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*Feb. 9,10.
*May 18.

THE STANDARD TRUSTS COMPANY (EXECUTORS OF THE WILL OF ROBERT MUIR) AND ROBERT R. MUIR AND ARTHUR E. MUIR.. } APPELLANTS;

AND

THE TREASURER OF THE PROVINCE OF MANITOBA..... } RESPONDENT.

In re ESTATE OF ROBERT MUIR AND OF THE "SUCCESSION DUTIES ACT."

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Constitutional law—Provincial legislation—Succession duties—Taxation—Property within province—Bona notabilia—Sale of lands—Covenant—Simple contract—Specialty—Construction of statute—Severable provisions—R.S.M. 1902, *c.* 161, *s.* 5 (*Man.*)—4 & 5 *Edw. VII., c.* 45, *s.* 4 (*Man.*)—*Appeal—Jurisdiction—Surrogate Court—Persona designata.*

M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M. who was to retain possession and operate the elevators and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan, known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur, JJ.

in respect of these debts under the Manitoba "Succession Duties Act," R.S.M., 1902, ch. 161, sec. 5, as re-enacted by the Manitoba statute 4 & 5 Edw. VII., ch. 45, sec. 4.

Per curiam.—The debt due under the contract with L. constituted property within the Province of Manitoba and, as such, was liable for succession duty as provided by the Manitoba statute. Also Davies J. dissenting, that under the agreements for sale of the "Kirkella Lands" a covenant to pay should be implied and, consequently, they were specialty debts which, as such, constituted property within the Province of Manitoba and were liable for succession duty there.

Per Davies, Idington, Anglin and Brodeur JJ.—The duties imposed by the Manitoba "Succession Duties Act" are direct taxation and, consequently, the legislation imposing them is *intra vires* of the provincial legislature.

Per Idington and Brodeur JJ.—The provincial legislature is competent to impose taxation as a condition for obtaining the benefit of probate.

Per Duff J.—In so far as the statute professes to impose duties in respect of property having a *situs* within Manitoba it is *intra vires* of the provincial legislature. *Rex* v. *Lovitt* ([1912] A.C. 212) followed. In so far as the statute professes to impose duties on property not having a *situs* in Manitoba, and without respect to the domicile of the owner, the reasoning of Lord Moulton in *Cotton* v. *The King* ([1914] A.C. 176), applies, the result of which is that such taxation if effectual in cases in which the beneficiary is domiciled abroad cannot be "direct taxation" within the meaning of section 92 of the "British North America Act, 1867."

Per Anglin J.—The succession duties imposed by the Manitoba statute are not fees payable for services rendered, but constitute taxation subject to the restrictions mentioned in item 2 of section 92 of the "British North America Act, 1867."

Per Duff and Anglin JJ.—The provisions of the Manitoba "Succession Duties Act" in respect to taxation which may be *ultra vires* may be treated as severable and do not render the statute ineffective as a whole.

Idington and Anglin JJ. questioned the jurisdiction of the Supreme Court of Canada under sub-section (*d*) of section 37 of the "Supreme Court Act," to entertain an appeal in a matter or proceeding originating in the Surrogate Court of Manitoba.

Anglin J. suggested that in the proceedings provided for by section 19 of the Manitoba "Succession Duties Act" the judge of the Surrogate Court would act as *persona designata* and that there may not be an appeal from his order to the Supreme Court of Canada.

The judgment appealed from (24 Man. R. 310) was affirmed.

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APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the judgment of the judge of the Surrogate Court for the Eastern Judicial District of Manitoba by which it was declared that the estate of the late Robert Muir was liable for succession duties, claimed by the Government of the Province of Manitoba, in respect of the debts owing under a contract for the construction of buildings in the Province of Saskatchewan and under certain agreements for the sale of lands in the Province of Saskatchewan.

The circumstances in which the Government of Manitoba claimed the succession duties in question are stated in the head-note and the issues raised on the present appeal are fully discussed in the judgments now reported.

W. R. Mulock K.C. for the appellants.

Wallace Nesbitt K.C. and *R. B. Graham* for the respondent.

THE CHIEF JUSTICE concurred in the judgment dismissing the appeal with costs.

