

57, 1933

In the Privy Council.

No. 1 of 1933.



ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

BETWEEN

THE PROVINCIAL TREASURER OF ALBERTA AND THE ATTORNEY-GENERAL OF ALBERTA ... (Defendants) Appellants,

AND

CLARA E. KERR AND WILLIAM H. McLAWS, Executrix and Executor of the Will of Isaac Kendall Kerr, deceased (Plaintiffs) Respondents,

AND BETWEEN

CLARA E. KERR AND WILLIAM H. McLAWS, Executrix and Executor of the Will of Isaac Kendall Kerr, deceased (Plaintiffs) Appellants,

AND

THE PROVINCIAL TREASURER OF ALBERTA AND THE ATTORNEY-GENERAL OF ALBERTA ... (Defendants) Respondents.

(Consolidated Appeals.)

CASE FOR THE PROVINCIAL TREASURER OF ALBERTA AND THE ATTORNEY-GENERAL OF ALBERTA.

1. This is an appeal and cross-appeal from a Judgment of the Appellate Division of the Supreme Court of Alberta, given the 22nd day of July, 1932, upon a Special Case agreed to by parties hereto and referred, pursuant to the Alberta Rules of Court, to the said Appellate Division by leave of a Supreme Court Judge.

Record.

p. 41. pp. 3-6.

p. 6, l. 30.

CASE FOR THE PROVINCIAL TREASURER AND THE A.-G. OF ALBERTA.

Record.
p. 3, l. 14.
p. 4, l. 34.
p. 4, l. 1.
p. 4, l. 8.

2. The late Isaac Kendall Kerr died on the 3rd day of December, 1929, and at the time of his death was domiciled and resident at the City of Calgary, in the Province of Alberta. The sole beneficiaries of the estate were both domiciled and resident within the Province of Alberta. The deceased left a large estate including the securities mentioned in paragraph 2 of the Special Case, as to which it was agreed for the purpose of deciding the issues herein that approximately one-half of the shares and other securities had their head office or transfer office situate outside the Province, and the other half had their head office or transfer office situate inside the Province. The documents evidencing title to these securities were all found at Calgary in 10 the Province of Alberta at the date of death.

p. 6, l. 1.
p. 6, l. 10.

3. Letters Probate were issued to Clara Emma Kerr, of the City of Calgary, in the Province of Alberta, Executrix, and William Henry McLaws, of the City of Calgary, in the Province of Alberta, Executor, the Plaintiffs herein, out of the District Court of the District of Calgary, Alberta. The property of the deceased hereinbefore mentioned has passed into the hands of the Plaintiffs in their representative capacities.

p. 4, l. 43.

4. Pursuant to the provisions of the Succession Duties Act, duties were assessed by the Provincial Treasurer in the sum of \$54,754.21 in respect of the property of the deceased. 20

p. 5, l. 3.

5. The Plaintiffs, the Executrix and Executor respectively of the estate, residing in the City of Calgary, Province of Alberta, as principals, and the Alliance Insurance Company as surety entered into a bond in the sum of \$60,000.00 conditioned on payment to the Provincial Treasurer of all duty to which the property of the deceased may be found liable under the provisions of The Succession Duties Act coming into the hands of the said Executrix and of the said Executor within one year from the date of the death of the deceased or within such further time as may be given under the provisions of the said Succession Duties Act.

6. The Statute applicable is the Succession Duties Act above referred to 30 as it stood at the date of the death of the deceased, and which is printed in the appendix of Statutes.

p. 6, l. 16.

7. The two questions referred to the Court for determination were whether or not Succession Duties could be validly levied, and are payable to the Defendants, under the provisions of the Succession Duties Act afore-said, in respect of the following property :—

p. 4, l. 3.

(1) Certain personal property consisting of shares and other securities in respect of which there was no registration or transfer office situate in the Province of Alberta, and other personal property locally situate outside the Province ; 40

p. 4, l. 11.

(2) Certain real property situate within the Province of Alberta, and personal property consisting of shares and other securities in

companies with head office, or transfer office, situate within the Province of Alberta and other personal property locally situate within the Province. Record.

