

57, 1933

No. 1 of 1933.

In the Privy Council.

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***

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— 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.***

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(Consolidated Appeals).

CASE FOR THE EXECUTORS.

1. This is a consolidation of appeals by both the Executors and the Province from a Judgment of the Appellate Division of the Supreme Court of Alberta dated the 22nd of July, 1932, as to the

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CASE FOR THE EXECUTORS.

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validity of death duties imposed by the Province and demanded from the Executors.

- p. 3. **2.** The parties agreed on a Special Case from which it appears that the late Isaac Kendall Kerr died on the 3rd day of December, 1929, domiciled in the Province of Alberta. At the time of his death he owned certain real and personal property situate within the Province, and certain personal property situate outside the Province. The Province imposed duties on all the property. The Executors disputed the validity of the duties on the ground that they were not "direct taxation", and further disputed the validity of the duties imposed on the personal property situate outside the Province on the ground that they were not "taxation within the Province". Two questions were submitted for the opinion of the Court, the first as to the validity of the duties imposed on the personal property situate outside the Province, and the second as to the validity of the duties imposed on the real and personal property situate within the Province. The Judgment appealed from held the duties imposed on the personal property situate outside the Province to be *ultra vires* the Legislature of the Province, and invalid, as they were not "taxation within the Province"; and held the duties imposed on the real and personal property situate within the Province to be "direct taxation" and valid. Both parties appealed, and the appeals have been consolidated.
- p. 4.
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FIRST APPEAL.

- p. 41. **3.** This is an appeal by the Province from the portion of the Judgment of the Appellate Division holding the duties imposed on the personal property of the testator situate outside the Province to be invalid.

4. The duties are claimed under Section 7 of Chapter 28, Revised Statutes of Alberta, 1922, amended by Chapter 31 of the Statutes of Alberta, 1927. This section as amended provides:—

" . . . all property of the owner thereof situate within the Province and
 "in the case of an owner domiciled in the Province, all the personal property
 "of the owner situate outside of the Province and passing on his death, shall
 "be subject to succession duties at the rate, etc. . . ."

5. The power of the Legislature of the Province to impose taxation is limited to the powers contained in Section 92, s.s.2 of the British North America Act, 30-31, Vict. Chapter 3, namely:—

"direct taxation within the Province in order to the raising of a revenue for
 "Provincial purposes".

6. The Executors adopt the dictum of Chief Justice Anglin in *re Muir Estate*, 51 S.C.R. at page 455 :—

“ . . . succession duties . . . imposed in respect to any property physically or locally situate outside the province are not ‘taxation within ‘the Province’ and are therefore *ultra vires* of a provincial legislature”.

confirming his opinion expressed in the *Cotton* case, 45 S.C.R. at page 536 :—

“In order that a provincial tax should be valid under The British North America Act in my opinion the subject of taxation must be within the ‘province’”.

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7. Shares in companies have a situs where the Head Office of the Company is situate—*Attorney-General v. Higgins*, 2 H. & N. 339; *Brassard v. Smith*, 1925 A.C. 371; *Erie Beach v. Attorney-General of Ontario*, 1930, A.C. 161—and the parties agree that the properties described in paragraph 2, s.s. (a) of the Special Case are locally situate outside the taxing Province. Section 7 above quoted imposes a tax on this personal property, and the subject of taxation not being within the taxing Province, the duties do not come within the limited powers of taxation conferred by the British North America Act. This question was raised in *Woodruff v. Attorney-General of Ontario*, 1908, A.C. 508. Lord Collins stated at page 510 the question under consideration as follows :—

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“The question on these appeals is as to the right of the Attorney-General of the Province of Ontario to demand payment of a tax called, in ‘the provincial Act which imposed it ‘succession duty’ upon personal ‘property locally situate outside the Province’”

and at page 513 Lord Collins, in delivering the Judgment of the Board held :—

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“ . . . The pith of the matter seems to be that, the powers of the ‘Provincial Legislature being strictly limited to ‘direct taxation within the ‘Province’ (British North America Act 30-31, Vict. Chap. 3, Section 92, ‘s.s. 2) any attempt to levy a tax on property locally situate outside the ‘Province is beyond their competence . . . Directly or indirectly the ‘contention of the Attorney-General involves the very thing which the ‘Legislature has forbidden to the Province—taxation of property not within ‘the Province’”.

