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.*)

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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(*Consolidated Appeals.*)

RECORD OF PROCEEDINGS.

No. 1.

Special Case.

No. 1. Special Case, 17th May 1932.

Suit No. 33816.

IN THE SUPREME COURT OF ALBERTA.
JUDICIAL DISTRICT OF CALGARY.

Between

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

and

10 THE PROVINCIAL TREASURER OF ALBERTA and THE ATTORNEY GENERAL OF ALBERTA - - - - *Defendants.*

The above-named parties concur in the following Statement of Facts :—

(1) Isaac Kendall Kerr, late of the City of Calgary, in the Province of Alberta, died at Calgary, aforesaid, on the 3rd day of December, 1929, and at the time of his death was domiciled in the Province of Alberta.

No. 1. Special Case, 17th May 1932—*continued.*

(2) The property owned by the said Isaac Kendall Kerr at the time of his death consisted of—

(*a*) Certain personal property of the aggregate value of $265,703·58 composed of shares and other securities of various Companies which had no Head Office in the Province of Alberta, and none of which had any registration or transfer office within the said Province, together with other personal property locally situate outside of the said Province. The share certificates and other documents evidencing such shares and other securities were found in the City of Calgary, in the Province of Alberta.

(*b*) Certain real property and personal property having an aggregate value of $274,697·03. The real property is situate within the Province of Alberta and the personal property consists of shares and other securities in Companies with Head Office and transfer office situate within the Province of Alberta, and other personal property locally situate within the said Province.

(3) Within two years prior to his death the said Isaac Kendall Kerr transferred to Clara E. Kerr, one of the Plaintiffs, certain real estate situate within the Province of Alberta, together with certain personal estate.

(4) The said Isaac Kendall Kerr, by his Last Will and Testament, appointed the Plaintiffs Executrix and Executor of the said Last Will, and the Trustees of his estate, and, by his said Will, devised to his widow, Clara E. Kerr, one of the Plaintiffs, personal property situate within Alberta to the value of $7,000·00, and directed that the remainder of his property be held upon trust to pay to his said widow, during her lifetime, all of the income thereof, for her sole use and benefit, and from and after her death, to pay the entire annual income thereof to Isaac Kendall Kerr, Jr., during his lifetime, and from and after the death of the said Isaac Kendall Kerr, Jr., to pay the said annual income to the grandchildren of the said Isaac Kendall Kerr during their lifetime, or until twenty-one years after the death of the last of his said grandchildren, living at the time of his death, whichever should be the shorter period, and upon the expiration of such time to divide the remainder of his property among the surviving grandchildren.

(5) The said beneficiaries, Clara E. Kerr and Isaac Kendall Kerr, Jr., are both domiciled and resident within the Province of Alberta.

(6) The Plaintiffs, with their application for Probate of the said Last Will and Testament of the said Isaac Kendall Kerr, filed, in accordance with the provisions of Section 11 of the Succession Duties Act, being Chapter 28 of the Revised Statutes of Alberta, 1922, and Amendments thereto, affidavits of the value of the property owned by the said Isaac Kendall Kerr at the time of his death, and of the relationship of the beneficiaries, and upon the receipt thereof the Defendant the Provincial Treasurer of Alberta, pursuant to the provisions of Section 12 of the said Statute and Amendments thereto, fixed the sum of $54,754·21 as the duties payable under the said Statute and Amendments thereto, with respect to all the property referred to in Paragraphs 2 and 3 hereof, which said duties are levied under Section 7.

(7) The Defendants, pursuant to Section 12 of the said Statute, required payment of the sum so fixed, or the delivery of a bond for the sum of

No. 1.
Special Case, 17th May 1932—*continued.*

$60,000·00 in the form provided in the said Statute, to secure the payment thereof.

(8) In compliance with the request of the Defendants, a bond was given in words and figures following :—

" IN THE MATTER OF THE ESTATE OF ISAAC KENDALL KERR,
" late of the City of Calgary, in the Province of Alberta, Gentleman,
" deceased.

" KNOW ALL MEN BY THESE PRESENTS that we, Clara Emma
" Kerr, of the City of Calgary, in the Province of Alberta, Widow,
" and William Henry McLaws, of the City of Calgary, in the Province
" of Alberta, Barrister and Solicitor, and the Alliance Assurance
" Company Limited of London, England, a Guaranty Company duly
" incorporated and authorized to carry on business in the Province
" of Alberta, are jointly and severally held and firmly bound unto
" the Treasurer of the Province of Alberta, representing His Majesty
" the King in that behalf, in the penal sum of Sixty Thousand
" ($60,000·00) Dollars, for which payment well and truly to be made,
" we bind ourselves and each of us, for the whole and not for a part,
" and our and each of our heirs, executors, administrators, successors
" and assigns, firmly by these presents.

" Sealing with our seals, the corporate seal of the Guaranty
" Company being duly attested by the proper officers thereof.

" The condition of this obligation is such that if the above-named
" Clara Emma Kerr and William Henry McLaws, the Executrix and
" Executor of the Will of Isaac Kendall Kerr, late of the City of
" Calgary, in the Province of Alberta, deceased, who died on or
" about the 3rd day of December, A.D. 1929, domiciled at the City
" of Calgary, in the Province of Alberta, do well and truly pay, or
" cause to be paid to the Treasurer of the Province of Alberta for
" the time being, representing His Majesty the King in that behalf,
" any and all duty to which the property of the said the late Isaac
" Kendall Kerr coming into the hands of the said Clara Emma Kerr
" and William Henry McLaws, may be found liable under the
" provisions of The Succession Duties Act, within one year from the
" date of the death of the said Isaac Kendall Kerr, or within such
" further time as may be given for payment thereof under the
" provisions of the said Act, then this obligation shall be void and of
" no effect, but otherwise shall be and remain in full force and effect.

" Signed, Sealed and Delivered
" in the presence of :—
" D. L. REDMAN.

CLARA E. KERR,
Executrix of the Will of Isaac Kendall Kerr, deceased.
W. H. McLAWS,
Executor of the Will of Isaac Kendall Kerr, deceased.
ALLIANCE ASSURANCE COMPANY LIMITED by E. E. Kenyon."

The said bond is still in full force and effect.

No. 1. Special Case, 17th May 1932—*continued.*

(9) Pursuant to the provisions of Section 15 of the said Statute, the Defendant the Provincial Treasurer of Alberta approved of the said bond and consented to the issuing of Letters Probate, and Letters Probate were issued by the District Court of the District of Calgary dated the 27th day of May, 1930, to the Plaintiffs, and all the properties owned by the said Isaac Kendall Kerr at the time of his death and referred to in Paragraph 2 hereof passed into the hands of the Plaintiffs, who obtained title thereto in their representative capacities.

(10) The Plaintiffs dispute the validity of the duties imposed by the said Statute and Amendments thereto, with respect to the property belonging to the said Isaac Kendall Kerr at the time of his death, referred to in Paragraph 2 hereof, all of which the Plaintiffs assert came into their hands as Executrix and Executor of the said Will, on the grounds that the said duties are not direct taxation within the Province, and are therefore *ultra vires* the Legislature of the Province of Alberta.

The following questions are submitted for the opinion of this Honourable Court :—

(1) Whether or not the succession duties levied in respect of the property mentioned in sub-section (*a*) in Paragraph 2 of the Special Case are valid and payable to the Defendants or either of them.

(2) Whether or not the succession duties levied in respect of the property mentioned in sub-section (*b*) in Paragraph 2 of the Special Case are valid and payable to the Defendants or either of them.

Dated this 17th day of May, A.D. 1932.

McLaws, Redman, Lougheed & Cairns,
Solicitors for the Plaintiffs.

H. J. Wilson,
Solicitor for the Defendants.

No. 2. Order of Clarke J., permitting Special Case to be heard, 28th May 1932.

No. 2.

Order of Clarke J., permitting Special Case to be heard.

Suit No. 33816.

In the Supreme Court of Alberta.
Judicial District of Calgary.

Between

Clara E. Kerr and William H. McLaws Executrix and Executor of the Will of Isaac Kendall Kerr, deceased *Plaintiffs*

and

The Provincial Treasurer of Alberta and The Attorney General of Alberta - - - - *Defendants.*

Dated at the Court House, Calgary, Alberta, Saturday, the 28th day of May, A.D. 1932.

Before the Honourable Mr. Justice Clarke.

No. 2. Order of Clarke J., permitting Special Case to be heard, 28th May 1932—*continued.*

UPON the application of the Plaintiffs: UPON reading the consent hereto of the Defendants:—

IT IS ORDERED that the parties hereto have leave to state for the opinion of the Court, the questions of law arising in the Special Case hereto attached.

AND IT IS FURTHER ORDERED that the said Case be set down for hearing at the sittings of the Appellate Division of the Supreme Court of Alberta, commencing upon the 6th day of June, A.D. 1932, at the City of Calgary in the Province of Alberta.

A. H. CLARKE, J.S.C.

Consented to:—

McLaws Redman Lougheed & Cairns,
Solicitors for the Plaintiffs.

H. J. Wilson, Solicitor for the Defendants.

No. 3.

Plaintiffs' Factum.

No. 3. Plaintiffs' Factum, 31st May 1932.

The facts are admitted by both parties and are set forth in the Stated Case.

The question of law raised is whether the duties imposed by The Succession Duties Act, Chapter 28, R.S.A. 1922 and Amendments thereto, come within the restricted powers of Provincial Legislatures contained in 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."

The Stated Case divides the property into three classes—(*a*) property within the Province; (*b*) personal property outside the Province and (*c*) property transferred by the testator prior to his death.

The duties imposed on or with respect to the property transferred by the testator prior to his death are not questioned because the property is all within the Province and the duties are not made payable by the executors, and are not secured by the bond, and under Section 45 are payable by the beneficiaries or out of the property.

FIRST. THE DUTIES IMPOSED ON OR WITH RESPECT TO THE PROPERTY WITHIN THE PROVINCE ARE ULTRA VIRES AND VOID AS INDIRECT TAXATION.

Re: DIRECT AND INDIRECT TAXATION.

What constitutes direct and indirect taxation has been defined by the Privy Council as follows:—

> "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."

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

Rex v. *Cotton*, [1914], A.C. 176 at pages 190 to 193.

Whether a tax is direct or indirect depends solely on the method of collection. Any tax may be rendered void by the Legislature adopting an indirect method of collecting it.

The powers of the Provincial Legislature to impose succession duties on property within the Province are not disputed, but it is contended that the method of collecting such duties adopted by the Statute in question is indirect, and that this method of collection renders the duties void.

Re: METHOD OF COLLECTION.

The duties are imposed by Section 7, which provides :—

> " all property of the owner thereof situate within the Province, and, in the case of an owner domiciled in the Province, all personal property of the owner situate outside the Province and passing on his death, shall be subject to succession duties at the rates set forth in the following table . . . "

The executors, before the issue of Letters Probate, are required to either pay or give a bond to secure the payment of the duties on all property which comes into their hands.

Sections 11, 12 and 13 provide as follows :—

> " 11.—(1) On all applications for letters probate . . . the applicant, or one of the applicants, shall . . . make and file . . . affidavits of value and relationship with inventories annexed . . . "
>
> " 12. The Clerk shall . . . forward one of such affidavits to the Provincial Treasurer, who shall determine the amount (if any) in which the property or any part thereof is subject to succession duty . . . and shall, as soon as may be, either require immediate payment, or the giving of security therefor by bond in form 2 of the Schedule hereto . . . "
>
> " 13.—(1) Every bond required to be given under the last preceding section . . . shall be conditioned for the due payment to His Majesty of any duty to which the property of the deceased coming into the hands of the said applicant or applicants, is or may be found liable . . .
>
> (2) Every such bond shall be executed by the applicant or by all the applicants if there is more than one . . . and the parties executing the bond shall be bound jointly and severally in the whole amount of the penalty thereof . . . "

The executors gave a bond which is set forth in Paragraph 8 of the Stated Case.

Under this bond the executors became personally liable for the duties on all property which came into their hands, and the duties may be recovered in an action against them, under Section 31.

United States Fidelity & Guarantee Company v. *The King*, 64 S.C.R. 48 and [1923], A.C. 808.

No. 3, Plaintiffs' Factum, 31st May 1932—*continued.*

This was an action under the British Columbia Statutes, but the provisions of the British Columbia Statute for the giving of the bond, and the form of the bond, are the same as under the Statute in question and Section 31 of this Statute corresponds to Section 42 of the British Columbia Act.

S.s (2) of Section 13 was not in the Ordinance considered by this Court *in re ; Cust* referred to later, or in the Statute considered in the *Lovitt* case later referred to, and some question was raised by this Court and the Supreme Court of Canada as to whether the bond was not only for the due administration of the estate. This subsection and the above decision settles that question.

The Bond required by the Statute and given in this case makes the executors liable in their personal capacities and not in a representative capacity. The bond must be executed and delivered to the Provincial Treasurer before Letters Probate or Letters of Administration are issued. Applicants for Letters of Administration could not give a bond in their representative capacity before Letters of Administration are issued to them. The section applies equally to applicants for Letters Probate and to applicants for Letters of Administration. The section also provides that the applicants, if more than one, and the surety, are bound jointly and severally.

The obligation, in the enacting clause of the bond, is by the executors in their personal capacity, and the surety. The addition of their descriptions after their signatures does not make it an obligation in their representative capacities only.

> " 15. Upon . . . the approval of any bond or other security taken to secure the payment thereof, the Provincial Treasurer shall . . . consent to the issuing of letters probate . . . but in no case shall letters be issued or resealed until such consent is given."
>
> " 16. The duties imposed by this Act shall be payable out of the share of each person or beneficiary entitled to share in the property of the deceased according to the rate applicable as aforesaid to such person or beneficiary."
>
> " 19. Where the property subject to succession duty includes any future contingent estate, income or interest, the duty on such estate, income or interest may be paid within the time limited by Section 24 . . . The duty on any future or contingent estate, income or interest, if not sooner paid as in this section provided, shall be payable forthwith when such estate, income or interest comes into possession . . ."
>
> " 24. Save as otherwise provided herein the duties imposed by this Act shall be due and payable on the death of the deceased or within six months thereafter . . . and the property in respect of

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

which such duties are payable shall be subject to a lien in favour of the Provincial Treasurer until the duties, together with interest thereon, are paid."

"31. Any sum payable under this Act shall be recoverable with costs of suit as a debt to His Majesty from any person liable therefor by action in the Supreme Court of the Province . . ."

"37. Executors, administrators and trustees shall have power to sell, pledge, mortgage, lease or otherwise dispose of so much of the share of any beneficiary as will permit the payment of the proper succession duties thereon."

Sections 46, 47 and 48 provide for the filing of a notice of lien in the Land Titles Office, and thereupon lands and mortgages cannot be dealt with, but the Crown may claim a lien without filing such notice.

Sections 9 and 45 provide for the beneficiaries paying certain duties, but the former only refers to duties on personal property outside the Province, and the latter to duties on property transferred by the deceased prior to his death, and therefore have no bearing on this part of the case.

It is the beneficiary upon whom the burden ultimately and indirectly falls as the duties are intended to be ultimately realized out of the shares in the property of the deceased to which the beneficiaries are entitled.

The duties on the property within the Province are not made payable by the beneficiaries. The beneficiaries are not personally liable, and the duties could not be recovered from them.

Section 19 of the Ordinance in force prior to this Statute authorized the executors to collect the duties from the beneficiaries, but that section was omitted from the Statute in question, and under this Statute the executors are only authorized to sell or pledge part of the shares of the beneficiaries.

The only section of the Statute providing for the realization of the duties is Section 31 above quoted and that authorized an action against the persons liable for the duties.

The only persons from whom the duties can be collected are the executors and their surety under the bond.

The English Statutes imposing death duties make the duties payable by the executors. The early Canadian Statutes all followed the English Statutes and made the executors liable for the duties. The British Parliament is not subjected to the limitations upon its taxing powers imposed upon the Legislatures of the Canadian Provinces by the British North America Act. The validity of the Canadian duties was therefore, questioned, and the Privy Council has held in decisions herein referred to that succession duties for which executors are required to become personally liable are ultra vires and void.

Following these decisions all the Canadian Provinces except Alberta and British Columbia amended their Statutes by providing that the executors should not be liable for the duties in the first instance, but should

not transfer the property to the beneficiaries without deducting the duty, and if they did so transfer the properties, then the executors became liable for the duties as a penalty.

> "No executor or trustee shall, in the first instance, be personally liable to pay the duty on any property to which any legatee, donee or other successor is beneficially entitled but . . . shall not transfer such property to the person so entitled without deducting therefrom the duty to which such property is liable and any executor . . . who transfers such property without deducting the duty therefrom shall pay to the Treasurer the amount of such duty in respect of such property and interest thereon . . ." R.S.O. 1927, c. 26, s. 22.

Similar provisions will also be found in:—

Man. 1930, c. 38, s. 22.
R.S. Sask. 1930, c. 37, s. 50.
P.E.I. 1925, c. 5, s. 11.
R.S. Nova Scotia, 1923, c. 18, s. 11.
R.S. New Bruns. 1927, c. 15, s. 22.

See also the Quebec Statute referred to on page 22.

The liability of the executors under s.s. (2) of Section 13 (quoted on page 8) and under the bond, is not a penalty, as under Section 37 the executors can realize the amount for which they are liable out of the estate. The liability of executors under the bond differs from their liability under Sections 17 and 32 of the Statute in question. There the executors may become liable for the duties as a penalty. Such penalty is not recoverable by the executors from the estate or the beneficiaries. The liability of executors under the Statutes of the other Provinces is a penalty and is not indirect taxation.

Erie Beach v. *Attorney General of Ontario* [1930], A.C. 161.

Other Provinces also amended their Statutes by making the duties payable by the beneficiaries:—

> "Every heir, legatee, donee or other successor and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as passes to him." R.S.O. 1927, c. 26, s. 12.

Similar provisions will also be found in:—

Man. 1930, c. 38, s. 12.
R.S. Sask. 1930, c. 37, s. 23.
R.S. Nova Scotia, 1923, c. 18, s. 10.
R.S. Que. 1925, c. 27, s. 13.
P.E.I. 1925, c. 5, s. 10.

No such amendments were made to the Statute in question. After the commencement of this action a new Act was then enacted and Sections 10 and 17 contain provisions similar to those above quoted. The new Statute however, does not apply to this action (*see* Section 2), and the

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

Statute in question, and under which probate was granted to the Plaintiffs, required the Plaintiffs to become personally liable for the payment of the succession duties before Letters Probate could be granted to them.

In *Attorney General for Quebec* v. *Reed*, 10 A.C. 141, the Privy Council held that law stamp taxation imposed for the purpose of raising a revenue for Provincial purposes, and not solely for the maintenance of the Courts, was indirect taxation if required to be paid by parties to litigation in which it would be decided later which party would ultimately bear the cost.

The duties in question in this action are taxation for the raising of revenue for Provincial purposes. Under Section 80 of the University Act, one-half of the duties go to the University of Alberta.

The principle laid down in the *Reed* case therefore applies to these duties.

