Privy Council Appeal No. 41 *of* 1929.

The Erie Beach Company, Limited - - - - - *Appellants*

v.

The Attorney-General of Ontario - - - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER, 1929.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD DARLING.
LORD MERRIVALE.
LORD TOMLIN.
MR. JUSTICE DUFF.

[*Delivered by* LORD MERRIVALE.]

The Erie Beach Company, Limited, appeals against the judgment of the Appellate Division of the Supreme Court in an action upon an agreed statement of facts wherein the Company prayed a declaration that certain shares of its capital stock registered in the name of Frank V. E. Bardol, deceased, and other like shares allotable to him under a contract of his with the Company were not upon his death subject to duty under the Ontario Succession Duty Act; a declaration that the Company is not under Section 10 of the Act liable to pay duty in respect of a transfer of such shares permitted by the Company before payment of succession duty thereon or security given for the payment of the same; and a declaration that Section 10 of the Act in so far as it purports to impose the last-mentioned duty on the Company is *ultra vires* of the Province of Ontario.

Frank V. E. Bardol was at all material times domiciled in the State of New York in the United States of America. The plaintiff Company is incorporated in Ontario under the Ontario Companies Act, 1914, having as its chief object the establishment,

ownership and conduct of an amusement park upon a site at the village of Fort Erie on the Canadian shore of Lake Erie, within easy reach of the city of Buffalo. Mr. Bardol was apparently the person chiefly concerned in the undertaking. In consideration of assignments of property made by him to the Company 9,000 preferred and 1,000 ordinary shares of $100 each therein, fully paid, were agreed to be issued to him ; one hundred of the ordinary shares were issued, ninety-six to him and four to nominees of his. The remainder were to be issued when and as he should direct, and remained unissued at his death in April, 1925. Probate of the will of Frank V. E. Bardol was granted in 1925 in the proper court in the State of New York. The plaintiff company in 1926 issued certificates for the testator's previously unissued shares, but was notified on behalf of the Attorney-General of Ontario that it would be held liable under the terms of the Provincial statutes if it should permit any transfer before succession duty had been paid or secured. Thereupon the Company brought the present action. At first instance judgment was given in its favour, but upon appeal the Court of Appeal was unanimously of opinion against the several contentions raised by the plaintiffs. The Court held the shares to be subject to succession duty, the statute *intra vires* of the Provincial Legislature, and the contingent liability of the Company under Section 10 to be well founded in law.

The Ontario Succession Duty Act (R.S.O., 1914, c. 24) by Section 7 imposes succession duty on " all property situate in Ontario and any income thereon passing on the death of any person, whether at the time of death domiciled " in Ontario or elsewhere, and no question was raised but that this enactment so far as Section 7 goes is within the legislative powers of the Province as a measure of direct taxation within the terms of the British North America Act, 1867, Section 92. What was mainly in dispute upon the hearing at this Board was whether the shares in question were assets of the testator situate in Ontario. There was, however, the further question whether, in any view of the matter, Section 10 of the statute, imposing liability not upon succession to shares, but upon the corporation in which the shares exist, without the accrual of any successory interest in them to the Company, is or is not indirect taxation and so beyond the legislative powers of the Province. The material words of Section 10 are these :—

> " No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, . . . whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred . . . until the duty, if any, is paid, or security given therefor, and any corporation or person allowing such property to be so transferred . . . contrary to this subsection shall be liable for such duty."

The nature of the property in the shares in question depends in the main—if not wholly—upon the terms of the enactment

under which the plaintiff Company subsists: the Ontario Companies Act, 2 Geo. V, c. 31. This statute of the Provincial legislature provides for the grant of incorporation by the Lieutenant-Governor in Council, for purposes whereto the authority of the legislature extends, to be set forth in the petition for incorporation. One of the antecedent requirements for incorporation is a statement by the petitioner or petitioners of a place in Ontario where the head office of the Company is to be situate. The shares are by Section 56 to be deemed to be personal estate transferable on the books of the Company. Under Section 60 no transfer is valid or effectual save as exhibiting the rights of the parties thereto toward each other until entry thereof is made in the books of the Company. By-law 22 of the Company provides, further, that the shares shall be transferable only by the recording of the transfer on the stock-book of the Company at their head office or the office of their transfer agents, if any, and the Company's authorised form of certificate states that the shares are transferable only on the books of Corporation by the holder in person or his attorney upon surrender of the certificate properly endorsed. By Section 118 of the statute the Company's register of shares and shareholders is required to be kept at its head office "within Ontario," and (by Section 119) available for inspection. There is provision in the statute—see Sections 52 and 119—for relaxation of the stringency of some relevant provisions by special Act, or letters patent, or by-laws, or leave of the Lieutenant-Governor, but no such special sanction exists in this case. By Section 121 of the statute, jurisdiction is given to the Supreme Court of Ontario to order rectification of the books, and to determine questions of title in relation to the shares.

