

Privy Council Appeal No. 1 of 1933.

The Provincial Treasurer of Alberta and another - - - *Appellants*

v.

Clara E. Kerr and another - - - - - *Respondents*

Clara E. Kerr and another - - - - - *Appellants*

v.

The Provincial Treasurer of Alberta and another - - - *Respondents*
(*Consolidated Appeals.*)

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1933.

Present at the Hearing :

LORD BLANESBURGH.

LORD ATKIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD THANKERTON.]

The late Isaac Kendall Kerr died on the 3rd December, 1929, domiciled and resident in the Province of Alberta. He left a large estate, and the respondents in the original appeal, both of whom are resident in the city of Calgary, obtained letters probate as executrix and executor of his will. Thereafter duties amounting to \$54,754.21 were assessed under the Alberta Succession Duties Act by the Provincial Treasurer in respect of the property of the deceased, and the respondents, along with a surety, entered into the bond afterwards referred to in order to secure payment of these duties.

The respondents challenged the validity of the imposition of these duties by the Province and a special case was agreed to by the parties, which was referred, pursuant to the Alberta Rules of Court, to the Appellate Division of the Supreme Court of Alberta. In this case two questions were referred for determination, and the decision of the Appellate Division, given the 22nd July, 1932, has led to the original appeal by the Provincial Treasurer and the Attorney-General of Alberta, hereinafter called the Province, and a cross-appeal by the executrix and executor, hereinafter called the executors.

The property in respect of which the duties were imposed is described in the special case 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.

(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.

No question is raised as to the duties in respect of the property in paragraph (3), and the following questions were submitted for the opinion of the 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.

The determination of the validity of the imposition of the duties depends on the application of the limits placed upon the taxing powers of a province by Section 92 of the British North America Act, 1867, viz., “Direct taxation within the province in order to the raising of a revenue for provincial purposes,” to the provisions of the Alberta Succession Duties Act. As regards the first question, which relates to personal property locally situate outside the Province, the issue is two-fold, viz., whether the taxation is direct and whether it is within the province. On the second question, which covers real and personal property situate within the province, the issue is whether the taxation is direct.

Dealing first with the question of taxation "within the province," the general law as to the power of taxation of a sovereign state has been thus stated (*Blackwood v. The Queen* (1882) 8 App. Case 82, at p. 96):—

"There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each state levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property."

There can be no doubt that the Alberta Succession Duties Act purports to impose taxation on the basis, *inter alia*, of personal property situate outside the Province, and therefore, if it possessed unlimited sovereign power it would be entitled to impose such taxation on its subjects. Accordingly, the present question only arises because of the limitations placed on the legislative powers of the province by Section 92 of the British North America Act of 1867, and, for this reason, the cases on legacy and succession duties in England are of little assistance for the present purpose. Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons—in any event, the duties here in question are not of that nature. In considering the limits placed on provincial taxation, the Courts have invariably had regard to the basis or subject matter in respect of which the taxation is imposed, and their Lordships agree with the statement of Anglin C.J. in *Cotton v. The King* (1912), 45 Can. S.C.R. 469, at p. 536, where he said, "in order that a provincial tax should be valid under the British North America Act in my opinion the subject of taxation must be within the province."

The Province maintained, in the first place, that under the Alberta Succession Duties Act the subject matter of taxation was the transmission of the property and not the property itself, and fell within the principle of the decision of this Board in *Alleyn v. Barthe* [1922] 1 A.C. 215.

In their Lordships' opinion, the principle to be derived from the decisions of this Board is that the province, on the death of a person domiciled within the province, is not entitled to impose taxation in respect of personal property locally situate outside the province, but that it is entitled to impose taxation on persons domiciled or resident within the province in respect of the transmission to them under the provincial law of personal property locally situate outside the province.

In *Lambe v. Manuel*, [1903] A.C. 68, a claim was made by the Province of Quebec for succession duties on moveable property locally situate in that province, which formed part of the succession of a testator domiciled in Ontario. The claim was rejected on the view that, on its true construction, the Quebec Succession Duty Act only applied, in the case of moveables, to transmissions of property resulting from the devolution of a succession in the Province of Quebec. Section 1191B of the Quebec Act of 1892, on which the issue turned, provided as follows:—"All transmissions, owing to death, of the property in, usufruct, or enjoyment of, moveable and immovable property in the province shall be liable to the following taxes. . . ." Thus the taxes were held to be imposed in respect of transmissions.