Rex vs *Cotton* [1914], A.C. 176, as explained and applied in *Burland* v. *The King*, [1922], A.C. 215, is the binding decision on direct and indirect taxation as applied to succession duties.

Rex v. *Cotton* [1914], A.C. 176.—The Quebec Statute considered provided that every heir, legatee, executor, trustee and administrator or notary before whom a will was executed, or some one of them, should forward to the Collector of Provincial Revenue an affidavit of value and relationship, and it then provided :—

> " (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, or 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."

The decision of the Board was delivered by Lord Moulton, who stated in part :—

> " 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." . . .

"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."

In November of the same year the question of indirect taxation was raised in this Province *in re : Cust*, 8 A.L.R. 39. The Trial Judge, the late Mr. Justice Beck, in delivering Judgment stated :—

"A careful consideration of the Ordinance in the light especially of *Cotton* v. *Rex* [1914], 1 A.C. 176; 15 D.L.R. 283, leads me to the conclusion that the Ordinance is ultra vires of the Provincial Legislature even when confined to the case of the estate of a person domiciled at the time of his death within the Province where the whole of the property comprising the estate is then also within the Province. I come to this conclusion for the reason that it seems to me that the theory upon which the Act is framed is, that the executor or administrator is made primarily liable for the duties imposed and is to look for indemnity to the several and respective devisees, legatees or other beneficiaries, that in intent and in effect the duty is to be raised not as—and the case does not correspond to the case of—a tax primarily and directly against property with a secondary or subsidiary legal obligation to pay upon the legal or beneficial owner, occupier or possessor—for it could not have been intended to make a direct tax against property outside the Province and the intent of the Ordinance in respect of property, whether within or without the Province, is the same; and if this is the proper interpretation of the Ordinance the Ordinance is an attempt to impose—not a direct but an indirect tax, which is beyond the power of the province. In my opinion therefore, no succession duty is collectible by the Crown."

The Ordinance referred to is the Succession Duty Ordinance in force in this Province up to 1914. The provisions of this Ordinance with respect to the property subject to duties, and the bond required to be given by the executors, correspond in all material respects with the Statute in question in this action.

With the above exception Canadian Courts did not apply the *Cotton* decision. This Court reversed the Judgment of Beck, J., *in re : Cust*, 8 A.L.R. 308. The appeal was not carried farther, but the Supreme Court

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

of Canada *in re : Muir*, 51, S.C.R. 428, and other cases, did not apply the *Cotton* decision for the same reasons as this Court, namely :—

(i) that the *Cotton* decision only applied to duties imposed on property situate outside the Province, and that the *Lovitt* decision applied to duties on property within the Province;

(ii) that it applied to a case where the duties were collectible from a notary who did not have the property in his hands, but did not apply in the case of an executor who was the legal owner of the property and had in his hands the property out of which to pay the duties;

(iii) That requiring an executor to pay the duties did not amount to indirect taxation, and that such duties had been held valid by the Privy Council in the *Lovitt* case;

(iv) that the *Cotton* decision was based on the interpretation of the Quebec Statute and the portion regarding indirect taxation was *obiter dictum.*

Burland v. *The King* [1922], A.C. 215.—The question of indirect taxation was again raised before the Privy Council in the *Burland* case which was an appeal from the Appeal Court of Quebec, on the same Statute.

The Privy Council not only reaffirmed its decision in the *Cotton* case, but also dealt with the grounds on which the Canadian Courts had not applied the *Cotton* case.

The Board held its decision in the *Cotton* case was not based on the fact that a notary might be required to pay the duties, but that it applied equally to an executor.

> " . . . and so the illustration drawn from the case of the notary cannot be taken to have been a reliable one; but the principle remains the same and could equally well have been illustrated by the case of the executor or administrator or legatee by a particular title. The error does not affect the force of the decision though their Lordships have thought it right to make this explanation as it has evidently given rise to misunderstanding in the Province."

Referring to the finding that the second grounds on which the *Cotton* case was based were *obiter dictum*, the Board stated :—

> " The decision that the Statute was ultra vires was in no sense a wayside dictum; it was just as complete and fundamental as the decision that bore on the construction of the Statute. The words used in the judgment itself make this clear."

Referring to the finding that the *Cotton* decision was only applicable to duties levied on the property outside the Province, the Board stated :—

> " . . . the fact that the authority to pass the law was challenged, though only associated with a limited relief, and a special case, was regarded as sufficient to compel the Board to consider the question of ultra vires in its widest application and not to bind themselves to consider only the one assigned reason of invalidity."

Subsequent to the *Burland* case the Supreme Court of Canada applied the law with respect to indirect taxation as stated in the *Cotton* case. *Manitoba Grain Futures Taxation Act*, [1924], S.C.R. 317.

> " In this respect the statute must, I think, on the authority of *Cotton's* case as explained and applied in the subsequent decisions, be held to be obnoxious to the restrictions imposed upon the provincial authority . . . in either case the tax in question would come within John Stuart Mill's definition of an indirect tax which the Judicial Committee in *Cotton* v. *The King* accepted as authoritative, for it is a tax which is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. That this is the character of the tax imposed by the Manitoba Statute I cannot doubt . . .
>
> " The case of *Cotton* v. *The King* may be referred to as showing that in the view of their Lordships took of the statute, the tax was indirect because the person who paid it, notary or executors, would naturally call upon the beneficiary for whom he was acting to recoup him, and thus their Lordships considered that the tax came within the definition of an indirect tax which they adopted."
>
> " 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 also settles that even if the executors are required to pay the duties as agents for the beneficiaries, the duties are still void because requiring an agent to become personally responsible for duties which he is not intended to personally bear, is indirect taxation.

The executors are the legal owners of the property of the testator, but they are not the beneficial owners and they hold the property in trust for the beneficiaries. To make the executors liable for duties which they can pay out of the trust property is indirect taxation, as the executors are in the same position as the agent in the decision just quoted. (See also page 17.)

The executors are however, not the agents of the Province for the collection of the duties. In the Ordinance considered by this Court *in re: Cust*, 8 A.L.R. 308, and in the Statutes considered by the Supreme Court of Canada *in re: Muir*, 51, S.C.R. 428, and by the Privy Council in the *Lovitt* [1912], A.C. 212 case, there were provisions for the collection of the duties from the beneficiaries.

> " Any . . . executor . . . having in charge or trust any estate, legacy or property subject to the said duty shall deduct the duty therefrom or collect the duty thereon upon the appraised value thereof from the person entitled to such property and he shall

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

not deliver any property subject to duty to any person until he has collected the duty thereon."

This provision was excluded from the Statute in question and the executors cannot demand payment of the duties from the beneficiaries. Their only power is in Section 37 to sell or pledge the shares of the beneficiaries to provide the duties.

Re : REALIZATION OUT OF THE PROPERTY.

Section 7 provides that " the property shall be subject to Succession Duties " and other sections refer to " the property subject to the duties." Section 16 provides that " the duties shall be paid out of the share of the beneficiaries in the property." Section 24 states the duties are a lien on the property. The amount of the duties varies with the value of the property.

In all these respects the Statute follows the English Statute imposing estate duties which is a tax on the property of a decedent and payable out of the property. Many of the sections are copied verbatim from the English Statute. The words used are also similar to other Alberta Statutes imposing taxes on property and payable out of property. But whether a tax is direct taxation or indirect taxation depends solely on the method of collection adopted (see page 8) and any tax otherwise valid may be rendered invalid if an indirect method of collection is adopted.

The method of collection provided in the Statute in question is entirely different from the English Statute it follows, or other Alberta Statutes taxing property.

The English Act* (Section 8, s.s. 13), provides :—

* 1894, 57 & 58 Vic., cap. 30.

> " Where any proceeding for the recovery of Estate duty in respect of any property is instituted, the High Court shall have jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property."

That the Crown, under the English Statute, depends on the duties being paid out of the property only is evidenced by the fact that the executors are not required to give a bond with a surety or any other security for the payment of the duties.

Every other Alberta Statute provides—principally under the Tax Recovery Act—that the lands or property taxed may be seized and sold to provide the taxes, and even when the taxes are collectible from the owner as a debt, the owner is not required to give a bond with a surety or other security. The property taxed is looked to for payment of the tax.

The Statute in question does not contain any provision authorizing the Crown to realize the duties out of the property.

The only section providing for proceedings to realize the duties is Section 31 which, as above stated, only authorizes an action against the persons liable for the duties.

The only section authorizing the realization of the amount of the duties out of the properties is Section 37 and that authorizes the executor

only to sell, pledge, etc., the share in the property to provide the amount of the duties.

The executors are authorized to sell or pledge a share of the property to provide the duties in order to indemnify themselves against their personal liability under the bond. The executors do not sell or pledge the property as the agents of the Crown either for the collection of the duties or for the realization of the lien. If they are, then making them personally responsible for the duties which they may pay out of trust property in their hands is indirect taxation which makes the taxation void.

Attorney General for Manitoba v. *Attorney General for Canada* [1925], A.C. 561, confirming *Manitoba Grain Futures* [1924], S.C.R. 317.

McLeod v. *City of Windsor* [1923], S.C.R. 696.

City of Windsor v. *McLeod* [1926], S.C.R. 450, at p. 457 :—

> " With the Appellate Divisional Court, we are of the opinion that the whole structure of the scheme for the imposition of taxes on income or in respect of income in the hands of persons in possession or control for the benefit of others depends on a system designed to make the trustee pay taxes which he is not intended to bear, but to obtain from other persons, and that consequently the tax sought to be imposed upon or collected from McLeod is an indirect tax, *ultra vires* of the Province, and illegal."

The giving of power of realization out of the properties to executors is inconsistent with any intention that the duties imposed by the Statute in question should be collected by the Crown out of the properties on, or with respect to which, they are imposed. Both the Crown and the executors could not be intended to be selling, etc., the same property at the same time to realize the same duties.

Canadian Northern Railway v. *The King*, 64, S.C.R. at page 275 :—

> " A law imposing taxation should always be construed strictly against the taxing authorities, since it restricts the public in the enjoyment of its property. These taxing laws are not to be extended beyond the clear import of the language used and the powers granted to the officers charged with their execution must be strictly pursued."

The Court cannot presume such power to have been overlooked, and supply the omission.

Cowan v. *Attorney General*, 21, A.L.R., at pages 244 and 245. *City of Ottawa* v. *Regan* [1923], S.C.R. at 312.

There is no reason to suppose that the omission of power to the Crown to realize the duties out of the property was not intentional by the Legislature because the Legislature has provided another method of collection, namely to require the executors to become personally liable for the duties and to give security for the payment of the duties by having a guarantee company join in the bond, and then authorizing the executors to sell or pledge sufficient of the shares in the property out of which the Legislature intended the duties to be ultimately paid. But the intention of the Statute is clear

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

that the Crown looks only to the bond for the collection of the duties, and not to the properties.

The lien provided in the Statute is only to hold the properties until such time as some person applies for probate or administration and gives the bond. The Statute does not contemplate or intend the lien to be enforced to realize the duties and once the Province has demanded and accepted the bond the lien ceases.

Minister of Finance v. *Caledonian Insurance Company*, 33 B.C.R. 29.

The Chief Justice, in delivering the judgment of a majority of the Court, stated at page 33 :—

> " There are many sections of the Succession Duty Act which are troublesome of interpretation, but I think much of the confusion in them disappears when the objects of them are closely scrutinised. It must be borne in mind that there may be estates as to which no letters probate or letters of administration have been applied for or granted. In such cases the Crown may proceed to enforce its claim for duty by any of the methods provided for in the Act. Such a state of circumstances would account for the several remedies open to the Crown which would not be necessary where a bond had been taken, or when the duty had been paid in cash by the executors. Moreover, many of the provisions of the Act, such as provisions enabling the executors to deduct duty from each legacy and which give them powers of sale, have their legitimate places in the Act. These sections so construed are not inconsistent with the notion that when once the valuation is settled upon and the bond given for the duty, that that frees the estate from any claim by the Crown and leaves the executors free to distribute the estate. Section 28 of the Act strongly supports this view. There foreign executors are prohibited from transferring stocks, debentures or shares within the Province, which are liable to duty, until such duty has been paid ' or security given as required by the last five preceding sections,' namely, the sections as to valuation and the giving of the bond. What is contemplated there is, that when the bond has been given, stock, debentures and shares, the property of the deceased in the Province, may be sold free from liability to the Crown for succession duty. If this be so, it is, I think, the fair interpretation to put upon the Act, that other portions of the estate are likewise released from claims by the Crown for duty when the bond has been given and accepted, there being no sound reason why the particular classes of property mentioned in that section should be freed while other property of the estate should be held bound by the Crown's lien."

This judgment was affirmed by the Supreme Court of Canada under the name *The King* v. *Caledonian Insurance Company* [1924], S.C.R. 207. Anglin, J., stated at page 215 :—

> " Taking into consideration all the provisions of the British Columbia Succession Duty Act, I am of the opinion that the better

construction is that put on the Statute by the learned Chief Justice of the Court of Appeal, namely, that upon the taking of the prescribed security for succession duties the lien of the Crown therefor is superseded. The implication of Section 37 that that is the case seems to me to outweigh any contrary inference that might be drawn from the provisions of Section 50. For the purposes of the grant of probate or administration and of the right of the personal representative to deal with and make title to the property of the decedent free from succession duty the taking of the prescribed security and actual payment of the duties seem to be put on the same footing."

The sections of the British Columbia Act referred to correspond in all material respects with the sections of the Statute in question in this action.

Section 28, referred to in the judgment of the Chief Justice of British Columbia, is the same as Section 32 of the Statute in question. Section 33 of the Statute in question supports the above decision even more than Section 32 :—

> " When any property of a deceased person is sold by private sale the executor or administrator as the case may be, shall forward to the Provincial Treasurer by registered mail within thirty days after such sale a report of such sale . . ."

Section 37 also shows that a lien was not intended after the executors or administrators were authorized to proceed with the administration of the estate by giving a bond with a surety to secure payment of the duties.

Even if the lien did not cease, retaining control over, the property on, or with respect to which the duties are payable, while making the executors liable for the duties does not prevent the Statute being indirect taxation. Section 6 of the Quebec Statute considered by the Privy Council in the *Cotton* case provided :—

> " (6) No transfer of the properties of any estate or succession shall be valid, or shall any title vest in any person, if the taxes payable under this section have not been paid . . ."

Under this section the Province of Quebec had as much control over the properties of the testator as the Province of Alberta has under its lien in the Statute in question.

The Quebec Statute did not make the executors liable unless the executors made the declaration, and the executors therefore assumed the liability voluntarily, but unless someone else made the declaration the executors had to assume the responsibility in order to properly administer the estate in accordance with the laws of the Province. Under the Statute in question the executors could avoid liability by renouncing probate, but to properly administer the estate they must give the bond and assume the liability.

In the *Cotton* case the executors were not required to pay the duties for thirty days after demand, during which time they had the property in their hands and might realize the amount of the duties. The executors

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

under the Statute considered in the *Cotton* case therefore did not necessarily have to pay the duties out of their own moneys. The duties were held *ultra vires* because the executors were made personally liable for the duties and the Province could collect the duties from the executors. Under the Statute in question in this action the duties are not payable for six months, and during that time the executors may or may not be able to realize the duties out of the properties. The Province may also extend the time, but is not bound to do so, and under the Statute in question the Province may, at the expiration of six months collect the duties from the executors and their surety whether the executors have been able to realize the duties out of the properties or not.

With the exception of the properties transferred by the testator prior to his death, all the properties within Alberta came into the hands of the executors, and the only method by which the Defendants can collect the duties imposed on this property is from the executors in an action on the bond.

It is submitted that the decision of Beck, J., *in re : Cust,* 8 A.L.R. 39, correctly sets forth the law with respect to the duties in question, and that that judgment is affirmed by the decision of the Privy Council in the *Burland* decision, and overrules the decision of this Court *in re : Cust,* and of the Supreme Court of Canada *in re : Muir* and other decisions.

Re : Rex v. *Lovitt* [1912], A.C. 212.

The New Brunswick Statute considered by the Privy Council imposes a duty on property similar to the duties imposed by the Statute in question. The duty imposed on personal property within the Province belonging to a decedent domiciled outside the Province was questioned, and the Privy Council held the duties valid.

The method of collecting the duties under the New Brunswick Statute was very different from the Statute in question.

(1) The Executor was not required to give a bond before the issue of Letters Probate. Probate was issued in the ordinary way on application.

(2) The executor was required to deduct the duty or collect the duty before delivering any property to the beneficiaries. He also had power to sell or pledge the property.

> "Any . . . executor . . . having in charge or trust any estate, legacy or property subject to the said duty shall deduct the duty therefrom or collect the duty thereon upon the appraised value thereof from the person entitled to such property and he shall not deliver any property subject to duty to any person until he has collected the duty thereon."

(3) The executor had thirty days to arrange payment of the duties and make his returns. Then if the duties were not paid in thirty days he was required to give a bond for the payment of the duties. If he did not give the bond the only effect was that the

Letters Probate became liable to cancellation by the Judge of Probate.

> " In case the executor or administrator or either of them shall neglect or refuse to furnish, procure and file such inventory within the required time or give the required bond the Letters granted to such executor or administrator may be cancelled by the judge of probate and new Letters may issue to other parties who may be entitled thereto."

The Letters Probate were not automatically cancelled and would only be cancelled on application to the Judge of Probate to appoint someone else executor. This was a provision for the protection of the Province should it consider the payment of the duties in danger.

(4) An estate could be administered under the New Brunswick Statute without the executor becoming personally liable or assuming any obligation other than not to transfer the property without collecting or deducting the duty.

The Privy Council stated the Act was intended to be a direct burden on the property and the intention of the Statute was clearly to realize the duty out of the property or to collect the duties from the beneficiaries—the bond of the executors was an incident to the collection of the duties, and an estate might be administered without giving a bond.

Under the Statute in question the executors must become liable before they can administer the estate. The whole scheme of the Statute in question in this action is to collect these duties from the executors under their bond.

The Privy Council in the *Lovitt* case considered only the question of " taxation within the Province." The question of " indirect taxation " is not referred to.

It was evidently argued in the *Cotton* case that the Board had by inference approved of the Statute as direct taxation even although in that case a bond had been given, and the Board, in the *Cotton* decision, referred to the *Lovitt* decision by stating :—

> " It relates solely to the power of the Province to require as a condition for local probate on property within the Province that a succession duty should be paid thereon."

The *Lovitt* decision is therefore, not an authority on the question of indirect taxation.

The right to impose a succession duty does not override the restriction on taxation contained in the British North America Act, and therefore the duties which the Province is entitled to impose as a condition of probate must be direct taxation.

A decision is only authority for the questions actually raised and dealt with in the Judgment, and the Board will only deal with the question raised as shown by the reference to indirect taxation in *Brassard* v. *Smith* [1925], A.C. 371, at page 377. This applies to the two cases on succession duties

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

from this Province which have come before the Privy Council and to the decision of this Court in the *Pierce* Estate.

That the Legislature of New Brunswick considered that the *Cotton* and *Burland* decisions required an amendment to the Statute considered in the *Lovitt* case is evidenced by the fact that subsequent to those decisions the New Brunswick Statute was amended by providing that the executor was not personally liable. (See page 11.)