DAVIES J.—In this appeal important questions were raised not only as to whether the "Succession Duties Acts" of the Province of Manitoba were *ultra vires* the legislature of that province on the ground that the duties they imposed were *indirect* taxation, but also, in case the acts were *intra vires* the legislature, whether certain properties consisting of debts due to the testator at the time of the death, from parties some of whom were residents of Manitoba and

(1) 24 Man. R. 310.

others of whom resided abroad, were subject to the provisions of the Act. In the latter case, the contention was that these debts were "specialties" and for that reason were so subject. As to the "Little debt," it being a simple contract debt and both debtor and creditor being residents of Manitoba, it could have no local situation other than the residence of the debtor where the assets to satisfy it would presumably be and would be *bona notabilia* within Manitoba where he resided. *Commissioners of Stamps* v. *Hope*(1), at p. 482, cited with approval in *Rex* v. *Lovitt*(1), at p. 218.

As to the debts due or claimed in respect of the lands near Kirkella in Saskatchewan being specialty debts, by reason of the recital in the several agreements of sale and purchase entered into by the testator with certain purchasers under seal, I have come to the conclusion that these debts are not "specialties" which come within the meaning of the principle *"mobilia sequuntur personam."* I think the rule laid down in *Marryat* v. *Marryat*(3), and in *Isaacson* v. *Harwood*(4), applies to these agreements of sale and that no covenant to pay can be implied from the mere recital. The agreements did not contain any express covenant to pay the purchase money and the only question is whether one must be implied from the recital. I cannot understand how such an implication could create such a "corporal existence" with respect to this debt as would change its locality and make the debts "conspicuous" within the jurisdiction where the agreement happened to be found with the testator at the time of his death. But in any case, and supposing

(1) [1891] A.C. 476.
(2) [1912] A.C. 212.
(3) 28 Beav. 224.
(4) 3 Ch. App. 224.

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the rule to be as applicable to the case of an implied as of an express covenant to pay, it remains a pure question of the construction of the agreements. What did the parties intend ? If they intended that the recital should operate as a covenant, then the debtor would be liable accordingly. But it seems to me clear that the recital was not inserted for the simple purpose of acknowledging a debt by a deed under seal without any other object declared by the deed in which case a covenant to pay might be implied. On the contrary, the object and purpose of the agreement was to create a binding contract for the sale of a piece of land and to shew how and when the purchaser was to complete the payments of the purchase money, in order that he might obtain his title. As to the intention of the parties, the fact that the agreements do contain express covenants as to money that might be expended by the vendor in paying insurance rather goes to shew that where it was intended there should be a covenant to pay moneys under the agreement it was so expressed. Those agreements even if a covenant to pay the purchase money could be implied from the language of the recital are not, I agree with Perdue J.A., of the Court of Appeal, like money bonds, scrip or mortgages containing express covenants to pay money, etc. Before the executors could have any right to recover the purchase moneys under these agreements, they would have to obtain probate of the will in Saskatchewan and have the lands transmitted to them in accordance with the statute of that province. They have no rights under the agreements until they have put themselves in a position to perform the vendor's obligations under them. They could not recover the purchase moneys until they had obtained power to

convey the lands to the purchaser and they could only obtain such power by having their probate of the will re-sealed in Saskatchewan, the statutory equivalent of taking out ancillary probate there.

These instruments are mere agreements for the sale of land in Saskatchewan and involve mutual obligations on the part of vendor and vendee which can only be performed under the laws of that province and which cannot be enforced by the appellant executors until they have first complied with those laws.

The most important question, however, still remains, namely, whether the "Succession Duties Act" of the Province of Manitoba was *intra vires* of the legislature of that province.

The contention on the part of the appellant was that the construction to be put upon this Act and other similar succession duties Acts of the different provinces of the Dominion, was decided by the Judicial Committee in the recent case of *Cotton* v. *The King* (1). In that case it was held that the Quebec "Succession Duties Acts" did not impose duties upon the transmission of movable property outside of the province and that the taxation imposed by them on such property was not direct taxation within the meaning of the "British North America Act" and was consequently *ultra vires* the legislature of the province.

If this contention as made by the appellants was sustained, of course this appeal should have to be allowed and the results in the several provinces of the Dominion would be most serious and disquieting.

I have reached the conclusion after a very careful study of this decision of the Judicial Committe in the

(1) [1914] A.C. 176.