8. The Province and the dissenting Judgment raised the following defences :—

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(a) That the duties are a tax on the transmission within the Province and not on the property.

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(b) That the duties are a tax on the succession or devolution of the property within the Province.

(c) That by the application of the maxim *mobilia sequuntur personam* the duties imposed on the personal property locally situate outside the Province are made taxation within the Province.

The Executors respectfully submit that these defences are not available for the following reasons.

9. The duties in question are not a tax on the transmission. The distinction between a tax on the property passing on the death of the owner, and a tax on the transmission, is shown by Lord Phillimore in *Alleyn-Sharples v. Barthe*, 1922, A.C. 227, where he quotes the two portions of the Quebec statutes. Under those statutes the duties imposed with respect to the property situate within the Province are made a tax on the property passing on the death of the owner so as to avoid *Lambe v. Manuel*, 1903, A.C. 68, and to secure the benefit of *Rex v. Lovitt*, 1912, A.C. 212, but the duties imposed with respect to the property situate outside the Province are made a tax on the "transmission within the Province" so as to come within the restrictions of the British North America Act. It is Art. 1387b which made the Quebec duties a tax on the transmission. This provides:—

"All transmissions within the Province owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of his death shall be liable to the following taxes"

This is clearly distinguished from Section 7 of the Alberta statute which imposes the duties in question and under which it is the property of the owner thereof passing on his death that is made subject to the duties. That the Alberta duties are a tax on the property is confirmed by other sections of the statute, including Section 12, which provides that the Provincial Treasurer "shall determine the amount if any in which the property or any part thereof is subject to succession duties", and Section 23, which authorizes the Treasurer to require information "to ascertain the duty payable on any property", and Section 38 which gives a Judge jurisdiction to determine "what property is liable to duties". Art. 1387g of the Quebec statute (referred to at the bottom of page 227 of the *Alleyn-Sharples* decision) may correspond to Section 9 of the Alberta statute, but Art. 1387g only refers to the collection of the tax imposed by Art. 1387b above quoted, and it is Art. 1387b (and not Art. 1387g) which makes the Quebec duties a tax on the transmission.

Section 9 of the Alberta statute also refers only to the collection of the duties, and the parties are agreed that the duties in question in this action are imposed by Section 7 of the Alberta statute. Section 9 need therefore, be considered only insofar as it may modify or otherwise affect the duties imposed by Section 7. The scheme of the Alberta statute is to collect from the executors or administrators the duties on all property which comes into the hands of the executors or administrators, and to look to the beneficiaries only in cases where the property passes to a beneficiary without first coming into the hands of an executor or administrator (see Section 45). When the duties were extended to personal property situate outside the Province by the Amendment of 1927, Section 9 was enacted to provide a method for collecting the duties on any outside personal property that did not come into the hands of an executor or administrator appointed by the Province. If the property came first into the hands of an executor or administrator, the Province collects the duties from such executor or administrator before it passes into the hands of the beneficiary, and nothing is payable by the beneficiary because the Province does not claim double taxation on the outside personal property. In this case all the outside personal property came into the hands of the executors. The duties imposed cover all outside personal property, and are not restricted to property passing to residents of the Province.

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10. The duties in question are not a tax on the succession or devolution within the Province of the outside personal property. The duties are a tax on the property of the owner passing on his death, as is clearly stated in Section 7 (above quoted) which imposes the duties, and by the other sections referred to in the preceding paragraph. This is also further evidenced by Section 6 which extends the duties to property which did not actually belong to the deceased at the time of his death, but which provides:—

“For the purpose of this Act all property which passes or is deemed to pass on the death of any person shall for the purposes of this Act be deemed to be the property of such person.”

