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LEGAL STUDIES



# In the Privy Council

14790

No. 3 of 1946

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## On Appeal from the Court of Appeal for Ontario

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IN THE MATTER OF The Succession Duty Act, 1939, and The Amending Act, 1940; and

IN THE MATTER OF the Estate of James D. Aberdein, late of the Town of Brookline in the Commonwealth of Massachusetts, in the United States of America, deceased; and

IN THE MATTER OF the Appeal of Alice R. L. Aberdein, Widow, of the Town of Brookline aforesaid, sole beneficiary, and of the said Alice R. L. Aberdein, and Harold E. Stevens, the latter of the City of Boston in the said Commonwealth of Massachusetts, Executors of the Estate of the above-named deceased.

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BETWEEN:

THE TREASURER OF ONTARIO, Appellant,

—AND—

ALICE R. L. ABERDEIN and HAROLD E. STEVENS, Executors of the Estate of James D. Aberdein, and the said ALICE R. L. ABERDEIN, Respondents.

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# Case for the Respondent

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CASE OF THE RESPONDENT

Record.

1. This is an appeal by the Treasurer of Ontario from the judgment of the Court of Appeal for Ontario dated the 16th day of February, 1945, which, by the unanimous judgment of three Judges, dismissed his appeal from a judgment of The Honourable Mr. Justice Kelly dated the 27th day of May, 1944, except with respect to paragraph two (2) of the judgment of first instance which adjudged that the debts of the estate as allowed in the State of Massachusetts should be deducted from the gross value of the estate for the purpose of ascertaining the aggregate value and the dutiable value of the estate under The Succession Duty Act of Ontario, and before the Appellant fixed the rate and made the assessment for Succession Duty on the assets within Ontario. The Court of Appeal for Ontario unanimously reversed this finding; and there is no cross-appeal from this decision. The judgment of the Court of Appeal sustained the finding of the Judge of first instance that the shareholdings of the deceased

p. 59.
p. 44.
pp. 44 and 45.

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in certain companies having their head offices in the Province of Ontario were not property in the Province of Ontario; and so were not liable to be assessed to Succession Duty.

pp. 8 and 9.

2. The proceedings were initiated under section 31 of The Succession Duty Act (Ontario) 1939 in furtherance of which the Appellant served upon the Respondents a statement showing the amount of duty and interest claimed to be payable and particulars as to the computation thereof. The Respondents served the Appellant with notice of appeal setting out their objections to such statement and the reasons therefor. The Appellant served the Respondents with a notice of confirmation; the Respondents served the Appellant with a notice of dissatisfaction; and the Appellant served the Respondents with a reply confirming his original statement of the amount of duty and interest claimed to be payable. 10

pp. 10, 11 and 12.
p. 12.
p. 13.
pp. 13 and 14.

3. Under protest and subject to an agreement with the Treasurer of Ontario, the Respondents paid to the Treasurer the amount of duty and interest claimed by him, reserving all their rights to recover the same.

p. 11, l. 37, to p. 12, l. 8.

4. The documents referred to in subsection 8 of section 31 of The Succession Duty Act 1939, as set forth in the paragraph hereof numbered two (2), were fyled with the local Registrar of the Supreme Court of Ontario and constitute the pleadings herein. 20

5. Subsequently Counsel for the Appellant and Respondents agreed upon a statement of facts which thereupon became part of the Record. In the course of the trial Counsel for the two parties agreed that this statement of facts should be amended by an admission that the shares in question herein were regularly dealt with on the stock exchanges established and carried on in the City of Toronto and in the City of New York.

p. 14, l. 18, to p. 16, l. 15.
p. 16, l. 19, to foot of page.

6. The Appellant claimed that duty was payable pursuant to section 5(a) of The Succession Duty Act 1939 which reads as follows:

"5. Subject to sections 3 and 4 on the death of any person whether he dies domiciled in Ontario or elsewhere; . . . 30

(a) Where any property situate in Ontario passes on his death duty shall be levied on such property in accordance with the dutiable value thereof."

7. The statement of facts agreed upon establishes that the late James D. Aberdein who died on the 11th day of December, 1940, was born in Madison in the State of Indiana, one of the United States of America, and was at all times a citizen of and resided in the United States of America. At the time of his death he was domiciled at Brookline in the Commonwealth of Massachusetts; at no time did the testator have a residence or place of business within the Province of Ontario; that the sole beneficiary under his Will was his widow, Mrs. Alice R. L. Aberdein who was born in the United States of America, was at all times a citizen of the United States and at the time of the death of the testator was 40

p. 14, ll. 18-23.
p. 14, ll. 22-3.
p. 14, ll. 24-5.
p. 14, ll. 32-3.
p. 14, ll. 26-29.