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Cotton Case(1), that it does not warrant the broad contention stated above.

The language made use of by Lord Moulton, who delivered the judgment, in parts of his judgment dealing with the transmission of movable property outside of the province, was very broad and general and would seem at first sight to justify the conclusion that all succession duties Acts of the several provinces necessarily violated the constitutional prohibition against provincial indirect taxation.

I do not think, however, their Lordships intended by any means to go that far or, indeed, to go any further than the specific question then before them required them to go. The language used by Lord Moulton must be read as only having reference to this special question they were in that case called upon to decide, namely, whether the Quebec Legislature imposed succession duties or had power to do so upon the transmission of movable property outside of the province.

In the *Cotton Case*(1) the duties had been levied upon two estates: first, on that of Charlotte L. Cotton; and, afterwards, on that of her husband, Henry H. Cotton, whom Charlotte predeceased.

A distinction was attempted to be made between the law as it stood at the death of Charlotte L. Cotton and as it was afterwards amended and stood at the death of Henry H. Cotton, and it was there contended that the amendment defining the meaning of the term "property" expressly included

> all movables *wherever situate* of persons having their domicile or residing in the Province of Quebec at the time of their deaths.

(1) [1914] A.C. 176.

Their Lordships, however, were of the opinion that this amended definition of the word "property" did not enlarge the express language of the operative clause of the Act which provided that of this property (that is the property made subject to the duties) those portions only are taxed which are *"biens situés dans la province."*

Dealing with this Act before it was amended and with reference to Charlotte L. Cotton's estate, His Lordship says at page 186:—

> 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 domicile of the testatrix) it did not see fit so to do. For the same reason no question of *ultra vires* arises in this part of the case, since the appellants do not dispute the power of the Quebec Legislature to tax movable property situated in the province.

Dealing next with the Act after it was amended and with reference to Henry H. Cotton's estate, he says:—

> The same consideration which was decisive in the former case (Charlotte L. Cotton's), therefore, applies with equal force here.

His Lordship having thus disposed of the appeal with respect to the claims for succession duties on each of the two estates, on the ground that the statute either as originally enacted or as subsequently amended did not authorize the taxation of movable property situate outside of the province, went on to consider whether the succession duty imposed would be within the definition of an indirect tax if it be taken that the duty was imposed on all the property of the testator *wherever situate* — that is on the assumption that the limited words "property situate within the

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province" were deleted from the operative taxing section.

After quoting a number of the sections of the Act, he concludes that they only can be construed as

> entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration under oath of a complete schedule of the estate required by the sections quoted and who must recover the amount so paid from the assets of the estate or more accurately from the persons interested therein.

Taking as an instance the facts of the case, then before him, of movables in New York bequeathed to one domiciled in Quebec, and stating that there was no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries — and that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the fiscal laws of New York relating thereto, he asks: How then would the provincial Government in such case obtain the payment of the succession duty? And answers his question by saying that it could only be from some one who was not intended himself to bear the burden but to be recouped by some one else, and that

> such an impost appeared to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

To assume that by this judgment the Judicial Committee intended to reverse many previous decisions of the Board which had held either expressly or by necessary implications that succession duty statutes properly framed and imposing taxes on movable or other property within the province were *intra vires* the legislatures which enacted them, would be unjustifiable.

In the case of *Rex* v. *Lovitt*(1) their Lordships expressly held, at page 223, that the statute of New Brunswick there in question

> was intended to be a direct burden on that property (*i.e.*, taxable property within the province) varying in amount according to the relationship of the successor to the testator.

Nothing is said in the judgment of the Board now under review calling in question this declaration of the intention and effect of the New Brunswick "Succession Duties Act." The only reference made to that case is as follows:—

> In the case of *Rex* v. *Lovitt*(1) no question arose as to the power of a province to levy succession duty situated *outside the province.*

And so in regard to *Woodruff* v. *The Attorney-General for Ontario*(2), the decision of the Judicial Committee in which, when the *Cotton Case*(3) was before us I considered as binding upon us, and followed, the only remark they made is that

> 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.

But not a suggestion that the Ontario "Succession Duties Act" so far as it levied taxes upon property within the province was *ultra vires* the legislature.