40 Unless the duties were intended to be imposed on the property of the deceased passing on his death and not on the legacy or benefit received by the beneficiary, there would be no need of providing that property taxed which did not actually belong to the deceased at the time of his death, should be deemed to be his property. This same question has been raised and decided in other appeals from Canada. The tax considered in *Rex v. Lovitt*, 1912, A.C. 212, was imposed by Revised Statutes of New Brunswick, 1903, Chap. 17, Sec. 5, and provided:—

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“ all property whether situate in this Province or elsewhere
 “ whether the deceased person owning or entitled thereto had a
 “fixed place of abode in or without this Province at the time of his death,
 “passing either by will or intestacy shall be subject to a succes-
 “sion duty

“(2) The provisions of this section are not intended to apply and shall
 “not apply to property outside this Province owned at the time of his death
 “by a person not then domiciled within the Province”

which is the same as the tax imposed by Section 7 of the Alberta
 statute. At page 222 Lord Robson stated :— 10

“The Defendants next say the true subject matter of the
 “tax was not the property but the succession or title which accrued to the
 “successor under the testator’s will.”

But Lord Robson held at page 223 :—

“Although called a succession duty the tax here in question is laid on the
 “corpus of the property,”

And after referring to the payment being a term of the grant of
 ancillary probate and that the executors were required to give a bond
 for the payment of the duties, and to deduct the duties from the
 property, and that a company permitting a transfer of stock by a
 foreign executor became liable for the duty, Lord Robson further
 held :— 20

“These provisions shew that the Act under consideration assimilates the
 “tax to the probate duty.”

The argument that the duties were a tax on the succession was
 therefore, not accepted. The above provisions apply to the statute
 in question. In the Lovitt case the statute also provided that the
 rate should vary with the relationship of the beneficiary
 to the testator, with the residence of the beneficiary and
 with the amount going to each. It also provided that the 30
 executor should collect the duties from the beneficiaries or deduct
 them from the properties and that in the case of a future estate the
 duties should be payable when such future estate came into posses-
 sion. Similar provisions in the statute in question do not therefore,
 make the duties a tax on the succession. The same question was
 also raised in *Woodruff v. Attorney-General of Ontario*, 1908, A.C. 508.
 The tax there considered was imposed by Revised Statutes of
 Ontario, 1897, c. 24, s.4, as amended by the Ontario Statutes of 1901,
 c. 8, s. 6, and provided—

“the following property shall be subject to succession duty 40
 “(a) all moveable property locally situate out of this Province and any interest

“therein where the owner was domiciled in the Province at the time of his death whether such property passes by will or intestacy.”

which is to the same effect as the Alberta statute. The Woodruff decision held the duties to be a tax on the property.

10 11. The duties in question may be distinguished from duties on the succession on the same grounds that the English Estate Duties were distinguished from Succession and Legacy Duties in *Winans v. Attorney-General*, 1910, A.C. 27. While the duties are imposed on the property passing aside from its destination, the destination may
 be considered in fixing the rate of taxation, and the rate may vary with the destination and may be ultimately payable by the beneficiaries without making the duties a tax either on the succession or on the legacy—Lord Atkinson at page 34 of the *Winans* decision. The same question was also decided in *Blackwood v. Regina*, 8 A.C. 82, at pages 90, 91 and 97.

20 12. The maxim *mobilia sequuntur personam* does not mean that the situs of the personal property is the domicile of the owner, or that for all purposes the personal property is deemed to be at the domicile of the owner. The maxim is applied only to the extent of holding that personal property devolves according to the law of the domicile of the deceased owner, and not according to the law of its own locality. As stated in *Blackwood v. Regina*, 8 A.C. 82:—

“For the purposes of succession and enjoyment the law of domicile governs the foreign personal estate: for the purpose of representation, of collection and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner’s domicile, but by the law of their own locality.

