548.55 in respect of the estate of Charlotte L. Cotton, and a sum of \$20,943.47 in respect of the estate of Henry H. Cotton, on the ground that neither under the statute regulating the succession duty in the Province of Quebec at the date of the death of Charlotte L. Cotton,

nor under the statute regulating the same at the date of the death of Henry H. Cotton, was moveable property locally situate outside the Province of Quebec liable to pay succession duty. It is admitted on behalf of the Crown that (subject to a small correction in respect of the debts due by the said Henry H. Cotton at the date of his death) the said sums are correctly calculated, and also that if the Appellants are right in their contentions that at neither of the said dates was the moveable property locally situate outside the Province of Quebec legally liable to pay succession duty, the said Executors are entitled to be repaid the sums so claimed by them subject to the said correction.

The case came on for hearing in the Superior Court of Quebec before Malouin, J., who on January 17th, 1910, gave judgment for the Appellants for the full amount of their claim with interest from July 12th, 1909, and costs. From this decision the Crown appealed to the Court of King's Bench, Appeal side, and on June 30th, 1910, that Court gave judgment confirming the judgment of the Superior Court subject to the reduction of the amount claimed by a sum of \$393, the Court holding that the debts due from the estate of the said Henry H. Cotton should have been deducted *pro rata* from the property situated outside the Province of Quebec, and not entirely from that situated within that Province. The correctness of this variation by the Superior Court is not contested by the Appellants.

The Respondent appealed from the above judgment of the Court of King's Bench to the Supreme Court of Canada, and on February 20th, 1912, that Court delivered judgment to the following effect. The Appeal, so far as it

related to the claim for the return of money overpaid in respect of the estate of Charlotte L. Cotton was dismissed, the six judges of the Court being equally divided on the point. The Appeal with regard to the amount claimed to be overpaid in respect of the estate of Henry H. Cotton was allowed, the Court being of opinion by a majority of four to two, that under the laws regulating succession duty in the Province of Quebec at the date of his death, the whole of his estate was liable to pay such duty. A cross Appeal by the present Appellants against the small correction mentioned above was dismissed, and from this dismissal no Appeal has been brought.

The present Appeals are brought from the above decisions of the Supreme Court of Canada. The Appellants appeal from the decision relating to the duties upon the estate of Henry H. Cotton, and the Crown appeals as to the decision so far as it affects the duties upon the estate of Charlotte L. Cotton. It will be seen, therefore, that the matter in dispute is solely as to the effect of the statutes regulating succession duty at the dates of the death of Charlotte L. Cotton and Henry H. Cotton respectively.

At the date of the death of Charlotte L. Cotton, the section imposing succession duty, which was in force, reads as follows:—

“All transmissions owing to death of the property in 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.”

The French text reads as follows:—

“Toute transmission, par décès de propriété, d’usufruit ou de jouissance de biens mobiliers ou immobiliers, situés dans la Province est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décès.”

There is no definition of "property," and the remainder of the group of sections and subsections relates to the rates of duty, the mode of payment, and the formalities to be gone through in connection with the succession.

Their Lordships are of opinion that no question of difficulty or doubt arises in this part of the case. By the express words of the taxing section the taxation is expressly limited to the property "in the Province," or in the French text, "biens . . . situés dans la Province." The meaning of these words is clear. Neither party denies that moveable property can be locally situate in a place, and in the present case the property as to which the dispute arises was locally situate in the United States of America, and therefore not in the Province of Quebec. No question arises as to the applicability of the doctrine *mobilia sequuntur personam*, because the section expressly limited the taxation to property in the province, and therefore whether or not the Province possessed and might have exercised a right to tax moveable property locally situated outside of the province (such right arising from the domicile of the testatrix) it did not see fit so to do. For the same reason no question of *ultra vires* arises in this part of the case, since the Appellants do not dispute the power of the Quebec Legislature to tax moveable property situated in the province.

The Cross Appeal of the Crown therefore fails.

There remains the Appeal of the Appellants.