Record.

domiciled at Brookline aforesaid. The assets of which the testator was in whole or in part possessed at the time of his death, material to the issues in this matter, were

(a) 200 shares, having a par value of $5.00 each, of the capital stock of Nipissing Mines Limited, a company incorporatd under the Companies Act of Ontario with head office in the Province of Ontario, represented by two share certificates dated October 23, 1933, in the names of "James D. Aberdein and Mrs. Alice R. L. Aberdein joint tenants with right of survivorship and not as tenants in common", being certificates numbered 4547-4548. The said share certificates were issued at the City of Boston by Old Colony Trust Company, transfer agents, and State Street Trust Company, registrar of shares, both duly appointed for their respective purposes by Nipissing Gold Mines Limited. At the date of death of the said James D. Aberdein the said shares were registered on the register of the said company in the City of New York, at the office of the Manufacturers Trust Company and on the register of the said company in Ontario at the office of the Toronto General Trusts Corporation, Toronto, and were interchangeably transferable either at the office of the Manufacturers Trust Company in the City of New York, in the State of New York, or at the office of the Toronto General Trusts Corporation, in the City of Toronto, Ontario, and at no other place.

p. 14, l. 37, to p. 15, l. 14.

(b) 4,000 shares of the capital stock of Dome Mines Limited a company incorporated under The Companies Act of the Dominion of Canada with head office in the Province of Ontario, represented by 40 share certificates for 100 shares each having no par value dated May 6th, 1940, in the name of James D. Aberdein, being certificates numbered 89233 to 89272. The said share certificates were issued at the City of New York in the State of New York by Empire Trust Company, transfer agents, and Bankers Trust Company, registrar of shares, both duly appointed for their respective purposes by Dome Mines Limited. At the date of the death of said James D. Aberdein the said shares were registered on the register of the said Company in the City of New York at the office of the Bankers Trust Company, and on the register of the said company in Ontario at the office of the Toronto General Trusts Corporation and were interchangeably transferable either at the office of the Empire Trust Company in the City of New York or at the office of the Trusts and Guarantee Company, Limited, in the City of Toronto, Ontario, and at no other place.

p. 15, ll. 15 to 32.

That at the date of the death of the testator all the certificates referred to in the two preceding sub-clauses of the last preceding paragraph hereof were in a safety deposit box in the National Rockland Bank, Roxbury Branch, in the City of Boston, in the Commonwealth of Massachusetts; that none of the said share certificates had been endorsed in blank or otherwise by the testator; and that the transfer agents and registrar named in the said clauses lettered (a) and (b) hereof were properly appointed and

p. 15, ll. 33 to 37.

p. 15, ll. 38 and 39.

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p. 15, ll. 39-42.

authorized to act in their respective capacities by Nipissing Gold Mines Limited and Dome Gold Mines Limited.

8. The facts herein differed from the facts in the case of *The King* v. *Williams,* (1942) Appeal Cases, p. 541, in two respects, namely:—

p. 15, ll. 37 and 38.

(1) None of the share certificates were endorsed in blank or otherwise at the time of the death of the testator.

p. 14, ll. 21-23.
p. 15, ll. 10-14.
p. 15, ll. 28-32.

(2) The testator did not reside in that State of the United States of America in which there were agents authorized to transfer the shares in question.

In the determination of the effect of these two facts, new ground must be broken. 10

9. The same situation existed in two other cases one of which was *The King* v. *The Globe Indemnity Company;* and the other is not further in appeal. These other cases did not arise under section 31 of The Succession Duty Act 1939; but the three cases were heard together by the Judge of first instance. The principal judgment was delivered in the case of *The King* v. *The Globe Indemnity Company.* The learned trial Judge (Kelly, J.) ([1944] O.R. p. 358) held that the shares in all three cases were not "property situate in Ontario"; and were, therefore, not liable to assessment for Succession Duty. He was of the opinion (p. 361) that endorsing such stock certificates and retaining possession of them would in no way affect the status of the shares or the ownership of the shares represented by the stock certificates; that so far as the provisions of The Succession Duty Act of Ontario were concerned the fact that the stock certificates were endorsed or not would in no way affect the application of the principles enunciated in the *Williams* case to the case at bar; that the Court was not required to fix the situs of the shares in question, but only to decide whether they are property situate in Ontario; and that the situs of the said shares is not necessarily in the Province of Ontario. In the instant case the Judgment required the Appellant to repay to the Respondents the sum of Thirteen Thousand Four Hundred and Forty-six Dollars and seventy-eight cents ($13,446.78) with certain deductions; and to pay to the Respondents interest at the rate of five per centum (5%) per annum on the proper amount returnable, calculated from the 21st day of January, 1943.

p. 17, l. 28 to p. 20, l. 13.
1944 O.R. p. 358 *et seq.*
1944 O.R. p. 362.
1944 O.R. pp. 360-1.
1944 O.R. p. 360.
1944 O.R. p. 362.
p. 45, ll. 13-21.