Re : Alleyn-Sharples v. *Barthe* [1922], A.C. 227.

This is the only case in which the Privy Council has approved of the liability of executors. The amendment to the Quebec Statute was passed after the *Cotton* decision was approved. The amended section is set forth on page 228 and reads as follows :—

> " No Notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the 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."

The amendment goes farther than the amendment to the other Statute quoted on page 11.

IT IS SUBMITTED—

(*a*) that the duties imposed on, or with respect to property within the Province are not direct taxation as the burden is intended to fall on the beneficiaries and the duties are not made payable by the beneficiaries nor are they realizable directly out of the beneficiaries' share in the property;

(*b*) that the duties are indirect taxation because they are collectible from the executors under their bond and the executors are not intended to bear the duties but are intended to indemnify themselves by selling or pledging the share of the beneficiaries to provide the duties for which they are personally liable.

SECOND.—RE : DUTY ON PERSONAL PROPERTY OUTSIDE THE PROVINCE.

The validity of these duties is questioned on two grounds, first that they are not " taxation within the Province " and second that they are not " direct taxation."

RE : TAXATION WITHIN THE PROVINCE.

The duties in question are imposed by Section 7 of the Statute (paragraph 6 of the Stated Case). The portion of Section 7 imposing duties on personal property outside the Province reads as follows :—

> " . . . in the case of an owner domiciled in the Province all the personal property of the owner situate outside the Province and passing on his death shall be subject to succession duties at the rate or rates set forth in the following tables. . . ."

This section is to the same effect as the provisions of the Ontario Act, R.S.O. 1897, Chap. 24, Section 4, as amended in 1901 by Chapter 8, Section 6, which reads :—

> " . . . the following property shall be subject to a succession duty as hereinafter provided to be paid to the use of the Province . . . (*a*) all movable property locally situate out of this Province and any interest therein where the owner was domiciled in this Province at the time of his death. . . ."

This Ontario section was considered by the Privy Council in *Woodruff* v. *Attorney-General of Ontario* [1908], A.C. 505, and the Privy Council held that the duty imposed by the Ontario Statute above quoted was invalid as not being taxation within the Province. Lord Collins, in delivering the Judgment of the Privy Council, stated on page 510 :—

> " 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 alleged by him to form part of the estate of a deceased domiciled inhabitant of the province."

and at page 513 :—

> " 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. c. 3, s. 92, sub-s. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub-sections of s. 4 of the Succession Duty Act, on which so much stress was laid in argument. 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."

The duties imposed by the Statute in question and in the Ontario Statute considered in the *Woodruff* case, and also by the New Brunswick Statute considered by the Privy Council in the *Lovitt* case, while called " succession duties " correspond to the English " estate duty." " Estate duties " differ from " succession duties " in that they are a tax on property whereas " succession duties " are a tax on the succession or on the transmission or devolution of the estate according to the laws of the Country or Province imposing the tax.

The duties imposed by the original Quebec Statute and the Province of Nova Scotia, and the duties imposed by the present Quebec Statute, and the present Ontario Statute in so far as they relate to personal property outside the Province, correspond to the English succession duties, and thus differ from the Statute in question and similar Statutes of other Provinces in Canada which correspond to the English estate duty.

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

The Quebec Statute considered by the Privy Council in *Alleyn-Sharples* v. *Barthe* [1922], 1 A.C. 227, read as follows :—

> " 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 such death, shall be liable to the following taxes calculated upon the value of the property so transmitted . . ."

The Privy Council held that where the transmission was entirely within the Province, namely when both the deceased and the beneficiary were domiciled in the Province, and the property passed under the laws of the Province, the duties were then " taxation within the Province."

The Alberta Statute in question is governed by the *Woodruff* decision and not by the *Alleyn-Sharples* decision.

The distinction between the two Statutes was noted by the Ontario Court of Appeal in *Attorney-General for Ontario* v. *Baby*, 60 O.L.R. 1.

In the *Cotton* case above referred to, the Supreme Court of Canada (45, S.C.R. 469) based its decision on " taxation within the Province." The Privy Council based its decision on " indirect taxation " and the *Woodruff* decision was not and could not have been followed, but there is nothing in the decision of the Privy Council in the *Cotton* case to overrule the *Woodruff* decision, and the Privy Council has not in any decision approved as " taxation within the Province " any Statute which imposes a duty on personal property outside the Province corresponding to the English estate duty.

RE : MOBILIA SEQUUNTUR PERSONAM.

Section 7 of the Statute in question imposes duties in the same words on both property within the Province and personal property outside the Province. There is no distinction made such as in the present Quebec Statute and the present Ontario Statute above referred to. The duties imposed correspond to the English estate duties and do not correspond to the English succession duties.

The above maxim is applied only to duties corresponding to English succession duties and is not applied to estate duties. *Winans* v. *Attorney-General* [1910], A.C. 27.

The Privy Council applied the maxim to Colonial Statutes in appeals before the Privy Council from Queensland, Victoria and other States now included in the Commonwealth of Australia because those Statutes corresponded to the English succession duties and not to the English estate duties.

Rex v. *Lovitt* [1912], A.C. 212 is the only case in which the Privy Council has considered the application of the maxim to Canadian Statutes and held that the maxim could be excluded by legislation and was excluded by the New Brunswick Statute in so far as the application of the maxim would have rendered exempt from taxation personal property within the Province belonging to a decedent domiciled outside the Province.

The restriction in the British North America Act on Provincial powers of taxation was not considered in the *Lovitt* case because duties were not

claimed on personal property outside the Province. The restriction of the British North America Act excludes the operation of the maxim in so far as it would render subject to taxation personal property situate outside the Province, as effectually as the New Brunswick Statute excluded the maxim in so far as it exempted from taxation personal property within the Province.

The Supreme Court of Canada applied the maxim in *Smith* v. *Provincial Treasurer of Nova Scotia*, 58, S.C.R. 570, as it held that the Nova Scotia Statute corresponded to the English succession duties, but the personal property there in question had an actual situs within the Province as was held by the Privy Council in *Brassard* v. *Smith* [1925], A.C. 371, and Mr. Justice Anglin expressly held, at pages 589 and 590, that the maxim could not override the restriction of the British North America Act.

The maxim was also applied in *Barthe & Alleyn-Sharples*, 60, S.C.R. 1, on the grounds that the Quebec Statute there considered corresponded to the English succession duties :—

> " That rule is not applicable in the construction of Statutes levying probate, and estate duties or other taxes, but is confined to succession and legacy duties." Page 4.

When the case came before the Privy Council in *Barthe* v. *Alleyn-Sharples* [1922], 1 A.C. 227, the Board held that the duties were only good if levied on the transmission and if the transmission was entirely within the Province so as to make it taxation within the Province. If the maxim applied the duties would be valid irrespective of the domicile or residence of the beneficiary. This decision of the Privy Council therefore overrides any Canadian decisions applying the maxim so as to render liable to taxation any personal property outside the Province belonging to a decedent domiciled in the Province.

The only way duties can be validly imposed with respect to personal property outside the Province is to levy the duties on the succession or transmission and not on the property itself, and to restrict the duties to cases where both the decedent and the beneficiary are domiciled in the Province, so that the succession or transmission taxed takes place entirely within the Province. The Statute in question does not come within this.

RE : INDIRECT TAXATION.

An administrator derives his title solely under his grant of administration, which only has force within the jurisdiction of the Court from which it issued.

Personal property outside the province does not come into the hands of an administrator under his grant and the duties on such personal property are therefore not covered by the administration bond for succession duties.

Section 9 enacted at the time of the amendment to Section 7 extending the duties to personal property outside the Province is carrying out the intent of the entire Statute, namely to collect the duties from executors or administrators on all property coming into their hands and to collect from the beneficiaries the duty on property which does not come into the hands of executors or administrators.

No. 3. Plaintiffs' Factum, 31st May 1932—*continued.*

But personal property outside the province does not come into the hands of an executor and the duty thereon is secured by the executor's bond and the executor is therefore made personally liable for the duties.

The first part hereof referring to duty on property within the province being indirect taxation applies also to the duties on personal property outside the province.

The clear intention of the Statute is to collect the duties on the personal property outside the province from an executor and in the case of probate it is the executor's bond that is looked to for payment and not the liability of the beneficiaries. The executor is required to give security by way of a guarantee company for the payment of these duties. The beneficiaries are required to give no security. The duties cannot possibly be realized out of the property itself.

Dated at Calgary this 31st day of May, A.D. 1932.

W. H. McLAWS,
Of Counsel for the Plaintiffs.

No. 4.

Factum of the Attorney General of Alberta.

No. 4. Factum of the Attorney General of Alberta.

The facts are fully set out in the Special Case.

The first question submitted to the Court is as to whether Succession Duties are payable by the executors of the estate of a deceased person domiciled in the Province with respect to personal property having a local situs outside the Province.

The Statutory provisions applicable are those contained in the Succession Duties Act, Revised Statutes of Alberta, 1922, Chapter 28, with Amendments as it stood at the time of the death of the deceased. The sections to which reference will require to be made are :—

> " 7.—(1) Save as otherwise provided, 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 the Province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary being fixed by the following or by some one or more of the following considerations, as the case may be :—
>
> (*a*) The net value of the property of the deceased;
>
> (*b*) The place of residence of beneficiary;
>
> (*c*) The degree of kinship or the absence of kinship of the beneficiary to the deceased.
>
> Provided, however, that no duty shall be payable on the share passing to any person mentioned in the second or third column where the value of the property taken by such person, wherever situate, does not exceed two thousand dollars.
>
> (2) The Succession Duties herein provided for shall be paid to the Provincial Treasurer, for the use of the Province, and shall be over and above the probate or other fees prescribed from time to time by law."

Here follows table showing schedule of percentages payable on shares passing to beneficiaries.

" 8. Where the share of any person mentioned in the second or third column of the table in the next preceding section exceeds fifty thousand dollars, or where the share of any person mentioned in the fourth column of the said table exceeds twenty-five thousand dollars, additional duty shall be payable on the taxable portion of such share at a rate set forth in the following table, the additional percentage payable on such share being determined by the following considerations :—

(*a*) Value of property taken, wherever situate;

(*b*) Degree of kinship to the deceased."

Here follows table showing additional percentages payable on certain individual shares.

" 9. Every person resident in the Province to whom passes on the death of any person domiciled in the Province any personal property situate outside the Province, shall pay to the Provincial Treasurer for the use of the Province a tax calculated upon the value of the property in accordance with the rates and subject to the considerations set forth in sections 7 and 8 of this Act."

" 16. The duties imposed by this Act shall be payable out of the share of each person or beneficiary entitled to share in the property of the deceased, according to the rate applicable as aforesaid to such person or beneficiary."

From these provisions it seems clear that the Legislature intended to provide for the taxation of personal property wherever situate of a deceased person who at the time of his death was domiciled in the Province.

In the case of *Royal Trust Company* vs. *Attorney-General* [1929], 1, W.W.R. 455 at p. 463, *et seq*) Hyndman J. giving the judgment of the Court, without expressly deciding the point, was inclined to think that the Act as it then stood (prior to the amendment of 1927) did not expressly incorporate the " mobilia " rule with respect to the property coming within the provisions of the Act, and relied on the dicta of Lord Moulton in *Rex* vs. *Cotton* [1914], A.C. 176, in which he said at page 186 :—

" No question arises as to the applicability of the doctrine ' mobilia sequuntur personam ' because the section expressly limited the taxation to the property in the Province, and therefore, whether or not the Province possessed and might have exercised a right to tax movable property locally situated outside of the Province (such right arising from the domicile of the Testatrix) it did not see fit to do so."

Since the judgment of the Appellate Division in the *Royal Trust Case*, the legislature in 1927 amended section 7 with the evident intention of making it absolutely clear that they intended the *mobilia* rule to be applied in this province. The words added were " and in the case of an owner domiciled in the Province all the personal property of the owner situate outside the Province." It is submitted that there could be no clearer evidence of an intention to incorporate the *mobilia* rule.

No. 4. Factum of the Attorney General of Alberta—*continued.*

The testator having been domiciled in the Province at the time of his death the actual or local situation of the stocks and other securities mentioned in sub-section (*a*) of paragraph 2 of the Special Case makes no difference insofar as the payment of succession duties to the Province is concerned. Through the application of the *mobilia* rule, the personalty is deemed to be attracted into the Province and situate here for purposes of taxation.

The Succession Duties Acts of the Provinces have been held to be analogous in some of their phases to legacy and Succession Duty Acts in England. The nature of the tax imposed is essentially a legacy or succession duty as opposed to a probate duty.

See remarks of Anglin C.J. in *Lovitt* vs *The King*, 43 S.C.R. at p. 151.

The *mobilia* rule was finally established in England in the case of *Thompson* vs *Advocate General*, 12 Cl. & F. 1; 9, Jur. 217; 8 E. R. 1294, and it has been consistently held in succession and legacy duty cases that personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death.

In re Ewen [1830] C. & J. 151; *Attorney General* vs. *Napier* [1851] 20 L.J. [N.S.] Ex. 173.

In the case of *In Re Succession Duty Act and Walker* [1922] 1 W.W.R. 803; 30 B.C.R. 549. Hunter C.J. held that succession duty was payable in respect of personal property locally situate in Saskatchewan of a deceased person domiciled in British Columbia by virtue of the application of the maxim *mobilia sequuntur personam.*

This principle has been applied many times in cases decided by the Supreme Court of Canada.

Smith vs *Provincial Treasurer of Nova Scotia*, 58, S.C.R. 570.

Barthe vs *Alleyn Sharples*, 60 S.C.R. 1.

See also review of authorities in *Attorney General* vs *Baby* [1926], (3) D.L.R. 928, in which *mobilia* rule was applied. This decision was affirmed on appeal [1927] (1) D.L.R. 1105.

Kennedy & Wells in their excellent work entitled " Taxing Power in Canada " summarize the effect of the decisions as follows :—

> " Despite the lack of any uniform principle running through these various decisions of the Supreme Court, it may now be taken to be established since the decision in *Smith* v. *Provincial Treasurer of Nova Scotia* that a Canadian province has a right to levy a tax on all the movable property of a domiciled decedent wherever it may be actually situate passing on his death to his beneficiaries; in other words, movables not actually situated within the province in which the deceased was domiciled may be considered as legally situated within the province for the purposes of such taxation."—(Kennedy & Wells, " Law of the Taxing Power in Canada," page 121.)

An examination of the cases which have come before the Privy Council and the language used would indicate that the Judges clearly accept the principle of the *mobilia* rule where it has been incorporated in Provincial enactments.

In defining a succession and the principle upon which succession duties are imposed when movables are locally situate outside the jurisdiction, the Court has uniformly held that the law of the domicile prevails over the situation. The case of *Harding* v. *Commissioner of Stamps for Queensland* [1898], A.C. 769, held that the laws of the domicile prevailed in the absence of clear words in the taxing statute to show that it was intended that the law of the locus should apply. Lord Hobhouse at page 775 says, " And as " regards locality it is clear that the assets now in question have locality " in Queensland, but that does not affect the beneficial interest to which " succession duty is attached and which devolves according to the law of " the owners domicile."

In the case of *Burland* v. *The King, Alleyn Sharples* v. *Barthe*, 62 D.L.R., 515, the matter came squarely before the Privy Council in the *Sharples* appeal. Lord Phillimore delivering the judgment of the Court referring to the alterations made on the Quebec Statute subsequent to the case of *Cotton* v. *The King*, says at page 523 :

> " These statutes have effectively met the difficulty which was pointed out in the case of *Cotton* v. *The King* as to taxation imposed by the earlier statutes being indirect and it only remains to be considered whether the taxation is within the Province."

The learned judge finds that the Statute is clearly within the powers conferred by the B.N.A. Act and that the personal property of Sharples, a domiciled decedent locally situate both within and without the Province was liable to payment of Succession Duties.

See also *Lambe* v. *Manuel* [1903], A.C. 68, and remarks of Lord Loreburn in *Winans* v. *Attorney General* [1910], A.C. 27 at page 30, also of Lord Atkinson, at pages 31–32.

It is to be noted in this case that the beneficiaries are both domiciled and resident in Alberta, and therefore there is no question but that the transmission and succession to all property of the deceased takes place within the Province.

Insofar as the property mentioned in sub-section (*b*) of paragraph 2 of the Special Case is concerned, it is submitted that the case of *Re Cust*, 21 D.L.R. 366 settles the point that with respect to the taxation of property within the Province, the Succession Duties Act of Alberta is unquestionably intra vires the powers of the Provincial Legislature.

For the foregoing reasons it is submitted that the Succession Duties levied in respect of the property mentioned in sub-sections (*a*) and (*b*) of paragraph 2 of the Special Case are valid and payable to the Provincial Treasurer under the provisions of the Succession Duties Act.

Respectfully submitted,

H. J. WILSON,
Counsel for Attorney General and
Provincial Treasurer.

No. 5.
Supplement to Plaintiffs' Factum replying to argument for Defendants.

No. 5.

Supplement to Plaintiffs' Factum replying to argument for Defendants.

The two questions at issue must be considered separately to avoid confusion. Each decision of the Judicial Committee relied upon is authority on only one of the questions, except *Alleyn-Sharples.*

Attorney General v. *Reed,* 10, A.C. 141, *Rex v. Cotton* [1914], A.C. 176, *Burland* v. *The King* [1922], A.C. 215, *Attorney General for Manitoba* v. *Attorney General for Canada* [1925], A.C. 561, and *Barthe* v. *Alleyn-Sharples* [1922], A.C. at 227, are (with the exception of the last) solely authority on " indirect taxation."

Woodruff v. *Attorney General of Ontario* [1908], A.C. 508, with *Blackwood* v. *The Queen,* 8 A.C. 82, which is made a part thereof; *Lambe* v. *Manuel* [1903], A.C. 68, which was referred to for the purpose of being distinguished; *Lovitt* v. *The King* [1912], A.C. 213, *Barthe* v. *Alleyn-Sharples* [1922], A.C. at 227, and the decision of the House of Lords in *Winans* v. *Attorney General* [1910], A.C. 27, which should be considered with *Blackwood* v. *The Queen,* are all (with the exception of *Alleyn-Sharples*), decisions solely on the question of " taxation within the Province."

(*A*) *Re :* INDIRECT TAXATION.

I. The defendants relied on the *Cust* decision, 8 A.L.R. 308, and argued that the portion stating that the *Lovitt* decision governed duties on property within the Province, had not been overruled.

In reply :—(1) The Court stated its reason for holding that the *Lovitt* decision governed duties on property within the Province was that the *Cotton* decision applied only to duties on property outside the Province (*see* second paragraph page 313). The Judicial Committee subsequently held in the *Burland* case that the *Cotton* decision did apply to duties on property within the Province. That portion of the *Cust* decision applying *Lovitt* is therefore, also overruled.

(2) The question at issue in *Cust* was " indirect taxation " and the *Lovitt* decision of the Judicial Committee is not an authority on indirect taxation and does not mention that subject and it therefore, could have no application to the question at issue in *Cust* and the reference in *Cust* to the *Lovitt* decision is therefore obiter.