The bulk of the careful and elaborate arguments upon these Appeals was devoted to this part of the case. It was distinguished from the case on the Cross Appeal by the fact that the legislation in force at the date of the

death of Mrs. Cotton had been repealed before the death of her husband, and the succession duties on the husband's estate were entirely regulated by the terms of an Act passed in 1906, entitled the Quebec Succession Duties Act. In this Act the operative part of the actual taxing section of the former legislation is reproduced with a minute verbal alteration which admittedly makes no difference. But there is inserted in the section a definition which did not appear in any of the former Acts. It reads as follows:—

“1191c. The word ‘Property’ within the meaning of this section shall include all property whether moveable or immovable 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.”

The Respondent contends that the presence of this definition extends the operative clause so as to make it cover all moveable property possessed by the Testator wherever situate. The Appellants deny that it has any such effect, and further contend that if it has such effect, the enactment is thereby rendered *ultra vires* of the Provincial Legislature, and is of no validity. 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. The latter of the two questions is of the greater practical importance in view of

the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the Province," so that a decision depending on the presence of those words would have no application to the present state of legislation.

Taking the first of the two questions their Lordships are asked to decide whether the presence of the definition has the effect of removing the words of limitation "in the Province" from the operative part of the section. It is difficult to see how it can be contended that they have that effect. Under the earlier legislation there was no specific definition of property, and therefore it would be interpreted in its natural sense, *i.e.*, the totality of all that the testator owned whatever its nature and wherever its situation. The specific definition that appears in the later legislation is not and could not be wider than this. It is true that it may indicate that the section is intended to apply to a wider class of owners than would be affected under the former legislation, because it refers to persons not domiciled within the Province. Such a breadth of application may perhaps give rise to questions in the future, but they do not arise here. In the case of a person who is domiciled in the Province, and who, therefore, is naturally subject to the operative clause (as Henry H. Cotton undoubtedly was), it makes nothing "property" which would not have been considered "property" if no specific definition existed. The same consideration which was decisive in the former case therefore applies with equal force here. By the words of limitation inserted in the operative clause the Legislature makes it clear that it does not intend to tax the whole of the "property" of the deceased, but only those of his goods which are "situés

dans la province.” It is no longer a question of the powers of the Legislature. Whatever they may be, it has chosen to exercise them only so far as the property locally situated within the province is concerned.

The necessity of this conclusion appears more strikingly when we examine that part of the definition on which the argument for the Respondent was exclusively based. Counsel relied on the presence at the end of the definition of the words “all moveables wherever situate of persons having their domicile (or residing) in the province of Quebec at the time of their death.” But the things so referred to would obviously be included in the word “property” as used in the earlier statutes—indeed, they could not be excluded from any concept of the property of the deceased. And, moreover, its presence emphasises the deliberate use of limiting words in the operative clause. The definition prescribes that “property” includes moveables “wherever situate,” but the express language of the operative clause provides that of this “property” those portions only are taxed which are “biens situés dans la Province.”

An attempt was made to suggest that this definition of “property” could only have been inserted in the Act to indicate that on which it was the intention to levy the duties, and that therefore the operative clause must be read as co-extensive with the definition. But apart from the fact that the language of the operative clause is fatal to this argument, the group of clauses itself shows a good reason for inserting a definition of property wide enough to cover all that the Testator possessed quite independently of the question whether duties should be levied on the whole of the property or not. By the provisions of 1191g the Executor or some party

interested under the will must make a declaration under oath, setting forth, among other things, "the description and real value of all " property transmitted." This is a matter of great importance to those who collect the revenue, because they are able to judge for themselves as to the amount of the duties leviable, or, in other words, to perform the duty imposed upon the collector by subsection 6, *i.e.*, to prepare "a " statement of the duties to be paid by the " declarant." Other provisions of the group of clauses illustrate in a similar way the use of the word "property" without any restrictive words in this group of clauses, and fully account for the breadth of the definition without in any way detracting from the force and effect of the limitation which is found in the operative clause.

On the above ground, therefore, their Lordships are of opinion that this Appeal must be allowed.