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p. 45, l. 32, to foot of p. 46.

10. The Appellant appealed to the Court of Appeal for Ontario, which heard the appeal in the other two cases before the appeal in this case. The appeal in this case was heard on the 16th day of October, 1944; and by a judgment dated the 16th day of February, 1945, the Court of Appeal for Ontario (Robertson, C.J.O., Henderson and Gillanders, JJ.A.) unanimously dismissed the appeal on the main point and allowed the appeal with respect to the deductions from the gross value of the estate for the purpose of arriving at the aggregate value thereof. 40

p. 59.

p. 55, l. 37, to foot of p. 58.

11. The reasons for judgment of the Court were given by The Honourable, the Chief Justice, who rested his judgment on the issues now the subject of appeal on the reasons given by the Court of Appeal in the case

Record.

of *The King* v. *The Globe Indemnity Company* ([1945] O.R. p. 190), in which, after reviewing the material facts as set forth in a signed statement, similar to the statement of facts agreed upon in the present case, the learned Chief Justice set forth certain general propositions important to be kept in mind as follows:

> "The first is that by section 92(2) of The British North America Act, the power of the Province in respect of taxation is defined, and is limited to 'Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes'. The second is that to determine the local situation of intangible property, when it is necessary to ascribe to it a location, regard is to be had to the rules or principles of the common law. A third proposition is that a Provincial Legislature cannot enlarge the scope of its taxing power, and fix the situs of property in disregard of the rules of the common law, by itself prescribing the rules or conditions for determining its situs. A fourth proposition is that, for the purposes that are of present concern, the property can have only one local situation. For these propositions I refer to the often-cited judgment of Duff, C.J., in *The King* v. *National Trust Company*, [1933] S.C.R. 670, [1933] 4 D.L.R. 465, approved in the recent case of *The King* v. *Williams et al.*, [1942] A.C. 541."

1945 O.R. p. 196.

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He then stated there was no longer any question of the power of an Ontario Company to establish a transfer agency in Buffalo; that the test in determining situs for Succession Duty purposes in the case of shares such as are here dealt with are:—

1945 O.R. p. 196.

> "Where can the shares be effectively dealt with as between the shareholder and the Company so that the transferee would become legally entitled to all the rights of a member."

1945 O.R. p. 197.

That either of the two places where transfer offices were maintained would be without question the situs of the shares were it not for the fact that the shares could be dealt with effectively at the other place "and the shares can only have one situs". He then points out the two respects in which the facts of the present case differ from the facts in *The King* v. *Williams* (*supra*); that the actual decision in the *Williams* case seems to have turned upon an admission of Counsel that the testator had signed endorsement of transfer on all the share certificates leaving in blank the names of the transferees and of the attorneys by whom the entries of transfer would be made in the register; and that this had the result of making a delivery of the certificate, with these endorsements signed in blank, a good assignment of the shares. He then referred to the decision of his Court in the *Treasurer of Ontario* v. *Blondé et al.*, [1941] O.R. 227, still standing in appeal before the Privy Council, in which the Court of Appeal for Ontario allowed an appeal and held that it was not in accord with the principle settled by *Brassard* v. *Smith*, [1925] A.C. 371, to disregard the place where the shares could be dealt with effectively by transfer; and that to exclude Ontario from consideration as a possible situs it was not necessary to determine what, in fact, was the situs of the shares. He then referred to

1945 O.R. p. 197.

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1945 O.R. p. 197.

1945 O.R. p. 198.

1945 O.R. p. 198.

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1945 O.R. p. 199.

Record.

1945 O.R. p. 199. 1945 O.R. p. 200.

the situs of a specialty debt as determined in *Toronto General Trusts Corporation* v. *The King*, [1919] A.C. 679; to *The King* v. *Lovitt et al.*, [1912] A.C. 212; and to the circumstances which were considered important in determining the situs of the intangible property there in question. He referred to the terms of the resolution of Lake Shore Mines Limited appointing a transfer agent in the City of Buffalo in the State of New York; that the Province of Ontario by Letters Patent created a Company with capacity to open an office for the transfer of shares in a foreign country; that on any reasonable interpretation such office would seem to answer the description of a place where the shares could be transferred effectively; and then continues:— 10

1945 O.R. p. 202. 1945 O.R. p. 203.

1945 O.R. p. 203.

"Bearing in mind that the Legislature of the Province cannot, by legislation, for the purpose of taxation, alter the rules of common law in regard to the situs of property, how can the Province of Ontario, in the case of shares in the circumstances here present, place its hand upon them to tax them?"

1945 O.R. p. 203.

that the executor, not having elected to come within Ontario by applying for Letters Probate here or by having the shares transferred into his own name, the learned Chief Justice was unable to find any valid ground for the Appellant's claim. The appeal was, therefore, dismissed with costs. 20

p. 58, ll. 22-27.