The Quebec Act of 1892 and the later Act of 1906 which re-enacted the words above quoted with alterations immaterial to this point, were considered in the case of *Cotton v. Rex* [1914] A.C. 176, and were construed as imposing the duties in respect of the transmission of the property. It was held, on construction, that neither of these Acts imposed any duty upon the transmission of moveable property outside the Province, and also that the taxation was not direct, in respect that it was imposed on "someone who was not intended himself to bear the burden but to be recouped by someone else."

In *Woodruff v. Attorney-General for Ontario*, [1908] A.C. 508, the deceased having died domiciled in the Province of Ontario, that Province claimed succession duty in respect of moveable property locally situate in the United States. It was held to be an attempt to levy a tax on property locally situate outside the province, which was beyond their competence. The Ontario Act of 1897, Section 4 (1) provided "the following property shall be subject to a succession duty," which clearly was not a tax in respect of the transmission of a succession.

The case of *Rex v. Lovitt*, [1912] A.C. 212, provides an interesting contrast to *Lambe's* case. The testator, who died domiciled in Nova Scotia, was possessed of certain personal property locally situate in the Province of New Brunswick, in respect of which the latter province claimed succession duty. It was held that, although called a succession duty, the tax in question was laid on the corpus of the property, and its payment was made a term of the grant of ancillary probate, and the claim to duty was upheld. The New Brunswick Succession Duty Act, 1896, Section 5 (1) enacted "All property, whether situate in this province or elsewhere, . . . passing either by will or intestacy . . . shall be subject to a succession duty."

In *Alleyn v. Barthe*, [1922] 1 A.C. 215, though an argument to the contrary was submitted, the judgment clearly proceeds on the footing that the taxation was imposed in respect of the transmission, and it may be noted that by the Quebec Succession Duty Act, 1909, as revised in 1914, Section 1387B, "All transmissions within the province, owing to the death of a person

domiciled therein, of moveable property locally situate outside the province at the time of such death" were made liable to the duties; this provision is substantially the same as that under construction in *Lambe's* case. The main question in *Alleyn's* case was whether the taxation was direct, but, in delivering the judgment of this Board, Lord Phillimore, after referring to the statutory provisions, states

"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."

The identification of the subject matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary. In the present case, Section 7(1) is the charging section, and provides 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 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.

In their Lordships' opinion, the terms of this section, which is very similar to that considered in *Lovitt's* case, clearly show that the subject matter of the taxation is the property and not the transmission of property; it is in marked contrast to the terms of the Quebec section considered in the cases of *Lambe* and *Alleyn*. It may be added that Section 9 of the Alberta Act, on which the Province sought to rely, does not modify this view, but merely provides a particular liability for payment of the tax.

The Province next contended that, although locally situate outside the province, the personal property of a person, who dies domiciled within the province, is to be treated as "within the province" for the purposes of Section 92 of the British North America Act, by reason of the application of the rule embodied

in the maxim *mobilia sequuntur personam*. This argument appears to proceed on a misunderstanding of the meaning and effect of that rule. If A dies domiciled in the United States of America, leaving moveable property locally situate in England, the latter country has complete jurisdiction over the property, but the law of England, in order to decide on whom the property devolves on the death of A, will not apply the English law of succession, but will ascertain and apply the American law. In other words, it is the law of England—not the law of America—that applies the principle of *mobilia sequuntur personam* in exercising its jurisdiction over the moveable property in England, the *locus* of the latter remaining unchanged; in no sense could the property be described as “within America.”

The Province further maintained that, as the bond given by the executors limited their liability to the duties in respect of property “coming into their hands,” and the property here in question had admittedly come into their hands, the taxation was in respect of property within the Province, but, in their Lordships’ opinion, the bond merely defines the extent of the security taken from the executors, and its terms cannot affect the validity or invalidity of the duties imposed under Section 7 of the Act. While that is sufficient to dispose of the contention, it may well be doubted whether “coming into their hands” means anything more than that the executors have completed their title to the property in question, the local situation of the property remaining unchanged.

Accordingly, their Lordships are of opinion that the duties under Section 7, so far as imposed on personal property locally situate outside the Province, did not come within the limits placed on provincial taxation by Section 92 of the British North America Act.