There is, however, as has been already pointed out, a second question in the case, the decision of which in favour of the Appellants would lead to the same result. This question is the following: whether a succession duty of the kind contended for by the Respondent could be imposed by the Provincial Legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the Testator as defined in the Statute or, to express it more simply, that the limiting words, "in the Province," have been deleted from that clause. Their Lordships have to decide whether an enactment in such a form would be within the powers of the Provincial Legislature by reason of the taxation imposed by it being "direct taxation within the Province in order " to the raising of a revenue for provincial pur-

“ poses ” within the meaning of Section 92 of the British North America Act, 1867.

The language of this provision of the British North America Act, 1867, marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of Political Economy so far as the taxation in Great Britain or Ireland or in any of our Colonies is concerned; and although all the authors of standard treatises on the subject recognised the existence of the two types of taxation, there cannot be said to have existed any recognised definition of either class which was universally accepted. Each individual writer gave his own description of the characteristics of the two classes, and any difference in the descriptions so given by different writers would necessarily lead to differences in the delimitation of the two classes, so that one authority might hold a tax to be direct which another would class as indirect. But so long as the terms were only used in connection with the theoretical treatment of the subject this state of things gave rise to no serious inconvenience. The British North America Act changed this entirely. “ Direct taxation ” is employed in that statute as defining the sphere of provincial legislation, and it became from that moment essential that the Courts should for the purposes of that statute ascertain and define the meaning of the phrase as used in such legislation.

Numerous cases were quoted to us in which the question has been dealt with by this Board. The earliest of these cases occurred in 1884, viz., the *Attorney General for Quebec v. Reed* 10 A.C. 141, in which the opinion of this Board was delivered by the Earl of Selborne, L.C. The Act in question in that case was an Act imposing a

duty of 10 cents upon every exhibit filed in Court in any action. The funds so raised were intended to pass into the general revenue of the province, and their Lordships held that such an impost came precisely within the words "taxation in order to the raising of a revenue for provincial purposes." The sole remaining question, therefore, was whether such taxation was "direct," and his Lordship, in delivering the opinion of the Board, says as follows:—

"Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the Appellants' arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—'one which is demanded from the very persons who it is intended or desired should pay it.' And then, the converse definition of indirect taxes is, 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.'"

Applying this definition, he pronounces that a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice is not one which is demanded from the very persons whom it is intended or desired should pay it, and that, therefore, the taxation in question was not "direct." The Act was accordingly held to be *ultra vires*.

The question next came before this Board in the year 1887 in the case of *The Bank of Toronto v. Lambe* 12 A.C. 575. The Quebec

Legislature had in the year 1882 passed an Act levying a tax upon every bank carrying on the business of banking in the Province. The amount of the tax depended upon the paid-up capital, and the number of offices or places of business of the bank, and it was contended by the Appellants that such a tax was not a direct tax.

In the argument Counsel for the Appellant quoted the following definition taken from the well-known treatise of John Stuart Mill as the one he would prefer to abide by:—

“Taxes are either direct or indirect. 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.

“The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.”

In delivering the judgment of this Board Lord Hobhouse says as follows:—

“Their Lordships then take Mill’s definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the Appellants’ Counsel, not only because it is that of an eminent writer, not with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act.”

The taxation was held to come within the above definition and accordingly the Act was held to be *intra vires* and valid.

In the year 1897 the same question came before this Board in a very similar case—*The*

Brewers and Maltsters Association of Ontario v. The Attorney-General for Ontario [1897] A.C. 231. The question in this case was as to whether an Act requiring brewers and distillers in the State of Ontario to take out licences was *ultra vires* of the Provincial Legislature. Lord Herschell, in delivering the opinion of the Board, treated the question as being settled by the decision in the *Bank of Toronto v. Lambe*, and referring to the decision in that case he says:—

“Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

“The definition referred to is in the following terms: ‘A direct tax is one which is demanded from the very person 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 as the excise or customs.’

“In the present case, as in *Lambe’s* case, their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person.”

Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase “direct taxation” in Section 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion. It remains to consider whether the succession duty imposed in the present case would be within this definition if it be

taken that the duty is imposed on all the property of the Testator, wherever situate.

For the purpose of deciding this question it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of "property" contained therein is admittedly too wide if it is intended to form a basis for provincial taxation since it would include the moveable property of any person who might be resident in the Province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the Appellants not only admit, but contend, that the Act imposes a succession duty upon all moveable property, wherever situated, of a Testator domiciled in the Province. This succession duty varies with the amount of the property and the degree of consanguinity of the persons to whom it is transmitted. The method of collection appears to be as follows: There is nothing corresponding to probate in the English sense, but there is an obligation on "every heir, universal legatee, " legatee by general or particular title, executor, " trustee and administrator or notary before " whom a will has been executed" to forward within a specified time to the Collector of Provincial Revenue a complete Schedule of the estate, together with a declaration under oath setting forth various matters relating thereto. Although this is an obligation on each member of each of the above classes, it is provided that " the declaration duly made by one of the above- " named persons relieves the others as regards " such declaration." On receipt of such declaration the following provisions with regard to the payment of the duty come into force:—

"(4) . . . the said collector shall cause to be prepared a statement of the amount of the duties to be paid by the declarant.

“(5) Such collector of provincial revenue shall inform the declarant of the amount due as aforesaid, by registered letter mailed to his address, and notify him to pay the same within thirty days after the notice is sent; and, if the amount is not then paid to him on the day fixed, the collector of provincial revenue may sue for the recovery thereof before any court of competent jurisdiction in his own district.

“(6) No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid.”

Their Lordships can only construe these provisions as entitling 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 persons interested therein.

To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of moveables such as bonds or shares in New York bequeathed to some person not domiciled in the Province. There is no accepted principle in International law to the effect that nations should recognise or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto How,

then, would the Provincial Government obtain the payment of the succession duty? It could only be from someone who was not intended himself to bear the burden but to be recouped by someone else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the Provincial Legislature it is by no means the only one. Indeed the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the Government as in the cases where local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not "direct taxation," and that the enactment is therefore *ultra vires* on the part of the Provincial Government. On this ground, therefore, the Appeal must be allowed.

Much of the argument before their Lordships related to the cases of *Harding v. The Commissioners of Stamps for Queensland* [1898] A.C. 769; *Lambe v. Manuel* [1903] A.C. 68; *The King v. Lovitt* [1912] A.C. 212; and *Woodruff v. The Attorney General for Ontario* [1908] A.C. 508.

Their Lordships are of opinion that the discussion of these cases is not necessary for the decision of the present case. *Harding v. The Commissioners of Stamps for Queensland*

related solely to the interpretation of the Queensland Succession and Probate Duties Act, 1892, and throws no light on the questions involved in the present case. *Lambe v. Manuel* decided nothing farther than that the Quebec Succession Duty Act of 1892 applied only to property which a successor claims under and by virtue of Quebec law, and this also is not in issue in the present case. In the case of *The King v. Lovitt* no question arose as to the power of a province to levy succession duty on property situated outside the province. It related solely to the power of a province to require as a condition for local probate on property within the province that a succession duty should be paid thereon. The decision in the case of *Woodruff v. The Attorney General for Ontario* was much relied upon on behalf of the Appellants, but the circumstances of the case were so special, and there is so much doubt as to the reasoning on which the decision was based, that their Lordships have felt that it is better not to treat it as governing or affecting the present decision, and they have accordingly decided the present case entirely independently of that decision.

Their Lordships will, therefore, humbly advise His Majesty that the Appeal of Charles S. Cotton and Another be allowed and the Cross-Appeal of the Crown dismissed. This is equivalent to directing that the decision of the Court of King's Bench (Appeal Side) be restored. The Respondent to the principal Appeal will pay the costs of the Appeal to Supreme Court of Canada and of these Appeals.

In the Privy Council.

CHARLES S. COLTON AND ANOTHER

v.

THE KING.

JUDGMENT OF LORD MOLLISON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.