On the face of the statutory conditions above enumerated, it must be seen that if the corporation has a local habitation Ontario is its locality. For the appellants, however, facts are relied upon such as in the case of an individual might well have warranted an argument, that the person in question had chosen as his place of domicile the State of New York and had followed up his choice by action effectual to secure domicile there.

Frank V. E. Bardol and his associates in the organisation of the Company and the conduct of its affairs appear to have been all of them people of the State of New York. Every meeting of the Company, whether of shareholders or of directors, took place in the City of Buffalo; the management of the Company's business was conducted from its office in Buffalo; its books, records and documents were kept there; the common shares actually issued were issued there, and such transfers as took place were made and recorded there.

The appellants contended that shares in a joint stock company have no local situation, that, like debts and other choses in action and rights arising ex-contractu, they constitute property of which the value—applying the maxim *mobilia sequuntur personam*—is

taxable at the place of domicile of the deceased possessor. This view was adopted by Logie J. at the trial of the action.

A series of judicial decisions extending from *Attorney-General* v. *Higgins* (2 H. & N. 338), in the Court of Exchequer in 1857, to *Brassard* v. *Smith* ([1925] A.C. 371), before this Board in 1925, have ascertained beyond possible doubt the test which must be applied to determine the local situation of the shares of a joint stock company when that fact has to be determined in order to decide as to liability to or immunity from local taxation. *Cotton* v. *Rex* ([1914] A.C. 176) and *Burland* v. *Rex* ([1922] 1 A.C. 215), which were much discussed in the argument here, show the working of the rule, but do not qualify it as previously laid down.

In *Attorney-General* v. *Higgins*, as in *Brassard* v. *Smith*, duty upon shares was in question. In *Attorney-General* v. *Higgins*, Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard* v. *Smith*, epitomised the crucial inquiry in a sentence—"Where could the shares be effectually dealt with." The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo; so far as they might; have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there.

The remaining question in the case is whether the liability purported to be created by Section 10 (2) of the statute in question is of such a nature as to render the subsection null as being made without authority; that is to say, as exceeding the power of the Provincial Legislature under the British North America Act, 1867, Section 92, to make laws in relation to direct taxation within the Province. On behalf of the appellants it was contended that the statute in so far as it purports to create a liability in the plaintiff Company, does not in truth impose succession duty on the Company, but lays a tax upon persons not concerned in the succession in question in the expectation and with the intention that they shall indemnify themselves at the expense of those actually interested in the succession. "A direct tax," it was said on undoubted authority, "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 the intention that he shall indemnify himself at the expense of another." The practical distinction between direct and indirect taxation formulated by John Stuart Mill in his "Political Economy" is, as was pointed out in *Attorney-General of British Columbia* v. *Canadian Pacific Railway Company* ([1927] A.C. 934), "not a legal definition," but "a fair basis for testing

the character of the tax in question." The question to be answered in the present case is not much helped by considering whether the impost effected by Section 10 (2) resembles more nearly stamp duties such as were held in *Attorney-General of Quebec* v. *Reed* (10 A.C. 141), to be a form of indirect taxation, or duties on licences, which in *Bank of Toronto* v. *Lambe* (12 A.C 575), were found to be direct taxes, or indeed by examination of various other cases to which their Lordships were referred. It is in truth this Is the intention of Section 10 (2) that when a corporation allows property of a deceased person to be transferred without provision previously made for succession duty, the corporation shall incur a liability beginning and ending with itself and answerable so far as legal liability goes out of its corporate funds alone, or does the section intend that the corporation shall pay the succession duty on behalf of the persons concerned, and by so doing become entitled to recover from such persons the amount paid ?

The answer to the question so stated must be determined by the terms of the statute. Sub-section 10 (2), it will be seen, does two things. It enacts a prohibition in the words following :—

> " No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred, paid or given to the person entitled thereto until the duty, if any, is paid or security given therefor."

Next it proceeds to provide that—

> " Any corporation or person allowing such property to be so transferred, paid or given contrary to this subsection shall be liable for such duty."

The statute makes no provision for reimbursement of the Company from any quarter, and no such provision can be implied. Breach of a statutory prohibition is *prima facie* a misdemeanour. It could no doubt be argued on the part of a person convicted of the misdemeanour of a wilful breach of the prohibition here under consideration that his guilt involved him only in the liability created by the second enactment in the subsection, and if that question arises it will be determined. Meantime, it is sufficient to say, as is said in the judgment of the learned Chief Justice in the Court of Appeal, " The subsection penalises a company which permits any property of a deceased person to be transferred until the duty payable in respect thereof is paid or secured, and the company is not entitled to recover the penalty from the beneficiary."

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The costs here and below will be borne by the appellants.

In the Privy Council.

THE ERIE BEACH COMPANY, LIMITED,

v.

THE ATTORNEY-GENERAL OF ONTARIO.

DELIVERED BY LORD MERRIVALE.

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