Assuming, therefore, I am correct in my understanding of the decision reached by their Lordships in the *Cotton Case*(3), I come to the Manitoba "Succession Duties Act" as it stood amended at the death of the testator Muir and under which the taxes in dispute in this case are levied. With respect to the "Kirkella lands" of the testator, situated in Saskatchewan,

(1) [1912] A.C. 212. (2) [1908] A.C. 508.
(3) [1914] A.C. 176.

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and the debts arising out of the agreements for the sale thereof I have already expressed my opinion that they do not come within the Act and are not taxable.

And with regard to the subject matter the statute deals with I am of opinion that it is direct taxation and not indirect. I accept the definition of direct taxation as

> one which is demanded from the very person whom it is intended should pay it,

and I think that the taxes sought to be imposed by that statute are such.

It is the estate that must pay the tax and it is the estate upon which the statute imposes the liability. The fact that the executor or the administrator is the channel through which the estate makes payment cannot make the tax indirect. He represents the estate. It is, in fact, by the law of Manitoba all vested in him and in paying the duties when he does so, he acts merely as the agent or person in charge of the estate.

The question is one of intention or expectation. Did the legislature either expect or intend that the executor or administrator should pay money out of his own pocket and afterwards take his chances of recovering it back from the legatee or beneficiary to whom the property was bequeathed or who by law became entitled to it ?

The statute answers the question I think in its 15th and 16th sections, which read as follows:—

> 15. Any administrator, executor or trustee, 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.
>
> 16. Executors, administrators, and trustees shall have power to

sell so much of the property of the deceased as will enable them to pay said duty in the same manner as they may be or are enabled by law so to do for the payment of debts of the testator or intestate.

Here executors and trustees are classed together. They are to deduct the duty from the property under their charge or which they hold in trust or collect it from the beneficiary, and are forbidden to deliver any property subject to duty to any person until the duty is collected. They are given power to sell so much of the property of deceased as will enable them to pay the duty in the same manner as they may do to pay the debts of the testator or intestate. If the property is of a character enabling them to deduct the duty they do so. If it is not they collect the duty from the beneciary or sell so much of the property as will enable them to pay the duty. But there is neither an intention nor an expectancy that they would pay, nor an obligation imposed upon them to pay, the duty out of their own moneys and take the chances of recovering it back from the beneficiary.

It must be remembered that in Manitoba the executor or administrator is by statute made for the time being the owner of all the property of the deceased testator or intestate as the case may be. Section 21 of the "Devolution of Estates Act" as enacted by 5 & 6 Edw. VII., ch. 21, sec. 1, and section 20 of the "Wills Act," R.S.M., 1902, ch. 174

But, of course, he only holds it for the purpose of administering the estate and as I have shewn is expressly empowered by section 16 of the "Succession Duties Act," to sell the property to pay the tax.

Section 5 of that Act says:—

Save as aforesaid the following property shall be subject to a succession duty as hereinafter provided,

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and sub-section (*a*) says:—

> All property within this province and any interest or income therefrom

shall be liable to the duties. Section 6 provides for the filing by the executors or administrator before the issue of letters probate or grant of administration

> of a full itemized inventory of all the property of the deceased person and the market value at the death of such deceased person,

and goes on to provide either for the payment by the executor or administrator of the duties called for by the Act or for the delivery of a prescribed bond conditioned for the due payment of any duty to which the property coming to the hands of such executor may be found liable.

I conclude that the duties under this Act were to be, as they were determined by the Judicial Commitee to be in the *Lovitt Case*(1),

> a direct burden on the property varying in amount according to the relationship of the successor to the testator,

and so to be burdens which the legislature had authority to impose.

I would, therefore, vary the judgment appealed from by excluding from the property subject to duty the debts arising out of the agreements for the sale of the "Kirkella lands" in the Province of Saskatchewan as not being specialties within the rule and with this variation I would dismiss the appeal, but without costs.

IDINGTON J.—The question of jurisdiction raised at the opening of the argument herein, is, in my opinion, so far from being beyond doubt that if either party had taken or maintained the objection I think

(1) [1912] A.C. 212.

we should have refused to exercise so doubtful a jurisdiction.

The parties hereto seem tacitly agreed we should act. Hence we may be justified in ignoring the doubt though, if that consent be our only right to hear them, the result may be a non-appealable judgment such as appears in *Attorney-General of Nova Scotia* v. *Gregory*(1).