30 The English statutes imposing succession and legacy duties, and the Queensland statute considered in *Harding v. Commissioner of Stamps for Queensland*, 1898, A.C. 769, used very wide terms. In the interpretation of those statutes the wide terms used were restricted so as to apply only to personal property which devolved according to the laws of England. This rule of interpretation was applied as a convenience because the English Courts had no knowledge of foreign laws with respect to the devolution of personal property. This however, was only followed when the duties were imposed as a tax on a succession or on a legacy where it was necessary to consider the laws by which the property devolved, but when the duties were
 40 imposed as a tax on the personal property itself, such as the Probate Duty and the English Estate Duties, then it was not necessary to consider the laws by which the property devolved, and the maxim therefore, had no application. *Winans v. Attorney-General*, 1910,

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A.C. 27. The maxim *mobilia sequuntur personam* has no application to the statute in question for the reasons stated in the Winans decision.

13. In *Lambe v. Manuel*, 1903, A.C. 68, the maxim was applied because the duties were a tax on the succession and not on the property itself, and because the property taxed was situate within the taxing Province, and therefore the restrictions above referred to, of the British North America Act, had no application. In *Lovitt v. The King*, 1912, A.C. 212, the personal property taxed was also within the taxing Province, and the decedent was domiciled in another Province, and the Supreme Court of Canada held—43 S.C.R. 106—that the personal property was not taxable in New Brunswick because it was not property situate in New Brunswick, but was property situate in Nova Scotia where the decedent was domiciled. This was also argued before the Judicial Committee, and Lord Robson stated, at page 220 :—

“The defendants however contend that the situation of the property is to be determined not by its actual locality but according to the principle expressed in the maxim *mobilia sequuntur personam*.”

As above stated, the New Brunswick statute was held to be a tax on the property, and not on the succession, and the Judicial Committee held that the situs of the property was in the Province where it was actually situate, and not in the Province where the owner was domiciled at the time of his death. It was held that the New Brunswick statute excluded the application of the maxim. The statute did not expressly exclude the maxim but excluded the maxim because the duties were a tax on the property passing and not on the succession. In both of these Canadian cases the personal property taxed was situate within the taxing Province, but the principle also applies to the situs of the personal property where it is situate outside the taxing Province. The maxim is not applicable to give the outside personal property a situs within the taxing Province. The English decisions whereby personal property locally situate outside of England was held liable to the English Succession and Legacy Duties, are not authority as to the situs of such personal property, because there is no limitation on the taxing powers of the English Parliament such as those imposed upon the Provincial Legislatures of Canada, and in the English cases all it was necessary to determine was whether or not on the correct interpretation of the English statutes the outside personal property belonging to a decedent domiciled in England had been taxed, and it was not necessary to find that the outside personal property had a situs in England, and the English cases are therefore, not decisions on that

point. In *Woodruff v. Attorney-General for Ontario*, 1908, A.C. 508, the Canadian Judgment appealed from held that on the application of the maxim the outside personal property which was held by trustees residing outside the taxing Province did not have a situs within the taxing Province and were therefore, not subject to death duties, but that the outside personal property held by trustees residing within the taxing Province did have a situs within the taxing Province, and were subject to the duties. This decision was reversed by the Judicial Committee, and Lord Collins, in delivering
 10 the Judgment held that there was no distinction between the two classes of outside personal property. The reference to the Woodruff decision in the Cotton decision does not overrule the Woodruff decision, and does not conflict with the Woodruff decision because the Cotton decision is on the entirely different question of indirect taxation. The "special circumstance" that the personal property had actually been transferred by the deceased prior to his death can have no bearing on the principle laid down as to the situs of the outside personal property. The Woodruff decision is also authority
 20 that where the personal property is situate outside the taxing Province, the above-mentioned restrictions of the British North America Act exclude such property from taxation by any Province other than the Province in which the personal property is locally situate, and this excludes the application of the maxim in any event.