8. The first question was answered by the Court in the negative under separate judgments delivered by Clarke, J.A., Lunney, J.A., and MacGillivray, J.A. A dissenting judgment was delivered by Ford, J.A. (Mitchell, J.A., concurring) answering this question in the affirmative. The second question was answered in the affirmative by all members of the Court. The Defendants appeal from the judgment of the Court on the first question and the Plaintiffs appeal from the judgment of the Court on the second question. The appeals have been consolidated by order of the Court.

p. 41, l. 26.
p. 41, l. 31.
p. 70, l. 18.
p. 71, l. 7.

9. Mr. Justice Clarke answered the first question submitted in the negative, holding that Section 7 of the Succession Duties Act is *ultra vires* in so far as it purports to impose duties on property outside the Province of Alberta being in contravention of the constitutional limitation of the Province to direct taxation within the Province. The second question he answered in the affirmative following the case of *In re : Cust 8*, A.L.R. 308.

p. 42.

10. Mr. Justice Lunney also answered the first question in the negative holding that the imposition of a tax on personal property outside the Province is beyond the jurisdiction of the Provincial Legislature. He rejects the applicability of the maxim: "mobilia sequuntur personam," and holds that the taxation of personal property, situate outside the Province, is not direct taxation within the Province. The second question is answered in the affirmative.

p. 62, l. 40.

11. Mr. Justice MacGillivray answers the first question in the negative, holding that the mobilia rule governing the distribution and succession to personalty according to the law of the domicile of the deceased has no application to a taxing statute and cannot override the constitutional limitation which restricts the taxing powers of the Province to "Direct Taxation within the Province." He also holds that the statute is analogous to an estate duty and has none of the features of statutes relating to legacy and succession duties. Therefore the statute cannot be said to impose a tax upon the transmission or succession within the Province. He answers the second question in the affirmative.

pp. 63-69.
p. 68, l. 14.
p. 68, l. 42.
p. 69, l. 29.

12. Mr. Justice Ford, whose judgment is concurred in by Mr. Justice Mitchell, answered both questions submitted in the affirmative. He holds that the Act imposes a direct tax, and constitutes taxation within the Province, and that the case submitted is clearly distinguishable from the case of *Rex v. Cotton* (1914) A.C. 176, and from the facts of the *Burland Case* (1922) 1 A.C. 215, but is not distinguishable and is governed by the case of *Barthe v. Alleyn-Sharpley* (1922) 1 A.C. 215. He exhaustively reviews all of the provisions of the Act and comes to the conclusion that in some aspects and for some purposes it resembles an English Probate Tax and as such is

pp. 42-62.
p. 62, l. 37.
p. 49, l. 1.
p. 51, l. 6,
et seq.

Record. pure taxation against the property, but in other aspects and for other purposes it is as much a tax on the succession or transmission of property to beneficiaries within the Province, as that imposed under the Quebec Statute under consideration in the *Barthe* case. The incidence of the tax falls upon the beneficiaries under Sections 9 and 16 of the Act by reason of the transmission of the property of the deceased to and the accession thereof by them. Mr. Justice Ford also holds that the Legislature has by the terms of the statute adopted the maxim "mobilia sequuntur personam," and that the rule expressed in the English cases of *In re Ewin*, 1 Cr. and Jerv. 151, *Thompson v. Advocate General*, 12 Cl. and Fin. 2, and *Attorney General v. Napier*, 6, Ex. 217, and adopted by the Supreme Court of Canada in *Smith v. Provincial Treasurer*, 58, S.C.R. 570, and other cases should be applied.

p. 55, l. 17. **13.** It is submitted that paragraph 6 of the Special Case, which states that the duties here in dispute are levied under Section 7, merely refers to the Section of the Act setting out the scale of duties applicable, but that the constitutional issues involved must be decided with reference to the whole Act including Section 9. It is urged that Mr. Justice MacGillivray erred in refusing to consider the applicability of Section 9, which is of extreme importance in determining the incidence of the tax as well as the kind of taxation imposed. The section clearly states that the tax falls directly on the beneficiaries to whom property is transmitted on death and in so far as it relates to the personal property locally situate outside the Province of a deceased person domiciled within the Province, the tax is upon the transmission or succession under this section.