It is upon the amendment of 52 Vict., ch. 37 (D.), alone that our jurisdiction, if any, must rest. It seems, in one way of reading it, possibly wide enough to confer jurisdiction in any case relative to what is involved in the probate of wills. But is the question to be determined herein at all of that nature? It may be that the legislature in the due exercise of its plenary power over civil rights in a province can say, as a condition precedent to anything being done in its courts, constituted by it with such limitations of authority as it has seen fit to confer, that such courts shall not hear the application for probate unless and until the tax for transmission has been secured and hence make the refusal to grant or granting of probate dependent thereon. But what has all that to do with the plain primary meaning of a "court of probate" acting as such or how can it bring this appeal within that term as used in the amending Act ?

I take the phrase "court of probate" in the sense indicated, for example, in *Pattison's Trustees* v. *Edinburgh University*(2), referred to in vol. 4, page 437, of Stroud's Judicial Dictionary.

But if all the judgments pursuant to any of the powers assigned to and exercised by said courts

(1) 11 App. Cas. 229. (2) 16 Ct. of Sess. Cas. (4 ser.) 73, 75*n*.

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(called "Surrogate" in Ontario and the Western Provinces) in a variety of ways beyond the mere granting or refusing of probate were to be held reviewable here whenever involving five hundred dollars, then it seems singular that this court has not been troubled ere this with some such case as might fall within the ambit of that view.

It is not the work of the court when acting in hearing the application for probate that we are herein asked to pass upon.

The Maritime provinces have called their courts dealing with such matters "Courts of Probate" and a number of appeals resting upon said amendment have come from there, but none involving any mere collateral matter without touching upon what is, properly speaking, the work of a court of probate has been cited in argument herein.

That is a remarkable result if the expression is to be held as covering anything else done in or by said court than what I suggest. It is to be observed that the case of *Lovitt* v. *The King* (1) came here by virtue of a case stated for the Supreme Court of New Brunswick.

The exclusion of Quebec (where there are no courts bearing the name "probate," but the Superior Court in certain cases discharges the duty involved) from the operation of the Act, rather clearly indicates we should not attach too much significance to the name, but look at the substance and confine appeals within the limits which that indicates.

Having thus indicated the reasons for my doubt I accept what seemed on the argument to be the opinion of the majority of this court as to its jurisdiction as

(1) 43 Can. S.C.R. 106.

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binding me, and accordingly proceed to pass upon the questions raised by the appeal.

I have no doubt as to the power of the legislature, resting upon its plenary power over not only the property in a province, but also civil rights in a province and the constitution of the courts therein and limitation of their powers, to enact a law such as before us imposing a tax as a condition precedent to giving its assent through its courts to the transmission of any property so far as such assent may be necessary in law.

It is argued that it is not a direct tax because the executor has not the money to pay it and in the first place gives a bond for its due payment and the amount payable thereunder depends upon a number of considerations set forth in the legislation, and the modes of inquiry and determination also thereby provided for, and that the executor has to recoup himself out of the estate when realized and when debts and expenses are paid.

All these things constitute but the legal machinery for the determination of the facts and the scale by which the tax is to be measured.

Those beneficiaries sharing with the state in that which the executor may have realized, I rather think feel that the tax is pretty direct. They know that the executor or other personal representative is but their agent, as it were, by whose hands they receive what they get and that he has no civil right in the province to assert any acquisition of the property of the deceased, but what the legislature has chosen to give assent to.

I repeat we must look at the actual substance of things and not be misled by mere words.

If and so far as the person becoming ultimately

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entitled under this process to receive his share in the estate of a deceased can obtain by law any of it without provincial legislation that property so obtained may not be taxable. No such proposition in law or in fact is or can be put forward relative to what is in dispute herein; therefore, I am, for clarity's sake, resolved not to travel into side issues and other cases.

There are only two items in question herein.

That known as the claim against one Little residing in the province, clearly is not only in the province and dependent upon the civil right conditionally conferred by the province, but is also collectable there. And if his assets have to be followed elsewhere it is only by virtue of that civil right so conditionally given that they can be followed.

The other item is a specialty debt held by deceased at his domicile in Manitoba, enforceable there if the debtor had any property there, and wherever to be enforced must be dependent upon the same civil right also conditionally conferred by the province.