14. There are no decisions of the Judicial Committee, and no unreversed decisions of the Supreme Court of Canada applying the maxim to render liable to death duties personal property situate outside the taxing Province. With reference to the decisions mentioned in the dissenting Judgment, *Alleyn-Sharpley v. Barthe*, 1922, A.C. 227, excludes the application of the maxim because the
 30 maxim is concerned only with the domicile of the decedent, and if the application of the maxim was the determining factor, the duties would have been payable when the decedent was domiciled within the taxing Province even if the beneficiary was not. Then the transmission would not be wholly within the Province, and would not come within the decision. In *Lambe v. Manuel*, 1903, A.C. 68, the personal property was situate within the taxing Province, and the tax was on the succession. In *Smith v. Provincial Treasurer of Nova Scotia*, 58 S.C.R. 578, the personal property had an actual situs within the taxing Province (see *Brassard v. Smith*, 1925, A.C. 371) and
 40 although some members of the Court held the maxim applicable, the decision of the Court was based on the personal property having an actual situs within the Province (see *Smith v. Levesque*, 1923, S.C.R. 578). In *Attorney-General of Ontario v. Baby*, 60 O.L.R., when the case

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reached the Court of Appeal it was decided on the grounds that the duty was on the succession within the Province, and not on the property outside the Province, and that it came within the Alleyne-Sharples decision. In re *Succession Duty Act and Walker*, 30 B.C.R. 549, the Trial Judge reluctantly applied what he in error considered the decision in *Smith v. Provincial Treasurer of Nova Scotia*.

15. By expressly taxing the outside personal property the statute in question excluded the maxim. *Winans v. Attorney-General*, 1910, A.C., at page 34.

16. The Executors submit that the duties on the outside 10 personal property are also invalid on the ground that they are "indirect taxation". This question is dealt with on the Second Appeal, and the Executors submit that the following paragraphs with reference to the duties on the property situate within the Province apply equally to the duties in question on this Appeal. The statute makes the same provision for the collection of all the duties. The only distinction is Section 9 and as stated in paragraph 9, that does not apply in this case as it only applies where the outside personal property does not first come into the hands of the Executors. 20

SECOND APPEAL.

p. 41.

17. This is an appeal by the Executors from the portion of the Judgment of the Appellate Division holding the duties imposed on the property of the testator situate within the Province to be "direct taxation" and valid.

18. In *Rex v. Cotton*, 1914, A.C. 176, the distinction between "direct" and "indirect taxation" is stated as follows:—

"A direct tax is one that 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 30 indemnify himself at the expense of another."

This follows previous decisions. Whether the duties are direct or indirect taxation depends upon the method of collection.

19. The burden of the duties in question is intended to be borne by the beneficiaries. Section 37 authorizes the executors to sell or pledge a portion of the share of each beneficiary to provide the duties. The beneficiaries are not made liable for the duties in question. Section 45 applies only to property which does not come into the hands of the executors, and in this case all the property came into the hands of the Executors. Section 9 applies only to 40

property situate outside the Province. The Executors respectfully submit that the duties are therefore not "direct taxation".

20. Death duties for which the executors of the estate are required to become personally liable are "indirect taxation". *Rex v. Cotton*, 1914, A.C. 176, as explained in *Burland v. The King*, 1922, A.C. 215. The Executors adopt the Judgments of the Supreme Court of Canada in *Manitoba Grain Futures Taxation Act*, 1924, S.C.R. at page 328:—

10 "The case of *Cotton v. The King* may be referred to as showing that in
 "the view their Lordships took of the statute, the tax was indirect because the
 "person who paid it, notary or executor, would naturally call upon the
 "beneficiary for whom he was acting, to recoup him, and thus their Lordships
 "considered that the case came within the definition of an indirect tax which
 "they adopted."

and at page 330:—

20 "In *Cotton v. The King* the Act provided that executors, administrators
 "and trustees should be personally liable for the duties chargeable in respect
 "of the estates which they represented. The Privy Council held in that case
 "that this was an attempt to impose taxation upon persons who were intended
 "not themselves to bear the burden but to be recouped by someone else and
 "that the taxation was therefore indirect and the act *ultra vires*."