II. Mr. Justice Ford suggests that the approval in *Cust* of *Re : Doe,* 16 D.L.R. 740, is still good.

In reply : *Re : Doe* held that the *Cotton* decision did not hold *all* succession duties bad but only the Quebec Statute, and that the *Cotton* decision did not apply to the British Columbia Statute because it was different from the Quebec Statute and was the same as the New Brunswick Statute approved in the *Lovitt* case and that the *Lovitt* decision applied. That was the same error made in the *Cust* case. The *Lovitt* decision of the Judicial Committee is not a decision on the question of indirect taxation which depends solely on the method of collection and not on the nature of the duties imposed. The *Cotton* decision on indirect taxation applies equally

to the Statutes of all the Provinces. For the difference in the method of collection under the New Brunswick Statute considered by the Judicial Committee in the *Lovitt* case and under the British Columbia Statute (and also under the Alberta Statute) *see* pages 19, 20 and 21 of the Plaintiffs' Factum. The statement *in Re : Doe* that the British Columbia duties are payable out of property the same as municipal taxes on land is overruled by the *Caledonian Insurance* case, 33 B.C.R. 29. The statement in *Doe* that no legal liability is placed on the executors is overruled by the *United States Fidelity and Guarantee* case [1923], A.C. 808. The first held that the lien on the property is discharged by the bond, and the latter held that the executors were legally liable on the bond, and under the British Columbia Statute the executor must give the bond or pay the duties before probate is granted. *Re : Doe* has no bearing on the question at issue in this action.

III. Mr. Justice Ford referred to *Attorney General* v. *Pearce*, 25 A.L.R. 553, as being binding on the Court and having a bearing on the issue.

In reply : The question in *Pearce* was the validity of duties imposed on property transferred by a testator prior to his death, and the liability of the executors for such duties. That question is not at issue in this case. Mr. Justice Mitchell's judgment in *Pearce* is very clear, concise, and covers fully the questions at issue in that case, but does not go farther, and has therefore, no bearing on the questions at issue in this case. The first paragraph on page 7 of the Plaintiffs' Factum agrees with the *Pearce* decision. Note the exception in the first sentence in the paragraph beginning at the middle of page 559 of the decision.

IV. In further support of the Plaintiffs' contention that the executors are made personally liable under the bond the Plaintiffs refer to *Rex* v. *London and Lancashire*, 1926, W.W.R. Vol. 3, page 461, and to the records of the Court in that case, which disclose that the Defendants, on a similar bond, sued the executors personally, and this Court approved of the liability.

V. The Defendants argued that the executors, before applying for probate, could collect the duties from the beneficiaries, and thus avoid personal liability.

In reply : Requiring an applicant for probate to pay duties which he must collect from others, namely the beneficiaries, either before or after payment, is in itself indirect taxation. The beneficiaries are not made liable and could not be compelled to provide the duties. While the lien on property ceases upon the giving of the bond, the executors do not give the bond to release the lien, but are required to give the bond or pay the duties to obtain probate and perform their duties as executors.

VI. The Defendants attempted to distinguish the Statute in question from that considered by the Judicial Committee in the *Cotton* case, on the grounds that the executors' liability in *Cotton* was statutory and under this Statute the executors became liable under the bond.

In reply : The general scheme and intent of the Statute must be considered (Lord Moulton in *Cotton* at page 195—[1914] A.C., and Anglin, C.J.C., in *McLeod* case at page 457—[1926] S.C.R.). The intention of the Statute in question in this action is the same as under the Statute considered

No. 5. Supplement to Plaintiffs' Factum replying to argument for Defendants—*continued.*

in the *Cotton* case, namely that the executor should be the person from whom the Province would collect the duties although the burden was intended to fall on the beneficiaries. Under the Quebec Statute an executor named in the will could renounce and could refuse to make the declaration and no liability, statutory or otherwise, attached to him. The executor became liable by making a declaration and in this Province by giving a bond. Under both Statutes the executor must assume the responsibility to perform his duties.

The extent of the liability or responsibility that can be imposed upon an executor is shown by (*a*) the provision of the Quebec Statute quoted and approved by the Judicial Committee on page 228 of the *Alleyn-Sharples* decision [1922], 1 A.C., and (*b*) the provisions of the Ontario Statute, R.S.O. [1927], Chapter 26, Section 12, sub-s. 3.

(*B*) *Re:* TAXATION WITHIN THE PROVINCE.

I. The Defendants argued that the duties levied by Section 7 of the Statute, on personal property actually situate outside the Province, was taxation within the Province, on the grounds that the application of the *mobilia* rule brought the personal property within the Province.

In reply: (1) In England the *mobilia* rule was applied only to succession duties (duties imposed on the succession—The Succession Duty Act, 1853, Sections 2 and 10) and to legacy duties, but was not applied to estate duties (duties on property which passed on death—Finance Act, 1894, Section 1). Confusion arose in Canada owing to all death duties being called " succession duties " whether levied on the succession or transmission or whether levied on the property passing on the death. In addition in Canada the restriction of the British North America Act must be considered.

(2) The restriction of the British North America Act has no effect when the duties are levied on property within the Province, and consequently in *Lambe* v. *Manuel* [1903], A.C. 68, the duty being levied on the succession and not on the property itself, the *mobilia* rule was applied to exclude from taxation personal property situate within the Province. In *Rex* v. *Lovitt* [1912], A.C. 213, the duty being levied on the property and not on the succession or transmission, the rule was excluded. The Judicial Committee stated that the New Brunswick statute excluded the application of the rule. There is no provision in the New Brunswick Statute (C.S.N.B. 1903, Chapter 17), excluding the rule. The rule was excluded because the New Brunswick Statute levied the duties on the property.

(3) The restriction must be considered when considering duties imposed on personal property outside the Province. In *Woodruff* v. *Attorney General of Ontario* [1908], A.C. 508, the Judicial Committee held that the duties being on property actually situate outside the Province, the duty was void owing to the limitation of the British North America Act. Then by applying *Blackwood* v. *The Queen* it also held that the *mobilia* rule did not apply. The Ontario Statute, like the Victoria Statute, was a duty on the property and in other respects, although not entirely, corresponded to the English estate duties.

In *Barthe* v. *Alleyn-Sharples* [1922], A.C. at 227 the duties were levied on the transmission and the Judicial Committee held that the transmission taxed must be entirely " within the Province." That is that both the testator and the beneficiary must be domiciled in the Province so that the property passed not only according to the laws of the Province, but entirely " within the Province." The Judicial Committee did not apply the *mobilia* rule because that rule is concerned only with the domicile of the testator, and would apply in the case of a testator domiciled in the Province and a beneficiary domiciled outside the Province, and the transmission taxed would not then be entirely " within the Province."

II. The Defendants argued that the words " passing on his death " in Section 7 made this a duty on the succession or transmission and not a duty on property.

In reply: (1) Effect must be given to the plain words of the Statute that the property is subject to succession duties. There is no reference to a tax on the transmission such as the Quebec Statute quoted on page 227 of the *Alleyn-Sharples* case, [1922], A.C., or on the succession as in the Ontario Statute quoted on page 3 of *Attorney General* v. *Baby*, 60 O.L.R.

(2) The New Brunswick Statute (R.S.N.B. [1903], Chapter 17, Section 5), considered in the *Lovitt* case, provided " all property . . . passing either by will or intestacy . . . shall be subject to a succession duty." Property can only pass at death by will or by intestacy and can only pass by will or intestacy at death and therefore the words " passing on his death " in the Alberta Statute and the words " passing either by will or intestacy " in the New Brunswick Statute, mean the same thing. The words imposing the duties are otherwise the same in the New Brunswick Statute and the Statute in question. The Privy Council held at page 223 of the *Lovitt* case—[1912], A.C.—that the New Brunswick Statute corresponded to a probate duty (which is a tax on property not on a succession) and the House of Lords held at page 30 of the *Winans* case—[1910], A.C.—that the probate duties and the estate duties (which are also a tax on property) were analogous and did not correspond to the English Statutes imposing a duty on a succession, or a legacy duty. The Alberta Statute is therefore a tax on property and is not a tax on the transmission or succession. It is the same as the Ontario Statute considered in the *Woodruff* case (R.S.O. 1897, Chapter 24, Section 4 as amended by 1901, Chapter 8, Section 6) and is governed by the *Woodruff* decision and is not a tax on the transmission or succession, and is therefore, not governed by the *Alleyn-Sharples* decision or by the *Attorney General for Ontario* v. *Baby* decision even although the beneficiaries are domiciled in the Province.

Mr. Justice Ford enquired if the Ontario Statute considered in the *Woodruff* case used similar words. R.S.O. 1927, Chapter 24, Section 4, sub-s. (*a*) used the same words as the *Lovitt* case, namely " passing either by will or intestacy."

III. The Defendants argued that Section 9 restricted the duties imposed by Section 7 on personal property outside the Province to personal property

No. 5. Supplement to Plaintiffs' Factum replying to argument for Defendants—*continued.*

passing to a beneficiary within the Province, and that the duties were therefore, taxation within the Province.

In reply:—(1) Even that interpretation would not make the duties valid because if the duties are imposed on property outside the Province (and not on a succession or transmission wholly within the Province), the domicile of either the testator or the beneficiaries or both cannot make it taxation within the Province.

(2) Section 9 is not open to the interpretation asked for by the Defendants. Statutes must be given their plain ordinary meaning. There is nothing in Section 9 to indicate any intention of restricting Section 7 or of restricting the subject matter of taxation. It refers solely to the collection of taxes. It is admitted that the duties in question in this action are imposed by Section 7 and Section 9 can only refer to the tax levied by Section 7. If the duties levied by Section 7 are not taxation within the Province, and are void, nothing is payable under Section 9; and in any event, no tax is levied under Section 9.

IV. The Defendants argued that the *mobilia* rule applied because the Judicial Committee had overruled the *Woodruff* decision by its reference to that decision at page 196 of the *Cotton* case [1914], A.C., and quoted the opinion of Anglin, C.J.

In reply:—(1) The Judicial Committee held that the *Cotton* Statute, on its proper interpretation, did not impose a duty on personal property actually situate outside the Province. Therefore the *Woodruff* decision could not have been applied. Further, the Statute considered by the Judicial Committee in the *Cotton* case imposed a duty corresponding to the English succession duties and was therefore a tax of an entirely different nature than the tax considered in the *Woodruff* case.

(2) The *Cotton* decision refers to doubts as to the reasoning on which the *Woodruff* decision was based, but does not suggest any doubt as to the result or the decision itself.

(3) The Judicial Committee has delivered no decision in any way inconsistent or contrary to the *Woodruff* decision. The *Alleyn-Sharples* decision is not contrary to the *Woodruff* decision, but, in fact, confirms the *Woodruff* decision because it decides that the " transmission " taxed must be wholly within the Province to comply with the restriction of the British North America Act, and the *Woodruff* decision was based on the restriction of the British North America Act. In *Alleyn-Sharples* the Judicial Committee did not apply the *mobilia* rule but held the duties valid because they were imposed on a transmission wholly within the Province.

(4) Anglin, C.J., by referring to the *Woodruff* decision being overruled could not have meant that the *mobilia* rule was applicable. *See* 58, S.C.R. 589, 60, S.C.R. 27, 51, S.C.R. 455, 45, S.C.R. 535–6.

(5) This case is governed by the *Woodruff* decision and the principle there laid down is broad enough to cover the facts of this case even although they may differ somewhat from the actual facts in the *Woodruff* case, and by adopting the *Blackwood* decision the *Woodruff* case expressly excludes

No. 5. Supplement to Plaintiffs' Factum replying to argument for Defendants—*continued.*

the application of the *mobilia* rule to render subject to taxation in the Province personal property having an actual situs outside the Province.

V. The Defendants argued that *Smith* v. *Provincial Treasurer of Nova Scotia,* 58, S.C.R. 570, was authority for applying the *mobilia* rule.

In reply :—This decision must be considered with *Smith* v. *Levesque* [1923], S.C.R. 578, and *Brassard* v. *Smith* [1925], A.C. 371, dealing with the same estate and the same personal property. The Judicial Committee decided in *Brassard* that the personal property was actually situated at Halifax, in the Province of Nova Scotia where the testator was also domiciled. The *mobilia* rule can have no application where the personal property has an actual situs in the same Province where the decedent is domiciled.

In the *Levesque* decision four of the six Judges held that *Smith* v. *Provincial Treasurer of Nova Scotia* was decided on the ground that the personal property in question had an actual situs in Nova Scotia independent of the *mobilia* rule and was therefore, subject to taxation in Nova Scotia. *See* pages 582, 587 and 589 of *Levesque* decision [1923], S.C.R.

Further, the Supreme Court of Canada held that the Nova Scotia Statute corresponded to the English succession duties (page 585) and also held (page 586) that it differed from the New Brunswick Statute held in the *Lovitt* case to correspond to a probate or estate duty.

The decision in *Smith* v. *Provincial Treasurer of Nova Scotia* has therefore, no bearing on the Statute in question. It is one of the Supreme Court of Canada decisions prior to the Judgment of the Judicial Committee in *Burland* v. *The King* and *Barthe* v. *Alleyn-Sharples.* The British Columbia decisions based on *Smith* v. *Provincial Treasurer of Nova Scotia* have no bearing on this case.

This does not contain any new reply or argument not advanced at the hearing and contains no new material except reference to *Re : Doe.*

W. H. McLaws,
Of Counsel for the Plaintiffs.

No. 6.

No. 6. Supplement to Defendants' Factum replying to argument for Plaintiffs.

Supplement to Defendants' Factum replying to argument for Plaintiffs.

The Defendants in reply to the Plaintiffs' argument rely on three main principles established by the cases relating to succession duties;

1. The Succession Duties Act in question makes no demand on the executors or legal representatives and no direct legal liability is imposed in the first instance on the executor to pay duties, therefore the Act cannot be said to impose indirect taxation.

2. In some aspects and for some purposes the Succession Duties Act resembles and is analogous to the English Statutes governing Estate and Probate duties, and in this sense can be said to be a direct tax on the property.

3. In other aspects and for other purposes the Succession Duties Act resembles and is analogous to the English Statutes governing Succession

No. 6. Supplement to Defendants' Factum replying to argument for Plaintiffs—*continued.*

and Legacy Duties and in this sense can be said to be a direct tax on the person to whom property passes under the Act.

(A) Succession Duties Act imposes a Direct Tax.

The Plaintiffs have sought to bring the present case within the decision of the Privy Council in *Rex* vs. *Cotton* [1914], A.C. 176 which held the Quebec Statute unconstitutional as imposing indirect taxation. The distinction between the present case and the facts in the *Cotton* case are two :—

1. In the *Cotton* case the Statute imposed a direct legal obligation on certain persons (the Executor, Universal Legatee, Notary executing the Will, etc.) to forward to the Collector of Provincial Revenue within a specified time a complete Schedule of the Estate. If one of this class made the declaration the others were relieved, nevertheless all could be forced to do so. Having made the declaration the declarant could be notified of the amount due for duties and if not paid on a day fixed the Collector of Inland Revenue could sue for the recovery of the tax before any court of competent jurisdiction.

Under the Alberta Act the executor or administrator filing an inventory cannot be forced to pay the duty or give a bond. No obligation to pay is fixed upon him and if he refused to pay or give the bond no action could be taken against him. This distinction has been pointed out in numerous cases. *See*—

In re Cust—8, *A.L.R. at p.* 310.
Re. Doe—16, *D.L.R. at p.* 741.
City of Halifax v. *Fairbanks et al* [1928], A.C. 117, at p. 126.
In re Inverarity Estate [1924], 1 W.W.R. 902.
Barthe v. *Alleyn-Sharples* [1922], 1 A.C. 215, at p. 228.
See also remarks of Duff, J., in *Barthe* v. *Alleyn-Sharples* 60, S.C.R. 1, at p. 24, and Anglin, J., at page 36.

2. The second distinction is that the *Cotton* case dealt with a statute placing a tax on the transmission or succession analogous to succession or legacy duty statutes and having none of the features of a probate tax placing a direct tax on the property. This distinction was clearly pointed out by Mr. Justice Clement in *In re Doe* supra and by Chief Justice Harvey in *In re Cust* supra following the decision of the Privy Council in *Rex* vs. *Lovitt* [1912], A.C. 212. It is true that the Privy Council were dealing with the provisions of the New Brunswick statute analogous to the English probate duty Act, but it is equally true that Lord Robson recognized that the statute in the same manner as the Alberta Act also assimilated some of the features of Succession and Legacy Duty Acts. At page 222—Lord Robson says—

> " Here the legislature of New Brunswick has expressly enacted that all property situate in the Province shall be subject to a succession duty though the testator may have had his fixed place of abode or domicile outside the Province. The Act purports to exclude the application of the maxim ' Mobilia sequuntur personam ' as regards

personal estate within the Province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the Province."

The Court is dealing with the case from the aspect of a probate duty but nowhere is there any suggestion that the legislature cannot if so minded, also by the same Act, impose succession or legacy duties. It is submitted that the Court has impliedly said that the New Brunswick Statute did that very thing exactly as has been done in the statute in question in this action.

(B) IN SO FAR AS THE SUCCESSION DUTY ACT OF ALBERTA RELATES TO PROPERTY LOCALLY SITUATE WITHIN THE PROVINCE, IT IS A DIRECT TAX ON THE PROPERTY.

In re Doe supra.

In re Cust supra.

The Act in Section 7 thereof states :—

" Save as otherwise provided all property of the owner thereof situate " within the Province . . . and passing on the death, shall be subject " to succession duties." Sections 24 and 46 give the Crown a direct lien upon the property and enforcement of the lien can be made directly against the property. Section 16 provides that duties shall be payable out of the share of the beneficiary according to the rate applicable.

The Minister may accept payment or a bond as security as provided by Sections 12 and 13, and having accepted a bond the lien of the Crown is gone. Security by way of bond is taken and the Crown accepts the bond in lieu of its lien against the property. *See*—

Minister of Finance v. *Caledonian Insurance Co.* 33, B.C.R. 29.

United States Fidelity v. *Rex* [1923], A.C. 808.

The counsel for the Plaintiffs has urged that these cases show that the remarks of Mr. Justice Clement in *In re Doe* that the tax resembles a property tax is erroneous, but it is submitted they rather confirm that view because they state that when security has been accepted by way of bond then and then only is the lien of the Crown gone. The Crown has accepted a right *in personam* in place of a right *in rem* which was given under the Act.

In *The United States Fidelity case* the Court held that if it were shown that the property had actually come into the hands of the obligor under the bond, then the surety was liable whether the property came into his hands as executor or devisee. It was pointed out that this was necessarily so since the applicant might be one of any number of classes of persons e.g. a creditor, or legatee. Sir Henry Duke at p. 813 says :—

" The Succession Duty Act contemplates that the obligor of the bond given to obtain probate may be a person who is not liable for the whole duty payable in respect of the estate, and this conclusion makes it proper to consider the possible position in respect of liability to duty of some of the classes of applicants who may properly claim probate or letters of administration. Where there is a Will, then upon the death or renunciation of an executor, administration

No. 6. Supplement to Defendants' Factum replying to argument for Plaintiffs—*continued.*

with the will annexed may be claimed by divers classes of parties having interest. Where there is intestacy, the classes of possible applicants are at least as numerous. Devisees and legatees may obviously be among the applicants.