I hold that there is in the contract in question a covenant for the payment of said debt. And even if the purchaser of the land, for which it is given, has to be constrained, by virtue of his necessity to get a title, to pay, and that upon the facts should happen to be efficacious as a means of enforcing payment, it is to Manitoba he must come to discharge his debt and there tender a conveyance for execution.

I can conceive of the like cases where the balance unpaid might so far exceed the value of the land as to render the covenant of no value and the recovery of the land be the only thing available. No such thing is set up here except incidentally arguing that there is

no covenant; I, therefore, need not follow that alternative.

The appellant's counsel tells us there is required by the law of Saskatchewan an ancillary probate to be got there to complete the title to the purchaser. That is the purchaser's business. If there is required by Saskatchewan law anything beyond the nominal expense of producing such verification as to obtain registration, and thus in the nature of a second succession tax, then I should be sorry to find such legislation in any province. It is the vicious practice of insisting upon such double taxation that has aroused some antagonism to these succession taxes. I am glad to see that the Legislature of Manitoba has been moving in the direction of trying to avoid the evil. The merely reprehensible nature of legislation producing such evil should have no weight in measuring the right and power of the province. And every attempt on the part of the courts to ameliorate such incidental evil results by way of needlessly limiting and cutting down the power given by the "British North America Act" to provincial legislatures weakens the forces which would otherwise be directed to enlighten public opinion and produce in the legislature a proper consciousness of the unrighteousness of such methods.

There is only one thing involved in this case for us to deal with and that is the power of the legislature. All such collaterial arguments as bear upon the abuse of the power should be discarded and we will thereby be the better able to reach a clear apprehension of what that power is.

The basis of the right to tax the transmission was

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expressed by Lord Loreburn in *Winans* v. *Attorney-General*(1), at page 30, as follows:—

> In both cases the property received the full protection of British laws, which is a constant basis of taxation, and can only be transferred from the deceased to other persons by a British Court.

I admit that some recent decisions and dicta in other judgments, if followed to their logical conclusions of measuring the civil rights in a province by the consequences thereof when having to be dealt with abroad, would so abridge the rights and powers of provincial legislatures as to revolutionize the fundamental principles upon which the legislatures and judiciary of this country have for a life time proceeded. For my part I shall not attempt to build upon the foundation so laid until, if ever, it has reached such further development as to become by concrete decisions absolutely identical in principle with that we have to pass upon.

In regard to the argument founded upon such decisions and the supposed logical result thereof I should adopt and apply here the language of Lord Halsbury in the case of *Quinn* v. *Leathem*(2), at page 506.

This case does not fall within that category. It is well within the principles proceeded upon in the case of *Bank of Toronto* v. *Lambe*(3), where the court above, referring to the application of the definition of scientific political economists as limiting the powers of principal legislatures over direct taxation, at page 582, spoke as follows:—

> It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would

(1) [1910] A.C. 27.
(2) [1901] A.C. 495.
(3) 12 App. Cas. 575.

run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Not only the income tax but much else of local taxation that has hitherto passed unchallenged would have to be revised if some such definitions had to be rigidly adhered to as the measure of the provincial legislatures' powers instead of the common sense of mankind as recognized in what I quote and the recognized legislative powers of other colonies in this regard.

It is further to be observed that it is not direct taxation of property within the province, but direct taxation within a province, that is the term used in the "British North America Act."

If people can get property of a deceased outside the province without asking or relying upon provincial authority then they may escape the tax.

Counsel for appellant complained that a schedule had to be filed shewing the entire estate of the deceased. That is simply as the basis of classification and for the determination of whether or not the deceased and his estate and those getting it fall within the class who could reasonably be asked to contribute to the public revenue.

That may in some cases rank the estate as of those which should pay 10%, for example, instead of 5%, or nothing.

The severity of it may in many cases be unwise and unjustifiable, but that has nothing to do with the existence of the power. It is merely the scale upon or by which the tax is to be measured.

If we had to clarify the legislative mind on the subject of taxation or to pass upon the merits of its

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product relative to taxation we should have perhaps a pretty heavy task. Some notions apparent in the work may occasionally seem to us to be crude.