This decision was affirmed by *Attorney-General for Manitoba v. Attorney-General for Canada*, 1925, A.C. 561.

21. The duties in question can be collected only from the Executors personally, and their surety, in an action on the bond set forth in paragraph 8 of the Special Case. There is no other source from which the Province can collect these duties. The Province cannot collect the duties from the beneficiaries or out of the property.

30 22. The Executors being nominated executors in the testator's
 Will, and having elected to act, were obligated to administer the
 property of the testator in accordance with the terms of the Will.
 They could not so administer the property without obtaining p. 4.
 Probate. Part of the property consisted of real estate, and by
 Sections 109, 110 and 111 of the Land Titles Act, Chapter 133,
 Revised Statutes of Alberta, 1922, the Executors could not give title
 to the real estate, or administer the real estate, until they had
 obtained Probate. Part of the property consisted of shares in
 Alberta companies, and the Executors could not give title to or
 administer these shares without Probate, as under Section 32 a
 40 company permitting a transfer of the shares would become liable
 for the duties. Part of the property consisted of debts owing to the

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estate, and the Executors could not enforce payment or obtain Judgment for these until Probate had been obtained. The Executors derived their power under the Will, but their title to any of the assets, or their right to administer or deal with any of the assets, is not recognized at law until Probate is granted. *Chetty v. Chetty*, 1916, 1 A.C. 603, at pages 608-9. There was therefore, an obligation on the Executors to apply for Probate and to do all matters and things necessary to obtain Probate. Failure to have done so would have left them liable in damages for their failure to properly administer the estate.

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p. 4. **23.** The Executors did apply for Probate, and as required by Section 11, filed Affidavits of Value of the property of the testator, and the relationship of the beneficiaries. The Province then fixed the amount of the duties and, pursuant to Section 12, demanded payment of the amount so fixed, or the giving of a bond therefor in the form provided by the statute. Under Section 15 Probate could not be issued without the consent of the Provincial Treasurer and to obtain such consent the applicant had to pay the duties or give the bond. The Executors were unable to pay the duties out of the testator's property because, as above stated, they could not obtain or give title prior to Probate. Even had the Executors been able to dispose of some of the corporate securities, had they done so they would have become personally liable for the duties under Section 13 as a penalty, and would have been unable to recover the duties from the estate. *Erie Beach v. Attorney-General of Ontario*, 1930, A.C. 161. Section 13 provides for security other than by a bond, but this only applies where the Provincial Treasurer is satisfied that the applicants could not obtain a surety, and the Executors could obtain a surety. The Executors were therefore, obligated to give the bond.

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p. 5. **24.** The Executors did give the bond set forth in paragraph 8 of the Special Case. The bond is in the form prescribed by the statute, and under Sub-section 2 of Section 13, all the parties to the bond are jointly and severally liable. The Company signing the bond is a surety, and the Executors are personally liable to indemnify the surety. The Province accepted the bond and Probate was issued to the Executors. All the property within the Province came into the hands of the Executors. The Executors thus became personally liable for all the duties and upon the expiration of the time allowed for the payment of the duties or such further time as the Province may see fit to extend, the Executors may be sued for the amount of the duties as in *United States Fidelity & Guarantee Co. v. The King*, 1923, A.C. 808.

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25. The Province may be entitled to demand payment of death duties as a condition to the grant of Probate, but this does not override the provisions of the British North America Act, and the duties so demanded must be collected as a direct tax; that is, they must be collected from the persons who are intended to bear the tax, and not from the Executors.