The construction of the bond required under the statute should therefore, if the terms of the statute admit of it, be wide enough to render the statutory form applicable and its possible operation effective to secure the object of the legislature—namely, the satisfaction of the claim of the Crown as a first charge upon the estate and every distributive share of it." 10

It is submitted that under the bond in question in this action the only obligation imposed by the condition of the bond which is the governing part (*see* Halsbury 2nd Edition, Vol. 3, at page 92) is an obligation as executor to pay duties on property coming into his hands and although the surety may be obliged to pay the amount assessed his right of recovery against the executor is only in his capacity as executor, but even if the applicant is a person other than the executor, the applicant has voluntarily agreed to give the security and is liable for duty on dutiable property coming into his hands.

The cases dealing with estate duty hold that if apt words are used in 20 the statute to show that a tax is imposed on the property of the deceased as in the statute in question there is no doubt that if the local situation of property is within the Province the property is taxable regardless of domicile.

See *Winans* v. *Attorney-General* [1910], A.C. 27.
Harding v. *Commissioner of Stamps for Queensland* [1898], A.C. 769.
Blackwood v. *The Queen*, 8 A.C. 68.

(C) The Plaintiffs have stated that the Alberta Act does not impose a duty on the succession or the person but it is submitted that the plain terms of the statute show that the legislature for some purposes imposes a duty on the intangible transfer to the beneficiary and thus incorporates the maxim 30 *mobilia sequuntur personam* into the construction of the Act.

Reference was made to certain sections of the Act in Defendants' factum but the following sections should also be considered to show that there was an intention to tax the benefit passing to beneficiaries, heirs, and legatees :—

> Section 3.—(*a*) " Aggregate value " shall mean the fair market value of the property of a deceased person, both within and without the Province, passing on his death, including therein the property which for the purposes of this Act is deemed to pass on his death, before the debts, incumbrances and other allowances authorized by 40 this Act are deducted therefrom;
>
> (*f*) " Passing " shall mean passing either immediately on the death of a person, or after an interval, either certainly or contingently and either originally or by way of substitutive limitation, whether the deceased at the time of his death was domiciled in the Province or elsewhere;

(*g*) " Property " shall include real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by Will, or of passing on the death of the owner to his heirs, or personal representatives;

Section 5 exempts certain property passing to certain classes of beneficiaries.

Section 6—property which shall be deemed to pass on death :—

(*a*) gifts made in contemplation of death;

(*b*) gifts *inter vivos*, or as a *donatio mortis causa ;*

(*c*) property transferred by owner to himself jointly with some other person;

(*d*) property passing under a settlement.

All these are clearly transmissions of property imposing a duty on the person benefiting and not on the property itself. In the case of a gift *inter vivos* it cannot be said to be the property of the deceased. The table showing percentages payable by the beneficiaries varies according to the relationship of the beneficiary.

See also Sections 17, 24 and 24*a*.

The fact that under Section 8 an additional duty is added where the share of each beneficiary exceeds a certain amount shows clearly that this is a tax on the legacy passing to such person.

These sections together with the sections quoted in the Defendants' Factum clearly show that for the purpose of taxing property outside the Province the tax imposed is analogous to succession duty or legacy duty Acts and by the amendment of 1927 it was placed beyond doubt that the *mobilia* rule was incorporated to bring into the Province property of a domiciled decedent locally situate outside the Province.

In the case of *Winans* v. *Attorney General* [1910], A.C. 27, the distinction between the two classes of duty was clearly pointed out. *See* remarks of Lord Gorell at pages 39–41 :—

> " The broad point with regard to the duties is that the first three [" probate duty," " account duty," and " temporary estate duty "] dealt with the duty on the amount of property passing, whatever its destination, while the other two [" legacy duty " and " succession duty "] dealt with the duty on the value of the interests taken and the duty varied with the relationship of the person taking to the person from whom the interest was derived or the predecessor ";

and by Anglin, J., in *Smith* v. *Provincial Treasurer of Nova Scotia* 58, S.C.R. at page 585.

See also remarks of Lord Robson in the *Lovitt* case referred to in the preceding pages.

It would appear to follow as a logical consequence that all legacies and bequests which have been held liable to legacy duty in England would otherwise be held liable to succession duty under the Alberta Statute.

No. 6. Supplement to Defendants' Factum replying to argument for Plaintiffs—*continued.*

Counsel for the Plaintiffs has relied on *Woodruff* vs. *Attorney-General for Ontario* [1908], A.C. 508, and although admitting that considerable doubt has been thrown upon its authority for anything but the narrow facts of the case then decided, nevertheless by its reference to *Blackwood* v. *The Queen*, 8 A.C. 82, he relies on the latter decision. In the *Blackwood* case the Privy Council held that the statute there in question effected a probate duty rather than a succession duty because the tax was effected upon the property in bulk before distribution and was payable by the executor. But the statute under consideration had none of the provisions appearing in the Alberta Act levying a tax on the successors of the deceased at the time when enjoyment accrues. (*See* Section 19.) It imposed a single duty on the property of the deceased. *See* remarks of Sir Arthur Hobhouse at page 90.

In the final analysis counsel for the Plaintiffs is forced to rely on the decision of *Cotton* v. *Rex* supra and *Woodruff* v. *Rex* supra. The *Cotton* case can be distinguished and in view of the remarks of Lord Moulton in *Cotton* v. *Rex* and of Anglin, J., in *Smith* v. *Attorney-General* and subsequently in *Barthe* v. *Alleyn-Sharples*, the *Woodruff* case insofar as the broad statement of law is concerned has been practically overruled.

In conclusion I may say that in its broad aspect a succession duty Act is essentially within the constitutional powers of the Provincial Government, and is the type of tax exclusively confined to the Province under Section 92 of the British North America Act. It is submitted that the Court should consider the broad aspect of taxation in construing its terms and while the definition of John Stuart Mill quoted in the cases is a general guide, nevertheless certain types of taxes are universally recognized as falling within the ambit of direct taxation and others of indirect taxation. Succession Duties are essentially regarded as direct.

See remarks of Viscount Cave in *City of Halifax* v. *Fairbanks Estate* [1928], A.C. 117, at pages 124 and 125.

Respectfully submitted,

H. J. WILSON,
Counsel for Defendants.

No. 7.

Formal Judgment.

No. 7. Formal Judgment, 22nd July 1932.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA, JUDICIAL DISTRICT OF CALGARY.

Between

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

and

THE PROVINCIAL TREASURER OF ALBERTA and THE ATTORNEY-GENERAL OF ALBERTA - - - - - *Defendants.*

Calgary, the Twenty-second day of July, A.D. 1932.

Before The Honourable Mr. Justice CLARKE,
The Honourable Mr. Justice MITCHELL,
The Honourable Mr. Justice FORD,
The Honourable Mr. Justice LUNNEY,
The Honourable Mr. Justice McGILLIVRAY.

The Special Case herein by leave of the Honourable Mr. Justice Clarke, granted upon the 28th day of May, A.D. 1932, having come on for argument on the Sixth day of June, A.D. 1932, and continued until the Ninth day of June, A.D. 1932, at the Sittings of this Honourable Court holden at the City of Calgary in the Province of Alberta, in the presence of Counsel for the said Plaintiffs and the said Defendants, upon hearing read the Special Case herein, and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct the said issue be set over for Judgment, and the same coming on this day for Judgment:

1. THIS COURT DOTH DECLARE that the succession duties levied in respect of the property mentioned in paragraph 2, sub-paragraph (*a*) of the Special Case, under the provisions of the Succession Duties Act of the Province of Alberta, being Chapter 28 of the Revised Statutes of Alberta, 1922, and amendments thereto, are invalid and are not payable.

2. THIS COURT DOTH FURTHER ORDER AND DECLARE that the succession duties levied in respect of the property mentioned in paragraph 2, sub-paragraph (*b*) of the Special Case, under the provisions of the Succession Duties Act of the Province of Alberta, being Chapter 28 of the Revised Statutes of Alberta, 1922, and amendments thereto, are valid and payable.

V. R. JONES,
Registrar, Appellate Division.

(SEAL)

No. 8.
Reasons for Judgment.
(A) Clarke, J.A.

No. 8.

Reasons for Judgment.

(A) CLARKE, J.A.—In my opinion Section 7 of The Succession Duties Act, under which the duties in question were imposed, is *ultra vires* in so far as it purports to impose duties upon property situate outside the Province of Alberta being in contravention of the Constitutional limitation of the authority of the Province to direct taxation within the Province.

I assume that the shares and other securities referred to in par. 2 (8) of the Special Case require some form of registration outside of the Province in order to effect their transfer so that their situs is not in this Province.

I express no opinion upon the construction of Section 9 of the Act other than that it does not restrict the generality of Section 7.

Therefore, my answer to question 1 is " No."

As to the property within the Province the validity of the duty was upheld by this Court *in re Cust*, 8 A.L.R. 308 [1915], which has been followed ever since and I think should not now be questioned by this Court.

I would, therefore, answer question 2 " Yes."

No costs.

(B) Ford, J.A.

(B) FORD, J.A.—The parties to this action concurred in stating a special case for the opinion of the Court which by leave was submitted directly to the Appellate Division.

The Special Case is in the following terms :—

The above-named parties concur in the following Statement of Facts :—

(1) Isaac Kendall Kerr, late of the City of Calgary, in the Province of Alberta, died at Calgary, aforesaid, on the 3rd day of December, 1929, and at the time of his death was domiciled in the Province of Alberta.

(2) The property owned by the said Isaac Kendal Kerr at the time of his death consisted of—

(*a*) Certain personal property of the aggregate value of $265,703·58 composed of shares and other securities of various Companies which had no Head Office in the Province of Alberta, and none of which had any registration or transfer office within the said Province, together with other personal property locally situate outside the said Province. The share certificates and other documents evidencing such shares and other securities were found in the City of Calgary, in the Province of Alberta.

(*b*) Certain real property and personal property having an aggregate value of $274,697·03. The real property is situate within the Province of Alberta and the personal property consists of shares and other securities in Companies with Head Office and transfer office situate within the Province of Alberta, and other personal property locally situate within the said Province.

(3) Within two years prior to his death the said Isaac Kendall Kerr transferred to Clara E. Kerr, one of the Plaintiffs, certain real estate situated within the Province of Alberta, together with certain personal estate.

(4) The said Isaac Kendall Kerr, by his Last Will and Testament, appointed the Plaintiffs Executrix and Executor of the said Last Will, and the Trustees of his estate, and by his said Will, devised to his widow, Clara E. Kerr, one of the Plaintiffs, personal property situate within Alberta to the value of $7,000·00, and directed that the remainder of his property be held upon trust to pay to this said widow, during her lifetime, all of the income thereof, for her sole use and benefit, and from and after her death, to pay the entire annual income thereof to Isaac Kendall Kerr, Jr., during his lifetime, and from and after the death of the said Isaac Kendall Kerr, Jr., to pay the said annual income to the grandchildren of the said Isaac Kendall Kerr during their lifetime, or until twenty-one years after the death of the last of his said grandchildren, living at the time of his death, whichever should be the shorter period, and upon the expiration of such time to divide the remainder of his property among the surviving grandchildren.

(5) The said beneficiaries, Clara E. Kerr and Isaac Kendall Kerr, Jr., are both domiciled and resident within the Province of Alberta.

(6) The plaintiffs, with their application for Probate of the said Last Will and Testament of the said Isaac Kendall Kerr, filed, in accordance with the provisions of Section 11 of The Succession Duties Act, being Chapter 28 of the Revised Statutes of Alberta, 1922, and Amendments thereto, affidavits of the value of the property owned by the said Isaac Kendall Kerr at the time of his death, and of the relationship of the beneficiaries, and upon the receipt thereof the Defendant the Provincial Treasurer of Alberta, pursuant to the provisions of Section 12 of the said Statute and Amendments thereto, fixed the sum of $54,754·21 as the duties payable under the said Statute and Amendments thereto, with respect to all the property referred to in paragraphs 2 and 3 hereof, which said duties are levied under Section 7.

(7) The Defendants, pursuant to Section 12 of the said Statute, required payment of the sum so fixed, or the delivery of a bond for the sum of $60,000·00 in the form provided in the said Statute, to secure the payment thereof.

(8) In compliance with the request of the Defendants a bond was given in words and figures following :—

" IN THE MATTER OF THE ESTATE OF ISAAC KENDALL KERR,
" late of the City of Calgary, in the Province of Alberta, Gentleman,
" Deceased.

" KNOW ALL MEN BY THESE PRESENTS that we, Clara Emma
" Kerr, of the City of Calgary, in the Province of Alberta,
" Widow, and William Henry McLaws, of the City of Calgary, in
" the Province of Alberta, Barrister and Solicitor, and the Alliance
" Assurance Company Limited of London, England, a Guaranty
" Company duly incorporated and authorized to carry on business
" in the Province of Alberta, are jointly and severally held and firmly
" bound unto the Treasurer of the Province of Alberta, representing
" His Majesty the King in that behalf, in the penal sum of Sixty
" Thousand ($60,000·00) Dollars, for which payment well and

No. 8. Reasons for Judgment. (B) Ford, J.A.—*continued.*

" truly to be made, we bind ourselves and each of us, for the whole " and not for a part, and our and each of our heirs, executors, " administrators, successors and assigns, firmly by these presents.

" Sealing with our seals, the corporate seal of the Guaranty " Company being duly attested by the proper officers thereof.

" The condition of this obligation is such that if the above- " named Clara Emma Kerr and William Henry McLaws, the Execu- " trix and Executor of the Will of Isaac Kendall Kerr, late of the " City of Calgary in the Province of Alberta, deceased, who died on " or about the 3rd day of December, A.D. 1929, domiciled at the " City of Calgary, in the Province of Alberta, do well and truly pay, " or cause to be paid to the Treasurer of the Province of Alberta " for the time being, representing His Majesty the King in that " behalf, any and all duty to which the property of the said late " Isaac Kendall Kerr coming into the hands of the said Clara Emma " Kerr and William Henry McLaws, may be found liable under the " provisions of the Succession Duties Act, within one year from the " date of the death of the said Isaac Kendall Kerr, or within such " further time as may be given for payment thereof under the " provisions of the said Act, then this obligation shall be void and " of no effect, but otherwise shall be and remain in full force and " effect.

" SIGNED, SEALED and DELIVERED
" in the presence of :—
" D. L. REDMAN.

CLARA E. KERR,
Executrix of the Will of Isaac Kendall Kerr, deceased.
W. H. McLAWS,
Executor of the Will of Isaac Kendall Kerr, deceased.
ALLIANCE ASSURANCE COMPANY LIMITED,
By E. E. Kenyon."

The said bond is still in full force and effect.

(9) Pursuant to the provisions of Section 15 of the said Statute, the Defendant the Provincial Treasurer of Alberta approved of the said bond and consented to the issuing of Letters Probate, and Letters Probate were issued by the District Court of the District of Calgary dated the 27th day of May, 1930, to the plaintiffs, and all the properties owned by the said Isaac Kendall Kerr at the time of his death and referred to in Paragraph 2 hereof, passed into the hands of the Plaintiffs, who obtained title thereto in their representative capacities.

(10) The plaintiffs dispute the validity of the duties imposed by the said Statute and Amendments thereto, with respect to the property belonging to the said Isaac Kendall Kerr at the time of his death, referred to in Paragraph 2 hereof, all of which the plaintiffs assert came into their hands

as Executrix and Executor of the said Will, on the grounds that the said duties are not direct taxation within the Province, and are therefore *ultra vires* the Legislature of the Province of Alberta.

The following questions are submitted for the opinion of this Honourable Court :—

(1) Whether or not the succession duties levied in respect of the property mentioned in sub-section (*a*) in Paragraph 2 of the Special Case are valid and payable to the Defendants or either of them.

(2) Whether or not the succession duties levied in respect of the property mentioned in sub-section (*b*) in Paragraph 2 of the Special Case are valid and payable to the defendants or either of them.

As stated in the Plaintiffs' factum the question of law raised is whether the duties imposed by The Succession Duties Act, Revised Statutes of Alberta 1922 and amendments thereto, come within the restricted powers of Provincial Legislature as to taxation contained in the British North America Act, namely, " Direct Taxation within the Province in order to the raising of a revenue for provincial purposes." (30–31 Vict. C. 3, s. 91, Cl. 2.)

The stated case divides the property of the testator into three classes as described in paragraphs (2) (*a*) and 2 (*b*) and paragraph (3).

No question is raised as to the property transferred by the deceased during his lifetime referred to in paragraph (3) of the Special Case.

As to the duties imposed in respect of all the property described in paragraph 2 it is contended on behalf of the plaintiffs that the Statute imposing them is *ultra vires* and void as imposing " indirect taxation."

As to the duties imposed with respect to the property described in paragraph 2 (*a*), which the plaintiffs contend is situate for all relevant purposes outside the Province of Alberta, and some of which clearly has a local or an actual situs outside the Province, it is argued on behalf of the plaintiffs that the Statute imposing them, or, at least, that part which imposes them, is *ultra vires* for the additional reason that the taxation is not " within the Province."

Before dealing with these two questions it may be helpful to state some general propositions.

The power of the Province, as stated by Lord Phillimore in *Burland* v. *The King* [1922], 1 A.C. 215 at p. 220 " knows no limits save those " prescribed in the section, but the endless variety of methods by which " taxation can be imposed have from time to time caused the attempted " use of this authority to be challenged, and the resulting decisions have " not been free from criticism." The power of a provincial legislature over " direct taxation within the province " for purposes of Provincial revenue is full, complete and sovereign. So long as the real substance of the enactment is " direct taxation within the Province " and not a subterfuge for doing indirectly what is forbidden to be done directly the power is unlimited.

While it may not be mere idle logomachy to dispute as to whether the Alberta Succession Duties Act resembles more nearly the English

No. 8. Reasons for Judgment. (B) Ford, J.A.—*continued.*

statutory provisions as to Estate Duty, or Legacy Duty, or Probate Duty or Succession Duty the discussion is, to use the words of Sir Arthur Hobhouse in *Blackwood* v. *The Queen*, 8 A.C. 82 at p. 91 " not very profitable." What should be kept in mind is that in one aspect and for one purpose the Act may resemble one of the English " Death Duties " and in a different aspect and for another purpose, it may resemble one or more of the others. It should also be remembered that in England more than one kind of duty is payable in respect of the same property.

Fortunately or unfortunately for the taxpayer Provincial Treasurers in Canada have not had the practical difficulties met with elsewhere as to the extension, correlation and consolidation of the various forms, and have been able to evolve, after enduring much forensic fire, in each Province a Statute which has resemblances to the English Estate, Succession and Legacy Duties as well as to the former Probate duty. It is, therefore, necessary, as Mr. McLaws urged, to take great care in considering and endeavouring to apply the English decisions on one or other of these various forms, and the decisions of the Judicial Committee on appeal from the Colonies and from the Dominions other than Canada, and indeed in considering the decisions of the Judicial Committee on appeal from one Province of Canada and from another.