But for us to tell the legislators that when using this exclusive power of the "British North America Act" over civil rights they must in the case of the beneficiaries by the death of one who has grown rich under the laws of his domicile, perhaps by virtue thereof, be careful that the power over civil rights be not used, but the law be so framed as to offer him a premium at the close of life to invest his acquisitions abroad and thereby escape the tax which probate duty, legacy duty, succession tax or death duty, or whatever other name be given the tax, would be apt to bring a sharp retort.

To try to distinguish between these names accidentally given in the course of the development of a century or more of law in England tends only, I submit, to lead to confusion. The purpose of the legislature has plainly been to so use its power over civil rights and to insist upon its right to withhold its needed sanction to give him claiming such benefits as derivable therefrom, unless and until this tax is paid. So acting I think the legislature is well within its powers within the province.

I think, therefore, the appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed. The statute in so far as it professes to impose duties in respect of property having a *situs* within Manitoba mut be held, I think, to be *intra vires* on the authority of *Rex* v. *Lovitt*(1). In so far as it professes to

(1) [1912] A.C. 212.

impose duties on property not having a *situs* within the province it must, I think, be held to attempt the imposition of taxes which are not "direct" taxes because it appears to me that as regards that feature of it the reasoning of Lord Moulton in *Cotton* v. *Rex*(1), at page 195, applies; and the result of that reasoning is, I think, that any attempt on the part of the province to exact succession duties in respect of property not situate within the province and without respect to the domicile of the beneficiary must fail for the simple reason that such taxation if effectual (in cases in which — the *situs* of the property being, let it be noted, outside the province — the beneficiary is domiciled abroad as well as in other cases) cannot be "direct taxation" within the meaning of that phrase as construed in that case.

I have had not a little difficulty in satisfying myself upon the point whether the provisions of the Act which bring personal property outside the province under the incidence of the duty ought not to be considered as of the essence of the statute in such a degree as to make it impossible to sustain the duty upon property within the province; after a good deal of doubt I have come to the conclusion that it is possible, in this case, and right to treat the provisions of the statute which if enacted by themselves would have been valid, as severable from those provisions which are *ultra vires*.

ANGLIN J.—The appellants challenge the right of the Province of Manitoba to recover succession duties from them as executors of the late Robert Muir, who

(1) [1914] A.C. 176; 15 D.L.R. 283.

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died domiciled in Manitoba, in respect of certain debts known as the "Little debt" and the "Kirkella lands debts," which formed part of the assets of his estate. It is asserted that these debts are not dutiable because they are not "locally situate" within the province; and that whether they are "locally situate" within or without the province the legislation authorizing the tax imposed is *ultra vires*.

Proceeding under section 19 of the Manitoba "Succession Duties Act" (R.S.M., 1902, ch. 161), the Surrogate Court of the Eastern Judicial District of Manitoba held the appellants liable to pay these duties. This judgment was affirmed by the Court of Appeal for Manitoba.

At the threshold of the appeal to this court there arises a question of jurisdiction. Is the Surrogate Court of Manitoba, admittedly not a superior court, a "Court of Probate" within the meaning of clause (*d*) of section 37 of the "Supreme Court Act"? This provision was introduced by 52 Vict., ch. 37. It had been held in *Beamish* v. *Kaulbach*(1), that this court had not jurisdiction to entertain an appeal in a case which originated in the Court of Wills and Probates of the County of Lunenburg, Nova Scotia. Having regard to the special provision made in section 96 of the "British North America Act" in regard to the courts of probate in the Provinces of Nova Scotia and New Brunswick and to the history of the surrogate courts in Ontario, upon which the surrogate courts of Manitoba appear to have been modelled in their constitution and jurisdiction (R.S.O., 1913, ch. 62; R.S.M., 1902, ch. 41), there would seem to be some ground for

(1) 3 Can. S.C.R. 704.

the suggestion that, if its application is not confined to the probate courts in the two former provinces, which have always been styled "Courts of Probate," such courts as the surrogate courts of Manitoba are not within clause (*d*) of section 37 of the "Supreme Court Act" If they are, a rather wide field of jurisdiction to entertain appeals in surrogate court matters would seem to be opened up.