14. It is submitted that in so far as the property referred to in the first question is concerned the tax or duty imposed under the Act is in the nature of a succession or legacy duty, and is governed by the principles of law established for over one hundred years in England whereby all movable or personal property of the deceased, wherever situate, is deemed to be at the domicile of the deceased by virtue of the maxim "mobilia sequuntur personam" which by the terms of the Statute has been expressly made applicable in this case.

15. It is further submitted that under the provisions of the Succession Duties Act, the incidence of the tax is on the beneficiaries or persons succeeding to the property of the deceased. No direct liability is imposed upon the executor or applicant for Letters Probate or Administration under the taxing statute. Any obligation which may be assumed by the applicant by virtue of the provisions of the bond is voluntary and is a matter of contract. The duties imposed under the Act constitute "direct taxation within the Province," within the meaning of Section 92 (2) of the British North America Act, 1867.

16. It is submitted on behalf of the Provincial Treasurer and the Attorney General of Alberta that both questions submitted should be answered in the affirmative for the following, among other

REASONS

AS TO QUESTION (1).

1. Because in so far as property locally situate outside the Province is concerned the tax imposed under the Act is analogous to Succession or Legacy Duties, as they exist and are interpreted under the English law.
- 10 2. Because the Legislature of the Province of Alberta has by Section 7 of the Succession Duties Act, expressly exercised its right to tax all the personal property wherever situate of a deceased person who died domiciled in the Province, thus incorporating into the Act the maxim "mobilia sequuntur personam," whereby such property is constructively within the Province in compliance with the constitutional restriction contained in Section 92 (2) of the British North America Act, 1867.
- 20 3. Because, under the facts of this case, the tax or duty is levied upon the net residue of the estate which has come into the hands of the Plaintiffs and in as much as the law of Alberta governs the distribution and succession to movables of a domiciled decedent, the impost is upon the beneficial surplus of the estate which at the time when the liability to pay duty under the bond arises is actually within the Province.
4. Because in so far as movables or personalty locally situate outside the Province are concerned, the duty or tax is imposed on the succession or transmission of property to a resident beneficiary on the death of a person domiciled in the Province, and is valid on the authority of *Barthe v. Alleyn-Sharples* (1922) 1 A.C. 215.
- 30 5. Because under the provisions of Section 9 of the Act, the tax, levied in respect of personal property locally situate outside the Province is a direct tax upon the person or persons resident in the Province who succeed to the property under a devolution or succession within the Province, and as such constitutes direct taxation within the Province under Section 92 (2) of the British North America Act, 1867.
6. Because the tax imposed by the Succession Duties Act of the Province of Alberta is a direct tax.

40 AS TO QUESTION (2).

7. Because in so far as the property locally situate within the Province is concerned, the tax is analogous to a probate or estate duty, and is a direct tax on the property.

8. Because the only obligation of the Plaintiffs under the bond is to pay duty on property coming into their hands in their representative capacity, and they therefore assume no personal obligation except to deduct and pay to the Provincial Treasurer the duties out of the share of the property passing to each beneficiary under the Will of the deceased.
9. Because the tax or duty imposed under the Alberta Statute is essentially the type of tax exclusively confined to the Provinces under the British North America Act, 1867, ¹⁰ and is universally recognised as falling within the ambit of direct taxation.

W. S. GRAY.

H. J. WILSON.

In the Privy Council.

No. 1 of 1933.

*On Appeal from the Appellate Division of the
Supreme Court of Alberta.*

BETWEEN

THE PROVINCIAL TREASURER OF
ALBERTA AND THE ATTORNEY-
GENERAL OF ALBERTA

(Defendants) Appellants,

AND

CLARA E. KERR AND WILLIAM H.
McLAWS, Executrix and Executor
of the Will of Isaac Kendall Kerr,
deceased

(Plaintiffs) Respondents,

AND BETWEEN

CLARA E. KERR AND WILLIAM H.
McLAWS, Executrix and Executor
of the Will of Isaac Kendall Kerr,
deceased

(Plaintiffs) Appellants,

AND

THE PROVINCIAL TREASURER OF
ALBERTA AND THE ATTORNEY-
GENERAL OF ALBERTA

(Defendants) Respondents.

(Consolidated Appeals)

CASE FOR THE PROVINCIAL TREASURER
OF ALBERTA AND THE ATTORNEY-
GENERAL OF ALBERTA.

BLAKE & REDDEN,

17, Victoria Street,

S.W.1.