The importance of these general observations will be seen when certain results, which clearly appear from decisions in Canadian Appeals to the Judicial Committee are stated.

These results so far may be stated as follows :

Provided the Statute does not offend against the Constitutional Limitation that the " taxation " must be " direct," a Province may impose (1) a duty or tax in the nature of a probate or estate duty upon real and personal property locally situate within the taxing Province, irrespective of the domicile of the deceased owner, if the tax is imposed as a condition of the grant of local probate or administration, *Rex* v. *Lovitt* [1912], A.C. 212 as explained in *Cotton* v. *The King* [1914], A.C. 176; and (2) subject to the same limitation, a duty or tax on the transmission of property to a resident beneficiary on the death of a person domiciled in the taxing Province at the time of the death notwithstanding that the property may be locally situated outside of the Province at the time of the death. *Alleyn* v. *Barthe* [1922], 1 A.C. 215.

There is also a considerable body of Canadian judicial authority for another proposition (3) that a succession or legacy duty may be imposed upon all of the personal property of a deceased person domiciled at the time of his death within the Province irrespective of the local situation of the property.

Now, first, is the tax a " direct tax " ?

In *Attorney General for British Columbia* v. *Canadian Pacific Railway Co.* [1927], A.C. 934 (Fuel-Oil Tax Act case) Lord Haldane at p. 937 said :—

> " It was laid down by the Board that while a direct tax is one that is demanded from the very person who it is intended or

desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. A tax levied, as in that case (*Attorney General for Manitoba* v. *Attorney General for Canada* infra) the tax was, on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation. The meaning of the distinction had been settled by the exposition given of it by the political economists, whose broadly phrased definition had been adopted in earlier decisions, such as *Attorney General for Quebec* v. *Reed* (10 A.C. 141), per Lord Selborne; *Bank of Toronto* v. *Lambe* (12 A.C. 575, per Lord Hobhouse); and *Brewers and Maltsters Association of Ontario* v. *Attorney General of Ontario* (1897, A.C.231, per Lord Herschell). It was true that the question of the meaning of the words used in ss. 91 and 92 was one, not of political economy but of law. Still, as Lord Hobhouse pointed out, the legislation must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to these tendencies. The definition given by John Stuart Mill was accordingly taken as a fair basis for testing the character of the tax in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious *indicia* of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867. Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test."

In *Attorney General for Manitoba* vs. *Attorney General for Canada* [1925], A.C. 561 (Grain Futures case), Lord Haldane at p. 566 used somewhat similar language.

In *Cotton* v. *The King* (supra) Lord Moulton, after reviewing the decisions in *The Attorney General for Quebec* v. *Reed*, 10 A.C. 141; *Bank of Toronto* v. *Lambe*, 12 A.C. 576, and *Brewers and Maltsters Association of Ontario* v. *Attorney General for Ontario* [1897], A.C. 231, said at p. 193 :—

> " Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase ' direct taxation ' in s. 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."

It is clear that the words " demanded from " mean " imposed upon," or " payable by " and not simply " asked for " without any obligation to pay or penalty for non-payment. They import the idea of a liability to pay

No. 8. Reasons for Judgment. (B) Ford, J.A.—*continued.*

being imposed upon someone. *See* remarks of Lord Haldane in *A.G. for Manitoba* vs. *A.G. for Canada* (supra) at p. 568 where he said :—

> " Turning to the only remaining question, whether the tax is in " substance indirect, and bearing in mind that by s. 5 the liability is " expressed as if it were to be a personal one, it is impossible to doubt " that the tax was imposed in a form which contemplated that some " one else than the person on whom it was imposed should pay it."

This perhaps obvious meaning is clearly seen when the foundation of the decision in *Cotton* v. *Rex* (supra) is quoted. At p. 194 Lord Moulton said : " 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 must recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein."

That this is the foundation of the decision that the tax was " indirect " is seen from what Lord Phillimore said in *Burland* v. *The King* at pp. 223–4 and also from the following statement of Lord Haldane in *A.G. for Manitoba* v. *A.G. for Canada* at p. 566 where he said :—

> " In *Cotton* v. *The King* followed in *Burland* v. *The King* this Board held that in the case of a provincial Succession duty, intended to be collected from a person concerned, it might be, merely with the administration of a testator's estate, who had been obliged by law to make a declaration of the particulars of that estate for taxation to be payable by him personally, and who was naturally entitled to recover the amount paid from the persons succeeding to the estate, the taxation was *ultra vires*. A probate duty (as distinguished from such a succession duty) paid as the price of services to be rendered by the Government and imposed on the person claiming probate, might, it was indicated, on the other hand, well be direct taxation."

On the other hand in *Alleyn* v. *Barthe* (supra) at p. 222, Lord Phillimore, dealing with the Quebec Succession Duty Statutes, which had been amended, said :

> " 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 . . ."

It is, therefore, necessary, in order to see whether the Act in the case at bar provides for " direct taxation " or is invalid as providing for " indirect taxation," to " examine closely the legislation imposing the duty or tax " (to adopt the language of Lord Moulton in *Cotton* v. *Rex*).

In this connection little, if any, help can be obtained from a study of what may be considered by some the more effective methods, for getting over the constitutional difficulty, used in the legislation of other provinces, to which considerable reference was made in the argument before us, though it is justifiable and helpful to contrast the Quebec Statutes considered in the *Cotton* and *Burland* cases, on the one hand, and the *Barthe* case on the other, with the Alberta Statute here in question.

No. 8. Reasons for Judgment. (B) Ford, J.A.—*continued.*

After a careful comparison of the Statutes in question 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 relevant sections of the Quebec Statutes dealt with in all the three cases under consideration are sufficiently set out in the judgments therein.

So far as the question of the taxation being direct or indirect is concerned the *ratio decidendi* of the *Cotton* judgment has been already quoted by me, but it is emphasized by the following, which appears in Lord Moulton's judgment at p. 194 :—

" There is nothing corresponding to probate in the English " sense, but there is (under art. 1191*g*) 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 other as regards " ' such declaration.' On receipt of such declaration the following " provisions of the above article 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 '."

On the other hand Lord Phillimore in the *Barthe* judgment at pp. 227 and 228 sets out the statutory provision which that judgment held to be valid as follows :—

" 4 Geo. 5, c. 9, provides by Article 1375, that all property " movable or immovable, the ownership, usufruct or enjoyment " whereof, is transmitted owing to death, shall be liable to certain " taxes calculated upon the value of the transmitted property.

No. 8.
Reasons for Judgment.
(B) Ford, J.A.—*continued.*

" Article 1376 says that the word ' property ' included all property " movable or immovable actually situate within the province, and " that whether the deceased was domiciled within or without, or the " transmission took place within or without; an exemption was given " by Article 1380 to a notary, executor, trustee or administrator from " personal liability for the duties imposed. This, as will be seen, does " not affect movable property outside the province, and of course " does not touch the property in the present instance; but by " 4 Geo. V., c. 10, it is expressly provided by Article 1387*b* that: " ' 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 such death, shall be liable to " ' the following taxes calculated upon the value of the property so " ' transmitted, after deducting debts and charges as hereinafter " ' mentioned,' and by Article 1387*g*, it is provided that the person " to whom as heir, universal legatee, legatee by general or particular " title, or donee under a gift in contemplation of death, movable " property outside the province is transmitted, is personally liable " for the duties in respect of such properties, and no more; and it " concludes: ' No notary, executor, trustee or administrator shall " ' be personally liable for the duties imposed by this section. " ' Nevertheless the executor, the trustee or the 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 '."

and at p. 228 Lord Phillimore states:

" 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, and it only remains " to be considered whether the taxation is within the province. For " this purpose 4 Geo. V. c. 10, is the relevant statute. The conditions " there stated upon which taxation attaches to property outside the " province are two: (1) That the transmission must be within the " province; and (2) That it must be due to the death of a person " domiciled within the Province. The first of these conditions " can, in their Lordships' opinion, only be satisfied if the person " to whom the property is transmitted is as the universal legatee " in this case was either domiciled or ordinarily resident within the " province; for in the connection in which the words are found " no other meaning can be attached to the words ' within the " province ' which modify and limit the word ' transmission.' So " regarded the taxation is clearly within the powers of the province. " It is, however, pointed out that Article 1387*g* refers to ' every

" person ' to whom movable property outside the province is " transmitted as liable for the duty, but this must refer to every " person on whom the duties are imposed, and those persons are, " as has already been shown, persons within the province."

It is now necessary to review in detail the provisions of the Alberta Statute in question in the case at bar and (to use the words of Lord Moulton) to consider its " whole structure " which, in my view, leads to the result that the taxation is neither indirect nor outside the province. For this purpose it will not be convenient to separate those portions of it which, in my view, make the Act valid as providing for direct taxation from that part of it which makes it valid as providing for taxation within the province. The whole structure of the Act shows that it has resemblances to the English estate duty, probate duty, succession duty and legacy duty and is not (to again use the words of Lord Moulton) " pure taxation " of property. The essential characteristics of these classes of the English " death duties " are clearly set out in Lord Shaw's judgment in *Winans* vs. *Attorney General* [1910], A.C. 27.

It may be noted, though perhaps it is of little value to do so, that throughout the Act the taxes are called " succession duties." It is clear, however, that in some aspects the tax is a property tax in the proper and limited sense and in other aspects a succession or transmission tax.

By Section 3 the following definitions are given :

" (*a*) ' Aggregate value ' shall mean the fair market value of the property of a deceased person, both within and without the Province, passing on his death, including therein the property which for the purposes of this Act is deemed to pass on his death, before the debts, incumbrances and other allowances authorized by this Act are deducted therefrom;

" (*e*) ' Net value ' shall mean the aggregate value less the debts, incumbrances and other allowances authorized by this Act, but no such deduction shall be made from property not available for the debts of the deceased;

" (*f*) ' Passing ' shall mean passing either immediately on the death of a person, or after an interval, either certainly or contingently and either originally or by way of substitutive limitation, whether the deceased at the time of his death was domiciled in the Province or elsewhere;

" (*g*) ' Property ' shall include real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives."

Section 5 exempts certain property passing to certain classes of beneficiaries.

Section 6 deals with certain property which shall be " deemed to pass."

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Section 7 reads in part as follows :—

" 7.—(1) Save as otherwise provided, 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 the Province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary being fixed by the following or by some one or more of the following considerations, as the case may be :—

(*a*) The net value of the property of the deceased;
(*b*) The place of residence of beneficiary;
(*c*) The degree of kinship or the absence of kinship of the beneficiary to the deceased."

Section 9 is as follows :—

" 9. Every person resident in the Province to whom passes on the death of any person domiciled in the Province any personal property situate outside the Province, shall pay to the Provincial Treasurer for the use of the Province a tax calculated upon the value of the property in accordance with the rates and subject to the considerations set forth in sections 7 and 8 of this Act."

The method of collection and the incidence of the taxes imposed will appear from the following :—

Section 11 is, in part, as follows :—

" 11.—(1) On all applications for letters probate or letters of administration, or for the resealing of letters probate or letters of administration made to any District Court in the Province, the applicant, or one of the applicants, shall at the time of filing the papers required by the practice of the said court on such application, make and file with the Clerk thereof two duplicate original affidavits of value and relationship with inventories annexed in form 1 of the schedule hereto."

Sections 12 and 13 are as follows :—

" 12.—The Clerk shall forthwith on receipt of such duplicate original affidavit, and fee, forward one of such affidavits to the Provincial Treasurer, who shall determine the amount (if any) in which the property or any part thereof is subject to succession duty, or will become subject thereto on the happening of a contingency, and shall, as soon as may be, require immediate payment, or the giving of security therefor by bond in form 2 of the schedule hereto, or with regard to the amount in which the property or any part thereof will become subject to duty on the happening of a contingency, require security to be given by bond in a form to be approved as hereinafter provided."

" 13.—(1) Every bond required to be given under the last preceding section shall be in a penal sum equal to ten per cent. of the sworn value of the property of the deceased liable, or which may become liable, to succession duty, or in such further sum as the Provincial Treasurer may deem sufficient, and shall be conditioned for the due payment to His Majesty of any duty to which the property of the deceased coming into the hands of the said applicant or applicants, is or may be found liable :

Provided, however, that the Provincial Treasurer may accept a bond in a penal sum less than ten per cent. of the sworn value aforesaid.

(2) Every such bond shall be executed by the applicant or by all the applicants if there is more than one, and a guaranty company approved by the Provincial Treasurer, as surety, and the parties executing the bond shall be bound jointly and severally in the whole amount of the penalty thereof :

Provided, however, that where it is made to appear to the satisfaction of the Provincial Treasurer that an applicant is unable to secure an approved guaranty company as surety, the security to be given may be of such nature and in such form and amount as the Provincial Treasurer may direct."

Section 15 makes it clear that the payment of the amount fixed or the giving of security is optional with the applicants and requires the Provincial Treasurer, subject to his right under Sec. 23 to ask for further information to " enable him to ascertain the amount of duty payable on any property," to consent to the issuing of letters probate or of administration on payment being made or the required security being given.

Section 16 clearly states the incidence of the taxation. It is as follows :-

" 16. The duties imposed by this Act shall be payable out of the shares of each person or beneficiary entitled to share in the property of the deceased, according to the rate applicable as aforesaid to such person or beneficiary."

Section 17 imposes a personal liability on any executor or administrator, to whom by this time a grant has been made, for certain deficiencies in the amount of duty arising from failure to include properties in the inventories or from certain incorrect statements made in his application.

Section 18 is as follows :—

" 18.—(1) Where, in respect of any property passing on the death of any person, no application for letters probate, or letters of administration or for the resealing thereof, is necessary, or if necessary has not been made, every person to whom any property passes shall within two months from the date of death of the deceased, or within such later time as the Provincial Treasurer shall allow, forward to the Provincial Treasurer a sworn statement to the best of his knowledge, information, and belief of the nature and value of the property passing :

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Provided that the delivery to the Provincial Treasurer by one of several beneficiaries of a statement as aforesaid, containing all the information required by the Provincial Treasurer, shall relieve the others from the obligation to deliver a further statement.

(2) Every person who being required by this section to deliver a statement as aforesaid omits or neglects to deliver such statement is guilty of an offence punishable on summary conviction by a fine of double the amount of the duty for which he is liable, or in default of payment of such fine by imprisonment for a term not exceeding one month."

Sections 19 and 22 provide for the payment of the duty on future or contingent estates, incomes or interests and for the commutation of such duty, which if not sooner paid is payable only when such estate, income or interest comes into possession.

Section 24 fixes the time within which the duties are payable and provides that " the property in respect of which such duties are payable shall be subject to a lien of the Provincial Treasurer."

A fasciculus of sections from 26 to 30 provides a special means of fixing valuations and ascertaining the property liable by reference to commissioners and on appeal to a Judge or by agreement.

Section 31, which, of course, must be read along with sections 9 and 16, is the only section which gives any right of action against any one, apart of course, from whatever right of action the bond gives. It is as follows :—

" 31. Any sum payable under this Act shall be recoverable with costs of suit as a debt to His Majesty from any person liable therefor, by action in the Supreme Court of the Province in any judicial district, and it shall not in any case be necessary to take the proceedings authorized by sections 26 to 29, both inclusive, of this Act."

Section 32 places a personal liability on any executor or administrator (which liability, of course, arises only after he has obtained his grant), if he sells, assigns, transfers or disposes of any stocks, shares, bonds or debentures of the estate without payment of the amount " in which the same are liable for succession duty."

Section 37 provides that executors, administrators and trustees " shall have power to sell, pledge, mortgage, lease or otherwise dispose of so much of the share of any beneficiary as will permit the payment of the proper succession duty thereon."

As pointed out by Sir Henry Duke (now Lord Merrivale) in *United States Fidelity & Guarantee Co.* v. *The King* [1923], A.C. 808, at p. 813, there are many classes of possible applicants for probate or letters of administration. " Where there is a Will, then upon the death or renunciation of an " executor, administration with the Will annexed may be claimed by " divers classes of parties having interest. Where there is intestacy, the " classes of possible applicants are at least as numerous."

It is clear that, differing from the Statute dealt with in the *Cotton* and *Burland* cases, there is, under the Alberta Statute, no obligation on any

class or one of a class, whether executor, next-of-kin, devisee, legatee, creditor, public administrator, or anyone else, to apply for probate or Letters of Administration. The only obligation imposed upon anyone to disclose the nature and value of property passing on death is upon the beneficiary who obtains a beneficial interest by reason of property passing to him on the death of another. This obligation is not to apply for a grant of probate or letters of administration but one to forward to the Provincial Treasurer a statement of the nature and value of the property passing to such beneficiary, and, if one of several beneficiaries makes the statement for all, the others are relieved. The penalty for default in making the statement is a fine of double the amount of duty for which the beneficiary is liable by reason of the tax placed upon the property and payable by him.

It is clear also that there is no right to require any applicant or class of applicant for probate or letters of administration to pay the duties.

The tax is not imposed either directly or indirectly upon the applicant whether executor under a will or not.

No applicant for probate or administration, other than the actual person to whom property, upon which the taxation is imposed, passes by will or on intestacy, and who must be in the Province to be reached by the hand of the law, can be compelled to pay the duty by any method of collection provided in the Act, and indeed such beneficiary is not liable as applicant but because the tax has been placed upon his property or upon the transmission thereof to, or the accession thereof by, him.

The only liability which is placed upon any applicant is that which arises by the giving of the bond as security. This liability arises by contract. There is no element of indirectness in any relevant sense. It is required as a condition of the consent to and the grant of letters probate or of administration. In consideration of the liability of the obligors on the bond the Crown gives up its lien on the property taxed and the executors or administrators in pursuance of the grant may administer all of the estate covered thereby.

It is perhaps unnecessary to determine whether there is really any personal liability even under the bond placed upon the executor or administrator in the same way as one is clearly placed upon the guaranty company " as surety." (*See* Sec. 13.) It is sufficient to say that it is clear that (unless the bond is given by a sole devisee as in *United States Fidelity and Guarantee Co.* v. *The King* or by all the beneficiaries), the liability of the executor or administrator is at the most the same as that of the guaranty company namely, that of an obligor by his bond obligating himself to pay the debt of another. The difficulty, arising from the circumstance to which Lord Moulton attached considerable weight in the *Cotton* case, of the instance " of movables such as bonds or shares in New York bequeathed to some " person not domiciled in the province," being reduced into his possession otherwise than through the executor, does not arise, because by the terms of the bond the persons to whom the grant of probate or administration is to be made and the guaranty company are bound in a penal sum conditioned for the payment by the executor or administrator as the case may be (who, by the way, does not covenant to pay the duty otherwise

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than as obligor on the bond), of the duty to which the property of the deceased coming into his hands may be found liable. If in the instance mentioned or indeed, in any other of a similar nature, the property does not come into the executor's or administrator's hands as part of the estate of the deceased, there is no liability on him and the condition is not broken by non-payment of duty thereon. Indeed, the particular instance given by Lord Moulton is clearly met by the provisions of Section 9 of the Act which clearly must be read as a qualification of Section 7 as it certainly does not provide for a tax additional to that provided by Section 7. It is perhaps well to mention that Section 9 was placed in the Act in 1927 when the Act, which theretofore had limited the taxation to property having a local situation within the province, was extended to personal property situate outside the province of a deceased person domiciled within it. The difficulty in question was recognized and met as far as practically possible.