12. Having found that the shares in question were not "property situate in Ontario" it was unnecessary for the Court to consider a further submission on behalf of the Respondent; namely, that the Succession Duty Act 1939 imposed the duty upon the property itself; that the Appellant purported to prohibit the transfer of the shares until Succession Duty was paid; and that such legislation was an unwarrantable interference with the corporate powers of Dome Mines Limited incorporated under The Dominion Companies Act. Sections 38, 39(2) and 40 of The Dominion Companies Act, 24-5 George V, Chapter 33, expressly confer upon a shareholder of a Dominion Company the right to transfer his shares. 30

The Dominion Companies Act, 24-5 Geo. V, ch. 33.

"38. (1) Subject to subsection two of this section and to the power of the Company by by-law to prescribe the form of transfer and to regulate the mode of transferring and registering transfers of its shares, the right of a holder of fully paid shares of a public company to transfer the same may not be restricted.

(2) Where the letters patent, supplementary letters patent or by-laws of a company confer that power on the directors, they may decline to permit the registration of a transfer of fully paid shares belonging to a shareholder who is indebted to the company except in the case of shares listed on a recognized stock exchange. R.S., c. 27, s. 80, am." 40

13. The Provincial Legislature cannot constitutionally interfere with the operations of a Company incorporated under The Dominion Companies Act: *Great West Saddlery Company* v. *The King*, [1921] 2 A.C. 91; *John Deere Plow Company Limited* v. *Wharton*, [1915] A.C. 330, at pp. 337, 341;

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*Linde Canadian Refrigeration Company* v. *Saskatchewan Creamery Company,* [1915] S.C.R. 400, at foot of p. 407; *Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1929] A.C. 260. It is submitted that the right of the shareholders of a Dominion Company freely to transfer their shares is a right essential to the continued exercise of its corporate powers; and that such right cannot be taken away by Provincial legislation.

14. The relationship between a shareholder and a Company is a contractual one: *In re William Metcalfe & Sons Limited,* [1933] Ch. 143 at p. 154; and one term of the contract between the late James D. Aberdein and
10 Dome Mines Limited was that the said James D. Aberdein could effectually transfer his shares upon application to the transfer agents of Dome Mines Limited in the City of New York.

15. The Respondent accordingly submits that the appeal should be dismissed and the judgment of the Court of Appeal for Ontario should be affirmed for the following among other

REASONS

(1) Because the shares in question were not and are not property situate in Ontario.

(2) Because the place of domicile of the owner of the shares at the time of his death cannot have any effect on a question of situs.

(3) Because the Respondent could effectually deal with the shares in question without coming into Ontario; and could not be compelled to part with them to enable the transfers to be effected in Ontario.

(4) Because in a business sense, the shares at the date of the testator's death could have been effectually dealt with in the State of New York; and that was the natural place for their transfer.

(5) Because with respect to the shares of Nipissing Mines Limited, the certificate was in the name of the deceased and Mrs. Alice R. L. Aberdein as joint tenants with the right of survivorship and not
30 as tenants in common. Mrs. Aberdein upon presenting these certificates and proof of the death of James D. Aberdein to the transfer agent in New York would have been entitled, without more, to a new certificate in her own name. p. 35, ll. 16-31.

(6) Because non-endorsement of the certificate and its remaining at home in the security box of the deceased would not affect the question of situs. It is delivery of a properly endorsed and guaranteed certificate which transfers the title to the shares represented thereby. The power of attorney executed by the endorsement of the certificate expired with the death of the testator. *Colonial Bank* v. *Cody,* 15 A.C. 267, at p. 277.

40 (7) Because in selecting one or other of the two possible places where the shares can be effectively transferred on a rational ground the considerations set forth at p. 54, l. 7 to p. 55, l. 3, are rational grounds upon which it is submitted the situs of the shares in question should be held not to be in Ontario. p. 54, l. 7, to p. 55, l. 3.

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The British North America Act 1867 (Imp.), 30-31 Vict., ch. 3, sec. 92, subs. 19.

(8) Because interest on the money to be re-paid to the Respondent is properly allowed at the rate of five per centum (5%) per annum. The authority to legislate with respect to interest was conferred exclusively upon the Parliament of the Dominion of Canada.

R.S.C. 1927, ch. 102.

(9) Because the Appellant having, without legal authority, compelled the Respondent to pay to him moneys not properly payable, must pay the legal rate of interest by way of damages. The Dominion Parliament has fixed the legal rate of interest at five per centum (5%) per annum.

(10) For the reasons given in the Judgments of the Judge of first instance and of the Court of Appeal for Ontario. 10

JOHN JENNINGS,
Of Counsel for the Respondent.