26. The duties are imposed as a tax on the property, and Section 16 provides that the duties are payable out of the share of each beneficiary according to the rate applicable to each beneficiary, 10 but it is only the executors who, under Section 37, are given power to sell or pledge a portion of such share to provide for the duties. Neither the Province nor any revenue officer of the Province has that power. There is no provision in the statute for realizing the duties out of the property, corresponding to Sub-section 13 of Section 8 of The Finance Act, 1894. Other taxes on property imposed by the Legislature of Alberta are collectible under the Tax Recovery Act, Revised Statutes of Alberta, 1922, Chapter 122, but that statute does not apply to the duties in question. Under Section 24 20 the Province is given a lien on the property but this lien is only to give protection until application is made for Probate and before Probate is granted the lien ceases and the property is released under Section 25. It could not be the intention of the Act that the duties should be realized under the lien or out of the property because the provisions with respect to a lien, and all the other provisions of the statute, including Section 16, apply equally to the personal property situate outside the Province, and to the property within the Province, and the Province could not enforce its lien or recover the duties out of property situate outside the Province. It is not the intent of the 30 statute that the estate be administered subject to the lien, and the duties paid in the course of administration because, before Probate is granted, the Executors must either pay the duties or give a bond, and in either case the lien ceases. The scheme or intent of the statute is that the duties should be collected from the Executors. Retaining control over the property of the estate until the duties are paid does not prevent the duties being indirect taxation because the statute imposing the duties held to be indirect taxation in the Cotton case provided that "no transfer of the property 40 "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 " shall consent to any transfer unless "the duties have been paid". This provision continued even after the executor had made the declaration. This gave the Province of

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Quebec at least as much control over the property as the statute in question gives to the Province of Alberta.

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27. The Judgment of a majority of the Appellate Division was delivered by Mr. Justice Ford, and the basis of his Judgment is stated on page 49 of the Record :—

p. 49, l. 1.

“I am of the opinion that the case at bar is clearly distinguishable from the ‘Cotton and Burland cases, and that it is not distinguishable from the Barthe case. Being governed by the Judgment in the Barthe case the tax is not ‘only ‘direct taxation’ but taxation ‘within the Province.’”

The Executors respectfully submit that this case is distinguishable 10
from the Barthe case in that under the statute in question the executor is required to become personally liable for the duties, while the statute considered in *Alleyn-Sharples v. Barthe* provided :—

“No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, trustee or 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”.

This clearly provides that the executor does not become personally 20
liable for the duties, and as stated by Lord Phillimore :—

“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.”

Since the Cotton decision all the other Provinces have made similar amendments to relieve the executor from personal liability for the duties, except only Alberta and British Columbia, and in British Columbia the executor's bond is taken only upon executors making application that their bond be accepted, and the bond of a surety 30
company without the executors may be given. The Executors respectfully submit that the Appellate Division was in error in holding that this case was governed as to “indirect taxation” by the decision in *Alleyn-Sharples v. Barthe*.

28. The ground on which the Appellate Division distinguished the Cotton case was that the Quebec statute considered in the Cotton case imposed an obligation on the Executors to make the declaration referred to in the statute, and to thus become liable for the duties, and that under the Alberta statute there was no obligation on the

executor to make application for probate. The Executors respectfully submit that the Cotton decision cannot be distinguished on that ground. An Executor always assumes the obligation of his office voluntarily. A person nominated as executor may renounce and no liability or obligation attaches to him. Persons nominated in a Will as executors do not become executors until they elect to act. "Executor" where used in Section 6 of the Quebec statute refers to a person who is actually an executor; that is, to a person who has elected to act; but does not apply to a person who is merely
 10 nominated as executor in the Will, but who has renounced. The obligation under the Alberta statute is much greater than the obligation under the Quebec statute considered in the Cotton case. Under the Quebec statute the making of the declaration was not a condition precedent to the administration of the estate. If the executor did not make the declaration he did not become liable for the duties, and he was only liable to a penalty of \$100.00 under Section 7 of the Quebec statute. Under the Alberta statute the Executors were obligated to apply for Probate, and to either pay the duties or become personally liable for them, or they could not administer the estate,
 20 and if they did not administer the estate they became liable for all the damages resulting, which might be the total value of the estate.