There remains the question of “direct taxation.” The principle to be applied in such cases is now well settled. Is the duty imposed on the very person whom the Legislature intended or desired should pay it, without any expectation or intention that he should indemnify himself at the expense of some other person? Under the Alberta Succession Duties Act the duties in question were imposed on the executors on their application for probate, and letters probate could not be issued without the consent of the Provincial Treasurer, whose duty was to secure payment of the duties or obtain security therefor by a statutory bond before giving such consent. There can be no doubt that normally the application for probate will be by executors, and the issue is whether the Legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. In their Lordships’ opinion the determination of this issue depends on the answer to a simple test, which was applied in the cases of *Cotton* and *Alleyn*, already

referred to, viz., whether the executor is personally liable for the duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

In *Cotton's* case, the provisions of the Quebec Succession Act 1906 were construed by this Board as entitling the Collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration and as providing, in the ordinary case, for payment of the duties by someone who was not intended himself to bear the burden but to be recouped by someone else, and the taxation was held to be indirect. Three erroneous views as to this decision have been subsequently propounded, two of which were corrected in *Burland v. The King* [1922] 1 A.C. 215, which was decided by this Board at the same time as *Alleyn's* case. The first suggestion was that the illustration of the declaration by the notary, before whom the will was executed, was based on inaccurate information, and that the value of the decision was thereby impaired, but it was pointed out in *Burland's* case that the case of the executor, or administrator, or legatee by a particular title might equally well have been taken, and that the error did not affect the force of the decision. The second suggestion in *Burland's* case was that the point was not necessary for the decision in *Cotton's* case, which had already been determined by other independent considerations, but it was held that the decision in *Cotton's* case on the invalidity of the statute was just as complete and fundamental as the decision in the earlier part of the judgment on the construction of the statute. The third suggestion, which has been adopted in certain decisions in Canada, including the present case, is that the decision on direct taxation in *Cotton's* case was confined to taxation in respect of moveable property not within the province. In their Lordship's opinion, this view is not justified either in fact or in principle. Two passages from the judgment may be cited, viz.:

(1) "This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the Provincial Legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words, 'in the province,' have been deleted from that clause," and

(2) "For the purpose of deciding this question it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of 'property' contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the moveable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the appellants not only admit, but contend, that the Act

imposes a succession duty upon all moveable property, wherever situated, of a testator domiciled in the province."

([1914] A.C. at pp. 189 and 195.) In principle also the local situation of the property comprised in the estate of the deceased appears to be irrelevant to the issue whether the executor is personally liable for payment of the duties, in the absence of any distinction in this respect drawn by the Act itself as regards duties in respect of different classes of property. In the Quebec Act, which was a tax on transmission, no such distinction was drawn, nor is any such distinction to be found in the present case.

In *Burland v. The King* (*supra cit.*) the testator had died in 1907, and the Quebec Act was again in question. It was held that certain amendments to the Act, which had followed immediately after the decision in *Cotton's* case, were insufficient to avoid the applicability of that decision, and the taxation was held to be indirect. But in *Alleyn's* case, which was decided at the same time as *Burland's* case, the testator died in 1913, by which time further important amendments had been enacted, which led to a contrary conclusion. In their Lordships' opinion, it is clear that the reason for this conclusion was the new provision in Art. 1387g of the Quebec Act, which was in the following terms: "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 to do so 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 Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under Sections 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

Reliance was placed in the Court below on the case of *in re Cust*, (1915) 8 Alberta L.R. 308, but it will be clear from the views their Lordships have expressed as to the principle laid down by the cases of *Cotton* and *Alleyn*, that the decision of the Court which decided *Cust's* case on appeal was erroneous, and must be taken as overruled. *Re v. Lovitt*, [1912] A.C. 212, referred to in that decision, was the case of a local probate duty charged by the province, where the property was locally situate,

for the collection or local administration of the particular property, and was not a case of pure taxation, as in *Cotton's* case and the present one. The question of direct or indirect taxation is not referred to in the judgment, and the only reference to it in the argument was in a contention that the tax was imposed on a transmission in another province and was therefore not direct, but it was held that the tax was not on transmission but on the corpus of the property.

Their Lordships are therefore of opinion that the succession duties levied in respect of the property mentioned in both subsections (a) and (b) in paragraph 2 of the special case are not valid. In the case of subsection (a) the taxation is neither direct nor within the Province, and in the case of subsection (b) the taxation is not direct.

Their Lordships will accordingly humbly advise His Majesty that the appeal for the Province should be dismissed, and that the cross-appeal for the executors should be allowed, and that the judgment of the Appellate Division of the Supreme Court of Alberta should be varied by substituting for the words "are valid and payable" at the end of the second declaration the words "are invalid and are not payable," and should otherwise be affirmed. By agreement of parties there will be no order for costs.

In the Privy Council.

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