It is, however, open to serious question whether there is any personal liability on the executor or administrator even on the bond. The proper construction of the bond may be and probably is that the executor and administrator is liable only to the extent that he can realize the debt due to the Crown out of the deceased's estate or but for his own default he should have realized it. In the latter case any liability would be analogous to that of the corporation in *Erie Beach* v. *A. G. of Ontario* [1930], A.C. 161. Certainly so far as the judgment in *United States Fidelity and Guarantee Co.* v. *The King* (supra) goes there has been no determination by the Judicial Committee on the point. All that was there dealt with by their Lordships was the liability of the guaranty Company as surety to pay the amount of the duties which it was held had been finally and conclusively determined to be payable and that the executor who was also sole devisee under the Will in question was also liable therefor.

The decision of this Division in *Rex* v. *London and Lancashire Guarantee and Accident Co.*, 22 Alberta L.R. 306 does not in terms deal with the liability of any one other than the guaranty company the surety on the bond. Indeed in the *United States Fidelity* case the distinction between the obligor and the surety is inherent in the reasoning as it is in section 13 of the Statute.

Now, second, is the " taxation within the Province " ?

If the Legislature has the right to apply the maxim *mobilia sequuntur personam*, as has been done in England in respect of legacy and succession duties, without going beyond its powers of " taxation within the Province," the Act in question is *intra vires.*

This question was clearly left open in *Cotton* v. *The King* and in *Alleyn* v. *Barthe.* In the *Cotton* case at p. 186 in dealing with the Cross-appeal of the Crown Lord Moulton said : " 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 " movable property locally situated outside of the province (such right " arising from the domicil of the testatrix) it did not see fit to do so." In dealing also with the appeal of the appellants it was held that the elimination

of the words " in the province " from the definition of property did not permit of the application of the maxim because " the express language of " the operative clause provides that of this ' property ' those portions " only are taxed which are ' biens situes dans la province.' " It is also clear that the " second question " in the case was limited to the consideration of the taxation being " direct " or " indirect."

While it cannot be said that the right to apply the maxim is implicit in Lord Phillimore's judgment in *Alleyn* v. *Barthe* it is clear that the right to apply it is not denied. What was there held was that the taxation was clearly within the province on the construction placed by their Lordships on the relevant statutes.

On the particular facts of the case at bar, the question of the right to apply the *mobilia* rule does not arise because, having regard to section 9 and to clauses (5) and (9) of the Special Case, the transmission is just as clearly within the province as was that in *Alleyn* v. *Barthe*. On the other hand if the *mobilia* rule can and does apply it is unnecessary to invoke the aid of Section 9 of the Act.

But it is suggested that section 9 cannot be invoked because the Special Case in paragraph (6) uses the words " which said duties are levied under section 7." If this is to be taken as an admission of fact I would respectfully decline to deal with question (1) asked in the Special Case dealing with the property described in paragraph (2) (*a*). It is clear, in my opinion, that the property is liable, if not under section 7 alone, under the combined effect of sections 7 and 9. If it was intended that the Court was to exclude section 9 from the consideration leave should not, and I think would not, have been granted under the Rules of Court for the submission of a Special Case to a single Judge as the Rules contemplate, much less for its submission directly to this Division. I decline to subscribe to a proposition that under the guise of an admission of facts a possibly erroneous construction of a statute can be admitted or agreed to. Rules 218 to 220 certainly do not contemplate the submission of inconclusive academic questions. If the so-called admission of fact bears the construction suggested Counsel should be called back and given an opportunity to amend the case so as to avoid an inconclusive and, in my view, an empty victory as to the property in paragraph (2) (*a*).

But, is it within the power of the Province to adopt the maxim *mobilia sequuntur personam* as a determinant or basis of a succession duty or tax, not indirectly imposed?

The fact that all property, whatever its actual or local situation, is by the Act to be reckoned for the purpose of ascertaining the aggregate and net values of the estate and that this inclusion, as well as the circumstance of the residence of a particular beneficiary being within or without the Province, affects the rate of taxation, has no legal significance on the constitutional question. The scale of duty varying with the whole value of the estate is based upon what the legislature has considered it is just that the smaller and larger estates should pay, and the increase of the duty on the legacy or share of a non-resident legatee or next of kin is designed to tax property

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which comes into the Province and is transmitted through the executor or administrator to one who may immediately take the property or its proceeds out of the Province. The legislature in adopting its own measure is clearly acting within that part of the reasoning of Lord Hobhouse in *Bank of Toronto* v. *Lambe*, 12 A.C. at p. 584, where he dealt with the words " within the province " in relation to the taxation of Banks there in question.

The judgment of Lord Merrivale (then Sir Henry Duke) in the *U.S. Fidelity* case is important in this connection as showing that the British Columbia Act there in question (which Counsel for the plaintiff before us said was for all practicable purposes the same as the Alberta one in question herein) is in the nature of a succession duty or transmission tax, for at page 813 he said :—

> " The object of the Succession Duty Act is to secure to the " Crown by a charge which attaches to the whole of any estate " passing upon death of a domiciled subject a fixed proportion of the " entire value of the estate. The relative duty is directed to be " deducted from the share of each person entitled to share the estate. " Executors or administrators or trustees are empowered to sell the " property of the deceased, whether realty or personalty, in order " to provide funds for payment of the duty in the same manner ' as " ' they may be enabled by law to do for the payment of debts of " ' the testator.' As a condition precedent to any grant of probate " or letters of administration, the Court having jurisdiction must " require :
>
> " (1) payment of the whole amount of the duty, or
> " (2) the making by the applicant with surety or sureties of a " bond such as is here in question. Such bond, however, is " defeasible by due payment of the duty to which the " property coming to the hands of the applicant or appli- " cants may be found liable."

My opinion is that (so long as the method of collection or enforcement of the tax is not indirect) the Province acts within the limits of its legislative power in placing a succession duty upon all property which devolves according to its general law. The fact that to exercise its power it has to adopt a melange of the principles underlying what have come to be known as estate, probate, legacy and succession duties does not affect the question. The fact that there may be taxes imposed in respect of the same property, in two countries or indeed in two provinces of Canada, and that, to use the words of Mr. Justice Holmes in the Supreme Court of the United States, " it is " disagreeable to a bond owner to be taxed in two places," are considerations for the legislature rather than for the Courts.

The law of a deceased person's last domicile is the law by which his movable property devolves on intestacy. In other words the succession to his movables wherever situate is governed by the law of the intestate's last domicile. Subject to certain exceptions, statutory and otherwise, which are foreign to the present inquiry, the validity of a Will of movables

wherever situate is governed by the law of a testator's last domicile, and speaking generally, in the absence of a manifest intention that some other law is to be applied, that law is the law to be applied as to its interpretation and effect.

Furthermore, while an English (or Alberta) grant of administration has no direct operation out of England (or Alberta) and while the Courts of the deceased person's last domicile have no exclusive jurisdiction to administer and distribute his movable property, an English (or Alberta) grant of Letters Probate or administration extends to all the movables of a deceased person wherever situate, at least, in the sense that a person who has obtained the grant may sue in an English Court in relation to movables situate abroad and may take steps (subject, of course, to complying with the law of the actual situs) to receive and recover in a foreign country movables there situate; and an English (or Alberta) Court has jurisdiction to administer the whole of the movable property of the deceased whatever its local situation, although it is true that an administrator's liability to account for foreign assets depends upon his legal power to get possession of and to deal with them or his actually getting them under his control. *See* Dicey's Conflict of Laws, 5th Ed., pages 379–381 and 970, where *Ewing* vs. *Orr-Ewing*, 9 A.C. 34 and *Ewing* vs. *Orr-Ewing*, 10 A.C. 453 are referred to.

The maxim *mobilia sequuntur personam*, while of course not changing the physical situs of tangible movables situate locally outside the country of the domicile, nor the legal or fictional situs of intangible movables has its special, if not its only application, as a convenient rule governing the law by which movables devolve on death.

It seems to me that, once it is conceded that the Provincial legislation provides a tax in the nature of a legacy and succession duty, the fact that it relies upon the fictional situs of movable property as being at the place of the last domicile does not make the legislation invalid as offending against the limitation that the taxation must be within the Province. The incidence of the taxation being on the share of the beneficiary the tax is clearly a legacy or succession duty. It is the person who has an " accession " who bears the duty. See *Winans* vs. *A.G.* (supra).

To ascertain the meaning to be given to the words " within the Province " as used in the British North America Act, 1867, it is " legitimate," " permissible " and in the present instance advisable to consider the kinds of taxation in vogue at the time of the passing of that Act in 1867 and the decisions of the Courts on the Statutes imposing taxation of a similar nature to that now under consideration. A similar rule or principle of construction has been very definitely applied in all the cases dealing with the words " direct taxation." To those already cited Lord Cave's judgment in the *City of Halifax* v. *Fairbanks Estate* [1927], A.C. 117, may be added. " The " external evidence derived from extraneous circumstances such as previous " legislation and decided cases " as a permissible and legitimate topic for consideration in determining the meaning of particular words used in the B.N.A. Act is also emphasized in the judgment of Lord Sankey, L.C., in *Edwards* v. *Attorney General for Canada* [1930], A.C. 124.

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In 1830 in *In re Ewin* 1 Cr. and Jerv. 151; 148 E.R. 1371, the rule that personal property follows the person and that " wherever the domicile of the " proprietor is, there the property is to be considered as situate " was applied to render liable to legacy duty in England foreign stock in Russia, in America, in France and in Austria passing on the death of a testator domiciled in England.

In 1845 in *Thomson* v. *Advocate General* 12 Cl. and Fin. 2; 8 E.R. 1294, the same rule was applied to exclude from legacy duty in England personal property in Scotland of a testator domiciled in the British Colony of Demarara. It was pointed out there was no local duty in the nature of legacy duty payable in the Colony but its right to pass such a law seems to have been clearly recognized.

In 1851 in *Attorney General* v. *Napier* 6 Ex. 217; 155 E.R. 520, *In re Ewin* was followed, and it was held that where a testator died domiciled in England the whole of his personal estate, whatever its actual situs, was liable to legacy duty. Parke B., said referring to *Thomson* v. *Advocate General:* " Lords Lyndhurst, Brougham, and Campbell put it upon the " great principle, that personal property is to be considered as situate " where the owner is domiciled at the time of his death."

In 1865 (just about one year and a-half before the passing of the B.N.A. Act), Lord Cranworth, L.C., in *Wallace* v. *Attorney General, Jeeves* v. *Shadwell,* L.R., 1 Ch. 1, applied the same principle to exclude from liability to succession duty a very large sum of British Consols standing in the English funds in the name of a testator domiciled in France as well as money and other personal property locally situate in England of a testatrix domiciled in the Colony of Port Natal. The broad principle adopted by the Lord Chancellor was that the generality of the words used limited the liability to duty to persons who " claim title by virtue of our law."

Since Confederation the right of a British Colony to apply the maxim *mobilia sequuntur personam,* so as to make the " law of the domicil prevail over that of situation," while recognizing the right by the use of apt words to tax property having an actual situs therein, has been again laid down in *Harding* v. *Commissioners of Stamps for Queensland* [1898], A.C. 769. The right of a Province of Canada to impose a tax on " a succession devolving under the law " of the Province was clearly recognized in the judgment of Lord Macnaghten in *Lambe* v. *Manuel* [1903], A.C. 68. While no question of legislative power appears to have been discussed in this case it seems clearly to follow from the emphasis placed upon the principle adopted by Lord Cranworth in *Wallace* v. *Attorney General,* that it must be taken that the words " taxation within the province " are not limited to taxation on or in respect to property having an actual situs in the Province, but that, if apt words are used, a succession duty can be imposed (if the tax is " direct ") upon " a succession devolving under the law " of Alberta. The fact that the Act may in a particular instance become a *brutum fulmen,* by reason of the disregard by a foreign Court of the rules of Private International Law, does not affect the question of the right to make the attempt to reach property which, by what is perhaps the clearest of those rules, devolves

according to our law. In this connection I am, of course, not referring to our fiscal or penal laws which any foreign Court has the right to disregard.

It should perhaps be noted that there is nothing in the very recent decision of the House of Lords in *English Scottish and Australian Bank, Ltd.* v. *Inland Revenue Commissioners* decided in December 1931 (48 T.L.R. 170) which conflicts in any way with the principle now being given effect to. In that case it was held that an agreement for sale of simple contract debts owed by debtors resident out of the United Kingdom is exempt from stamp duty in respect of such debts on the ground that they are " property locally situate out of the United Kingdom." The rule as to probate and probate duty dealt with by Lord Merrivale in *Royal Trust Co.* v. *Attorney General of Alberta* was there followed. The testator whose property was being dealt with in *Royal Trust Co.* v. *A.G. of Alberta* had died before the Act now in question had adopted the *mobilia* rule and was confined to property " situate within the Province."

Woodruff v. *Attorney General for Ontario* [1908], A.C. 508 was strongly pressed upon us by Counsel for the Plaintiff as being in conflict with the view now being given effect to by me. Whether or not that decision can be said to have been overruled or to have been " virtually " overruled, even a cursory reading of the judgment of Lord Collins shows that it was based entirely upon the fact that upon the proper construction of the Act there in question the statute provided for a tax upon property which was, to use Lord Moulton's expression, in the *Cotton* case, " pure taxation."

In *Blackwood* v. *The Queen*, 8 A.C. 82, referred to in *Woodruff* v. *Attorney General* the distinction between a succession duty and a probate duty was referred to and on the true construction of the Victorian statute there in question, it was held the legislature did not intend to apply the maxim *mobilia sequuntur personam.*

Moreover the reasoning of the judgment in the *Woodruff* case has been especially dissented from by Lord Moulton in the *Cotton* case where he said : " The decision in the case of *Woodruff* v. *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." As the question dealt with in the *Cotton* case is the same as the question now being dealt with in the case at bar it is clearly justifiable to treat " the present case entirely independently of that, *i.e.*, the *Woodruff* decision." It should perhaps also be pointed out that the property on which duty was claimed in the *Woodruff* case consisted of securities which were at the time of the testator's death in a safety deposit vault in the City of New York and which the testator had in his lifetime transferred with the intention that the transfers should only take effect after his death.

There is undoubtedly in Canada a conflict of judicial opinion on the question and there does not appear to me to be any Canadian decision binding upon this Court which goes the length of determining that as

No. 8. Reasons for Judgment. (B) Ford, J.A.—*continued.*

applicable to movables, having nothing more than the fictional or legal situs which the maxim imports, a succession duty can be validly imposed on its transmission by death except to someone resident or domiciled within the province. The following cases may be referred to :—

The Ontario case of *Attorney General for Ontario* v. *Baby* [1926], 3 D.L.R. 928; [1927], 1 D.L.R. 1106.

The British Columbia case of *in Re Succession Duty Act* and *Walker* [1922], 1 W.W.R. 803; 30 B.C.R. 549.

The Supreme Court of Canada decisions in *Smith* v. *Provincial Treasurer of N.S.*, 58 S.C.R. 578; and in *Smith* v. *Levesque* [1923], S.C.R. 578.

I should add that I have dealt with the property described in paragraph (2) (*a*) of the Special Case on the assumption which seemed to me to have been made by Counsel on both sides, that the personal property therein described had so far as it consists of tangibles, a physical situs and, as to the shares and other securities there referred to, an artificial situs in contemplation of law, outside the Province. I do not, however, desire it to be understood that I agree that it is clear that the debts represented by the share certificates and other securities therein referred to are all clearly situate outside the Province. Something might depend upon whether some of the " documents " are specialties or represent only simple contract debts. Furthermore it does not appear whether the ownership of the shares and other securities could be effectively dealt with only outside and not within the Province of Alberta within the authority of *Brassard* v. *Smith* [1925], A.C. 371. Whether intangibles have any " local habitation " at all, or whether for the purpose of probate jurisdiction they may be said to have one " locality " and for purposes of succession another " situation," may still be a live subject for discussion. These difficulties disappear if one adopts Mr. Dicey's paraphrase of Lord Cranworth's application of the principle " *mobilia sequuntur personam* " by saying that " the law of domicil prevails over that of situation " as Lord Hobhouse did in *Harding* v. *Commissioners of Stamps for Queensland* (supra). See *Secretary of State for Canada and Custodian* v. *Alien Property Custodian for the United States* [1931], S.C.R. 169.

For the reasons given both questions asked in the Special Case should be answered in the affirmative.

As arranged there will be no costs to either party.

(C) Mitchell, J.A.

(C) MITCHELL, J.A. :

I concur in the judgment of my brother Ford.

(D) Lunney, J.A.

(D) LUNNEY, J.A. :

The two questions submitted to the Court are :—

(1) Whether or not the succession duties levied in respect of the property composed of shares and other securities of various companies which had no head office in the Province of Alberta, and none of which had any registration or transfer office within Alberta, together with other personal property locally situate outside the

said Province—the share certificates and other documents evidencing such shares and other securities having been found in the City of Calgary, Province of Alberta—are valid and payable to the defendant or either of them.

(2) Whether or not the succession duties levied in respect of certain real property and personal property, the real property being situate within the Province of Alberta and the personal property consisting of shares and other securities in companies with head office and transfer offices situate within the Province of Alberta, and other personal property locally situate within the said province are valid and payable to the defendants or either of them.

Section 7 of the Succession Duties Act, under which the tax has been imposed, clearly purports to tax all property of the owner situate within the province, and all the personal property situate outside the Province, and passing at his death, of an owner domiciled in the Province.

As to the taxing of " All the personal property of the owner situate outside the Province, and passing at his death " I have reached the conclusion that such a tax is beyond the jurisdiction of the Province. I am not prepared to accept the " mobilia sequuntur personam " theory as bringing within the direct taxing power of the Province what would otherwise not be available as taxable property. I think the taxation of personal property, situate outside the Province, of a decedent domiciled in the Province, is not direct taxation within the Province and accordingly would answer the first question in the negative.

As to the second question, I have come to the conclusion that the imposition of a tax on all property within the Province is direct, that the tax does not become indirect by the necessity of the executor to pay in cash or furnish a bond before obtaining probate. In the judgment *in re Cust*, 8 A.L.R. 308. Harvey, C.J., says at p. 313 : " It is quite clear that there was no intention in the *Cotton* case to qualify the decision in the *Lovitt* case, for Lord Moulton says : ' In the case of *Rex* v. *Lovitt* no question arose as to the power of a Province to levy Succession duty on property situated outside the Province ' which remark also indicates that all that they intended to deal with in the *Cotton* case was such power. I am of opinion, therefore, that the present case is really governed by the *Lovitt* case which appears to me to establish the validity of the ordinance as far as it levies duties on property within the Province."

I do not think the difference in wording between the Ordinance under which the *Cust* judgment was given and the wording of the present Act is sufficient to cause a departure from the *Cust* judgment. Accordingly I would answer the second question in the affirmative.