29. The Judgment of the Honourable Mr. Justice Clarke holds p. 42. that the Appellate Division was bound by its previous decision in re: *Cust*, 8 A.L.R. 308, and the Honourable Mr. Justice Lunney followed the *Cust* decision. In that decision the Appellate Division p. 63. held that the Cotton decision applied only to duties imposed on personal property situate outside the Province, and did not apply to duties imposed on property situate within the Province, and that the question as to whether duties imposed on property within the
 30 Province were "direct" or "indirect" was governed by *Rex v. Lovitt*, 1912, A.C. 212. The *Cust* decision further held that the Cotton decision only applied to duties payable by a notary who did not have the property of the estate in his hands, and that it did not apply to duties payable by an executor, as the executor did have the property of the deceased in his hands. The *Cust* decision was delivered prior to *Burland v. The King*, 1922, A.C. 215. at a time when the Cotton decision had, as stated in the *Burland* decision, "evidently given
 40 "rise to misunderstanding in the Province." The Executors respectively submit that the *Burland* decision overruled the *Cust* decision and established that the principles laid down in the Cotton decision apply to death duties payable by executors as well as those payable by a notary, and that they apply to duties imposed on property

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within the taxing Province as well as to duties imposed on property situate outside the taxing Province. The Executors further respectively submit that the fact of the Executors having the property of the testator in their hands, and possibly being able to pay the duties out of the property and not out of their own moneys, does not affect the question of indirect taxation, as under the statute considered in the Cotton decision the Executors would have the property in their hands for at least four months before the duties would be payable, and during that time might be able to pay the duties out of the property. The Executors further respectfully submit that the 10 Executors being the legal owners of the property does not affect the question of indirect taxation as they are not the beneficial owners of the property, but hold the property in trust only, and making an agent or trustee liable for duties payable out of the property or assets held in trust or belonging to a principal is indirect taxation, *Attorney-General for Manitoba v. Attorney-General for Canada*, 1925, A.C. 561. The Executors further respectfully submit that the Lovitt decision governs only the question of "taxation within the Province" and does not govern the question of "indirect taxation" as shown by the reference to it in the Cotton decision. "Indirect taxation" is 20 not referred to in the Lovitt decision.

The Executors therefore respectfully submit:—

FIRST that the Judgment of the Appellate Division holding the duties imposed on the personal property situate outside the Province to be invalid, should be affirmed for the following among other

REASONS.

- (1) Because the British North America Act restricts the taxing powers of the Provincial Legislature to "direct taxation within the Province."
- (2) Because a tax on personal property situate outside the 30 taxing Province is not taxation within the Province.
- (3) Because the duties in question are imposed as a tax on the personal property situate outside the Province, and are not a tax upon the succession or transmission within the Province.
- (4) Because the duties are also indirect taxation for the reasons stated in the Second Appeal.

SECOND that the Judgment of the Appellate Division on the Second Appeal, holding the duties imposed on the property within the Province to be valid, should be reversed for the following among other

RECORD.

REASONS.

- (1) Because the British North America Act restricts the taxing powers of the Provincial Legislature to "direct taxation."
- 10 (2) Because a direct tax is one that is demanded from the very person who it is intended or desired should pay it.
- (3) Because the persons upon whom the burden of the duties falls are the beneficiaries sharing in the distribution of the estate.
- (4) Because the duties are not made payable by such beneficiaries.
- (5) Because indirect taxes are those demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.
- 20 (6) Because death duties for which executors are required to become personally liable are indirect taxation.
- (7) Because the Executors are obligated to apply for Probate and to obtain Probate the statute requires the Executors to either pay or become personally liable for the duties.
- (8) Because the scheme of the Act is that the duties be collected from Executors and they are not collectible from any other source.
- 30 (9) Because the Executors are not the persons intended or desired to pay the duties, and are authorized to indemnify themselves out of the shares of the estate going to the beneficiaries, but the scheme of the statute is that the duties should be collected from the Executors.

W. H. McLAWS.

In the Privy Council.

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 EXECUTORS.

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