As arranged between the parties there will be no costs.

(E) McGILLIVRAY, J.A. :

(E) McGillivray J.A.

In this case the plaintiffs dispute the validity of the duties imposed on the property of the late Isaac Kendall Kerr under the Succession Duties

No. 8. Reasons for Judgment. (E) McGillivray, J.A.—*continued.*

Act of Alberta, being Chapter 28 of the Revised Statutes of Alberta, 1922, and amendments thereto, on the grounds that the duties " are not direct taxation within the Province and are therefore *ultra vires* the Legislature of the Province of Alberta."

The action comes before this Court in the form of a special case. I have had the privilege of reading a draft judgment prepared by my brother Ford in which the special case is set out at length. Assuming that it will so appear in his final judgment I shall not quote the whole of the special case. I think it important however to restate precisely what property is involved in this appeal and so I repeat paragraph 2 of the special case which reads as follows :—

" (2) The property owned by the said Isaac Kendall Kerr at the time of his death consisted of—

(*a*) Certain personal property of the aggregate value of $265,703.58 composed of shares and other securities of various Companies which had no head office in the Province of Alberta, and none of which had any registration or transfer office within the said Province, together with other personal property locally situate outside of the said Province. The share certificates and other documents evidencing such shares and other securities were found in the City of Calgary, in the Province of Alberta.

(*b*) Certain real property and personal property having an aggregate value of $274,697.03. The real property is situate within the Province of Alberta and the personal property consists of shares and other securities in Companies with Head Office and transfer office situate within the Province of Alberta, and other personal property locally situate within the said Province."

I also think it important to repeat paragraphs 5 and 6 of the Special Case, which read as follows :—

" 5. The said beneficiaries, Clara E. Kerr and Isaac Kendall Kerr, Jr., are both domiciled and resident within the Province of Alberta."

" 6. The Plaintiffs, with their application for Probate of the said Last Will and Testament of the said Isaac Kendall Kerr, filed, in accordance with the provisions of Section 11 of The Succession Duties Act, being Chapter 28 of the Revised Statutes of Alberta, 1922, and Amendments thereto, affidavits of the value of the property owned by the said Isaac Kendall Kerr at the time of his death, and of the relationship of the beneficiaries, and upon the receipt thereof the Defendant the Provincial Treasurer of Alberta, pursuant to the provisions of Section 12 of the said Statute and Amendments thereto, fixed the sum of $54,754.21 as the duties payable under the said Statute and Amendments thereto, with

respect to all the property referred to in paragraphs 2 and 3 hereof, which said duties are levied under Section 7."

In order that it may be quite clear as to what are the exact questions that the Court is called upon to decide in this case, I quote the questions put to the Court at the end of the case, which read as follows :—

" The following questions are submitted for the opinion of this Honourable Court :—

(1) Whether or not the succession duties levied in respect of the property mentioned in subsection (*a*) in paragraph 2 of the Special Case are valid and payable to the Defendants or either of them.

(2) Whether or not the succession duties levied in respect of the property mentioned in subsection (*b*) in paragraph 2 of the Special Case are valid and payable to the Defendants or either of them."

I agree with my brother Ford that the tax imposed on the property within the Province described in paragraph 2 (*b*) is a direct tax and is enforceable. As to the tax in respect of the property described in paragraph 2 (*a*), I disagree with him. In my opinion this is a tax imposed on property outside the Province and so is invalid and unenforceable. My reasons for so holding may be shortly and simply stated.

By section 92, subsection 2 of the British North America Act, the Provinces of Canada are given authority to make laws imposing " direct taxation within the Province," for the raising of revenue for Provincial purposes. This Court therefore has to consider The Succession Duties Act with a view to deciding first whether or not the tax in question is direct and secondly whether or not it is " taxation within the Province."

Now it is quite clear that in the view of the Crown and these particular defendants by the succession duty legislation applicable to this case, the Legislature attempts to effect taxation in respect of personal property outside of the Province of Alberta. The difficulty attaching by reason of this movable property not being within the Province is gotten over the defendants say, by the application of the maxim " mobilia sequuntur personam."

In this connection I may refer to the language of paragraph 6 of the Special Case and to the first of the two questions submitted to the Court, before quoted, and to the factum of Mr. Wilson, counsel for the defendants, who is also the head of the Succession Duties Branch of the Department of Government concerned with such matters, in which he states by way of opening after quoting from sections 7, 8, 9 and 16 of the Succession Duties Act—

" From these provisions it seems clear that the Legislature intended to provide for the taxation of personal property wherever situate of a deceased person who at the time of his death was domiciled in the Province."

No. 8.
Reasons for Judgment.
(E) McGillivray, J.A.—*continued.*

Mr. Wilson then refers to the case of the *Royal Trust Company* vs. *Attorney General* [1929], 1 W.W.R. 455, and says :—

> " Since the judgment of the Appellate Division in the *Royal Trust* case, the legislature in 1927 amended section 7 with the evident intention of making it absolutely clear that they intended the *mobilia* rule to be applied in this Province. The words added were ' and in the case of an owner domiciled in the Province all the personal property of the owner situate outside the Province.' It is submitted that there could be no clearer evidence of an intention to incorporate the *mobilia* rule.
>
> " The testator having been domiciled in the Province at the time of his death the actual or local situation of the stocks and other securities mentioned in subsection (*a*) of paragraph 2 of the Special Case, makes no difference insofar as the payment of succession duties to the Province is concerned. Through the application of the *mobilia* rule, the personalty is deemed to be attracted into the Province and situate here for purposes of taxation."

In my view the general principle governing testamentary and intestacy succession under which the law of the country where the deceased was domiciled at death governs the distribution of and succession to his personalty, has no application whatsoever to the facts of the case at bar. If this be a tax on property situate outside the Province of Alberta, it is beyond the taxing power conferred upon the Province and the generally recognized rule of convenience governing the devolution of personal estate based upon domicile surely cannot override the clear intention of the Imperial Parliament as expressed in the British North America Act.

In the case *Rex* vs. *Lovitt* [1912], A.C. 212, Lord Robson said :—

> " When, therefore, it is said that *mobilia sequuntur personam* all that is meant is that for certain limited purposes we deal with ' mobilia ' (or leave them to be dealt with) under the law governing their owner as though they were situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad."

There remains for consideration however the important question as to whether the duties levied in respect of the movable property situate outside the Province are a tax on property situate without the Province, or a tax upon the transmission or succession within the Province.

In the first case the tax in my opinion would be invalid. In the second case since the deceased had and the beneficiaries had and have an Alberta domicile, in my opinion the payment of the tax could not be successfully resisted.

A reference to paragraph 6 of the Special Case shows that the Provincial Treasurer fixed the duties payable with respect to " all the property " mentioned in paragraphs 2 and 3 of the Special Case and that this was done pursuant to the authority conferred upon him by Section 12

of the Succession Duties Act. Section 12 provides for the determination by the Provincial Treasurer of the amount (if any) in which " the property or any part thereof is subject to Succession Duty."

It is clear that in the case at bar the duties are levied under Section 7 of the Act. The concluding words of paragraph 6 of the Special Case, are, " which said duties are levied under Section 7." It is also clear from the questions submitted to the Court at the end of the Special Case that the only question to be decided is whether or not the succession duties " levied in respect of the property " are valid and payable.

It follows from what I have said that the whole question as to the duties payable with respect to the property described in paragraph 2 (*a*) turns upon the proper construction of Section 7 of the Act. This Section reads as follows :—

> " 7.—(1) Save as otherwise provided, 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 the Province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary being fixed by the following or by some one or more of the following considerations, as the case may be :—
>
> (*a*) The net value of the property of the deceased;
> (*b*) The place of residence of beneficiary;
> (*c*) The degree of kinship or the absence of kinship of the beneficiary to the deceased."

In considering whether the words underlined create a property tax or a tax on transmission the case of *Winans* vs. *Attorney General* [1910], A.C. 27, is most helpful. In this case Lord Loreburn, L.C., said at p. 30 :

> " Legacy and succession duties fall upon the benefits received by survivors on their accession upon a death. Estate duty falls upon the property passing upon a death, apart from its destination."

Lord Atkinson said at p. 32 :—

> " Legacy and succession duty are taxes on the enjoyment of and succession to property."

Lord Shaw said at p. 47 :—

> " My Lords, in my opinion it cannot be successfully maintained that the bearer bonds in this case fall within that category. It is quite true that they would not have been liable to legacy or succession duty. These duties, my Lords, are duties upon the accession to property by legatees and successors, and the levy of them is, in my opinion, an incident of such accession, meant to have been governed under the law of the domicil of the deceased which regulates the distribution of his personal estate. Estate duty is of a different character; the levy and payment thereof occur not at the point

No. 8.
Reasons for Judgment.
(E) McGillivray, J.A.—*continued.*

of accession to property but of the passing of property by the death of a testator."

It seems to me that the language of Buckley, L.J., in the case of *Attorney General* vs. *Peek* et al, 82 L.J.K.B. 767 at 772 may be aptly applied to the case at bar :—

> " The difficulties of this case largely disappear if there be borne steadily in mind the essential difference between estate duty and succession duty or legacy duty. Estate duty is a certain percentage of property passing upon death; that which remains to be beneficially dealt with is only the difference between that which passes and the percentage which the State is going to take out of it. Legacy and succession duties are sums of money which are taken from those who become beneficially entitled under the dead man's will."

Construing Section 7 in the light of these observations I experience no difficulty in coming to the conclusion that the section provides for the imposition of a tax in the nature of an estate duty upon movable property whether within or without the Province.

I may add that I have considered the Act as a whole and I find nothing in any context upon which the defendants rely which affects the force of the plain language of Section 7 expressing the intention of the Legislature to impose a tax on " all the personal property of the owner situate outside the Province and passing on his death."

It seems to me that if the Legislature of this Province intended to impose a tax upon the succession or transmission in respect of property outside the Province it might well have so stated in express language as has been done in other Provinces of the Dominion.

In the case *Attorney General* vs. *Peek*, 81 L.J.K.B. 574, at 580, Hamilton, J. (now Lord Sumner), said :—

> " The principle has often been laid down that taxing Acts are to be construed strictly. Where the Legislature has given the Crown revenue, that revenue must be exacted, however burdensome; but where the Legislature has not clearly given the Crown the revenue, the Act cannot be strained or supplemented by any implications to effect that object."

In the case of *The City of Ottawa* vs. *Egan*, [1923] S.C.R. 304 at 312, in speaking of an omission from a taxing statute, Duff, J., said :—

> " But it is no part of the duty of a court to supply such deficiencies in legislation. What is sometimes called an equitable construction is not admissible in a taxing statute. In order to justify taxation upon it the subject of assessment must be brought clearly within the provisions of the Act."

I cannot think that a tax " on all the personal property of the owner situate outside the Province " can be construed as a tax on succession or

transmission without contravening the principle of the well established rule of construction to which these cases refer.

If the tax in question is in the nature of an estate duty as I think it is, then it is a tax on property and as the property described in paragraph 2 (*a*) is outside of the Province the tax offends against the limitation placed upon the taxing power of the Province by the British North America Act.

I have come to my conclusions with respect to the two questions submitted after a careful consideration of the many cases cited by counsel, to each of whom the Court is indebted for very great assistance.

I may add that if Section 7 were treated as imposing a tax on succession or transmission it would be clearly invalid in its application to beneficiaries domiciled outside the Province. See *Alleyn* vs. *Barthe* [1922], 1 A.C. 215 at 227 and 228, and as no distinction is made in this section between beneficiaries domiciled within and without the Province, an added reason is provided for concluding that section 7 was intended by the Legislature to be a property tax.

Differences of opinion have arisen amongst members of the Court as to whether or not Section 9 provides a different and additional tax to that provided for in Section 7. As to this it is enough to say that neither in the Special Case nor in the argument has this question been raised. I for one, following the practice of the Judicial Committee am content to decide the questions raised by the Special Case and nothing more. It seems to me that to do otherwise without the assent of the parties and the benefit of argument by counsel would be both unwise and unfair.

In the result I would answer the first question by declaring that the succession duties levied in respect of the property mentioned in sub-section (*a*) in paragraph 2 of the Special Case are invalid and not payable to the defendants or either of them.

Insomuch as the *ultra vires* provisions of the Act imposing a tax on movables outside the Province are severable from the *intra vires* provisions of the Act which support a tax upon property within the Province, these latter provisions do not fall with the *ultra vires* ones and so I would answer the second question in the affirmative.

As counsel request there will be no costs to either party.

No. 9. Order granting conditional leave to appeal to His Majesty in Council and consolidating Appeals, 12th August 1932.

No. 9.

Order granting conditional leave to appeal to His Majesty in Council and consolidating Appeals.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.
JUDICIAL DISTRICT OF CALGARY.

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).*

Dated at the Court House, in the City of Edmonton, Province of Alberta, this 12th day of August, A.D. 1932.

Before : The Hon. CHIEF JUSTICE OF ALBERTA.
Hon. Mr. Justice FORD.
Hon. Mr. Justice EWING.

Upon the application of the defendants for leave to appeal from the portion of the judgment of the Appellate Division of the Supreme Court of Alberta answering the first question submitted in the Special Case herein in the negative, and upon the application of the plaintiffs to cross-appeal from the portion of the judgment of the Appellate Division of the Supreme Court of Alberta answering the second question submitted in the Special Case herein in the affirmative, and upon reading the pleadings and proceedings herein, and upon hearing Counsel for the defendants as well as for the plaintiffs;

IT IS ORDERED that the defendants have leave to appeal to His Majesty in Council and that the plaintiffs do have leave to cross-appeal to His Majesty in Council upon the following conditions :—

(*a*) That the defendants within three months from the date of this Order enter into good and sufficient security to the satisfaction of this Court in the sum of Twenty-five ($25.00) Dollars, for the due prosecution of the Appeal and for the payment of all such costs as may be payable to the plaintiffs in the event of the defendants obtaining an Order Granting Conditional Leave to Appeal, or the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the defendants to pay the plaintiffs' costs of appeal.

(*b*) That the plaintiffs within three months from the date hereof enter into good and sufficient security to the satisfaction of this Court in the sum of Twenty-five ($25.00) Dollars for the due prosecution of the Cross-Appeal and for the payment of all costs as may become payable to the defendants in the event of the plaintiffs obtaining an Order Granting Conditional Leave to Appeal, or of the Appeal being dismissed for non-prosecution, or of His

Majesty in Council ordering the plaintiffs to pay the defendants' costs of Appeal.

(c) That the defendants and plaintiffs within the period of three months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England.

IT IS FURTHER ORDERED that the appeal of the defendants and the appeal of the plaintiffs be consolidated.

By the Court,
V. R. JONES,
Registrar at Calgary.

No. 9. Order granting conditional leave to appeal to His Majesty in Council and consolidating Appeals, 12th August 1932—*continued.*

No. 10.

Certificate of compliance with Order granting conditional leave to appeal to His Majesty in Council.

No. 10. Certificate of compliance with Order granting conditional leave to appeal to His Majesty in Council, 5th November 1932.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.
JUDICIAL DISTRICT OF CALGARY.

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).*

In pursuance of the Order of this Honourable Court dated the 12th day of August, 1932, and entered on the 30th day of August, 1932, granting the Defendants conditional leave to appeal to His Majesty in Council and granting the Plaintiffs conditional leave to cross-appeal to His Majesty in Council, I beg to report that I find as follows :—

1. The Defendants have deposited in Court to the credit of the above action the sum of $25.00 for the due prosecution of the appeal herein by the Defendants to His Majesty in Council, from the Judgment of this Court pronounced on the 22nd day of July, 1932, and entered on the 26th day of September, 1932, and for the payment of all such costs as may become payable to the Plaintiffs in the event of the Defendants not obtaining an Order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Defendants to pay the Plaintiffs' costs of the appeal, as the case may be.

2. The Plaintiffs have deposited in Court to the credit of the above action the sum of $25.00 for the due prosecution of the appeal herein by the Plaintiffs to His Majesty in Council, from the Judgment of this Court pronounced on the 22nd day of July, 1932, and entered on the 26th day of September, 1932, and for the payment of all such costs as may become payable to the Defendants in the event of the Plaintiffs not obtaining an

No. 10. Certificate of compliance with Order granting conditional leave to appeal to His Majesty in Council, 5th November 1932 —*continued.*

Order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Plaintiffs to pay the Defendants' costs of the appeal, as the case may be.

3. The Plaintiffs and Defendants have, up to the date hereof, done all acts as prescribed to enable them to complete the records.

4. The Plaintiffs and Defendants are satisfied that the copy of the said records has been placed in the hands of the Court Reporters at Calgary, and that a copy of the said records will be made by not later than the 10th day of November, 1932.

ALL OF WHICH I humbly certify to this Honourable Court.

Dated at the City of Calgary, in the Province of Alberta, this 5th day of November, A.D.1932.

V. R. JONES,
Registrar of the Appellate Division
of the Supreme Court of Alberta, at
Calgary, Alberta.

No. 11. Order granting final leave to appeal to His Majesty in Council, 8th November 1932.

No. 11.

Order granting final leave to appeal to His Majesty in Council.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.
JUDICIAL DISTRICT OF CALGARY.

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).*

Dated at the Court House in the City of Calgary, Tuesday, the 8th day of November, 1932.

Before : The Honourable the CHIEF JUSTICE.
The Honourable Mr. Justice CLARKE.
The Honourable Mr. Justice MITCHELL.
The Honourable Mr. Justice LUNNEY.
The Honourable Mr. Justice McGILLIVRAY.

UPON MOTION made this day to this Court by Counsel for both parties for a final Order admitting their consolidated appeals herein to His Majesty

No. 11. Order granting final leave to appeal to His Majesty in Council, 8th November 1932 —*continued.*

in Council from the Judgment of this Honourable Court pronounced on the 22nd day of July, 1932, and entered on the 26th day of September, 1932, and UPON READING the Order granting conditional leave to appeal herein and consolidating the appeals, dated the 12th day of August, 1932, and the Certificate of the Registrar of this Court dated the 5th day of November, 1932, of compliance with the said Order, and it being shown that the preparation of a copy of the Record is being proceeded with, and UPON HEARING Counsel for the Plaintiffs and Defendants herein :

THIS COURT DOTH ORDER that final leave to appeal to His Majesty in Council as applied for, be granted to both parties herein.

AND it appearing that the printing of the Record is to be proceeded with in England :

THIS COURT DOTH FURTHER ORDER that the parties hereto do complete the copying of the said Record and instruct the Registrar of the Appellate Division of the Supreme Court of Alberta to transmit to the Registrar of the Privy Council one certified copy of such Record on or before the 20th day of December, 1932.

By Order of the Court,

(SEAL)

V. R. JONES,
The Registrar of the Appellate Division of the Supreme Court of Alberta, at Calgary.

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.*)

RECORD OF PROCEEDINGS.

BLAKE & REDDEN,
17, Victoria Street, S.W. 1.
For the Appellants and Cross-Respondents.

LAWRENCE JONES & Co.,
Lloyds Building,
Leadenhall Street, E.C. 3.
For the Respondents and Cross-Appellants.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4.