It is also suggested that in the proceedings provided for by the section 19 of the Manitoba "Succession Duties Act" the surrogate court does not act as a court of probate, or that those proceedings are taken before the judge of the Surrogate Court as *persona designata* subject to a special right of appeal to the provincial court of appeal, and that there is, therefore, no right of appeal to this court. While by no means entirely satisfied that we have jurisdiction to entertain this appeal, in deference to the opinions of my learned colleagues who think that we have jurisdiction, I shall proceed to consider the appeal on its merits.

In regard to the "Little debt" the unanimous conclusion in the provincial courts, that, as a simple contract obligation, it was locally situate at the residence of the debtor in Manitoba, seems to me incontrovertible; and, while it has occasioned some divergence in judicial opinion, I am not prepared to differ from the view of the majority of the learned judges of the Court of Appeal that the respondent's contention that the "Kirkella lands claims" are locally situate in Manitoba, because they are specialty debts, is also well

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founded. *Commissioners of Stamps* v. *Hope*(1); *Emmens* v. *Elderton*(2); *Russell* v. *Watts*(3); *Aspdin* v. *Austin*(4); *Farrall* v. *Hilditch*(5); *Lay* v. *Mottram* (6).

In *Cotton* v. *The King*(7) the nature of succession duties imposed by the Legislature of Quebec was considered by the Judicial Committee. Although the case then before their Lordships might have been fully disposed of by the construction placed by them on the Quebec "Succession Duties Act," which excluded the property in question from its purview, Lord Moulton, delivering the judgment of the Board, after stating the questions at issue — the one as to the construction of the Quebec statute, the other as to the nature of the taxation which it imposed—says:—

> These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other. The latter of the two questions is of the greatest practical importance in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the province" so that a decision depending on the presence of those words would have no application to the present state of legislation.

Their Lordships' opinion, that, at least in regard to outside movables, the tax imposed by the Quebec "Succession Duties Act" would be indirect and the Act to that extent *ultra vires*, certainly cannot be regarded as *obiter dictum*. They have seen fit expressly to base their judgment upon it.

(1) [1891] A.C. 476.
(2) 4 H.L. Cas. 624, at pp. 666-7.
(3) 10 App. Cas. 590, at p. 611.
(4) 5 Q.B. 671, at p. 683.
(5) 5 C.B.N.S. 840.
(6) 19 C.B.N.S. 479.
(7) [1914] A.C. 176.

The liability to succession duties of movable property locally situate outside the province was the question at issue in the *Cotton Case*(1). Under the Quebec statute the person who made the schedule and declaration of the assets of the estate was held to be personally liable to pay the whole of the duties imposed on the estate (p. 194), and to be entitled to

> recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

This provision was dealt with as if applicable equally to assets outside and to assets within the province. As an illustration of the indirectness of the Quebec taxation, Lord Moulton intances the case of

> bonds or shares in New York bequeathed to some person not domiciled in the province,

which the legatee could obtain on duly proving the will in New York and satisfying its fiscal laws in relation thereto regardless of any duty imposed by the Quebec statute. "The Quebec Government," his Lordships adds,

> could in such a case obtain its succession duties only from some one who was not intended himself to bear the burden, but to be recouped by some one else.

Because

> the payment is obtained from persons not intended to bear it, within the meaning of the accepted definition above referred to, (John Stuart Mill's well-known definition of indirect taxation.)

their Lordships held the Quebec legislation *ultra vires*, at all events as to movables situate outside the province, as imposing taxation which was not "direct taxation."

Section 5 of the Manitoba "Succession Duties Act,"

(1) [1914] A.C. 176; 15 D.L.R. 283.

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as enacted in 1905 and in force in 1908, rendered the movable property of a domiciled decedent situate without the province as well as all his property situate within the province liable to succession duties. Section 15 provided that:—

> Any administrator, executor or trustee 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.

On obtaining grant of probate or administration the personal representative was required by section 6 to execute and deliver to the surrogate clerk a bond

> conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of such executor or administrator may be found liable.

Giving to the words "coming to the hands" their widest signification (*Batten, Proffitt & Scott* v. *Dartmouth Harbour Commissioners*(1)), having regard to the terms of section 15, it would seem to be at least arguable that the personal liability of the executor or administrator was confined to duties payable in respect of property of which he should be entitled to obtain possession under and by virtue of the Manitoba grant, as a condition of receiving which he was obliged to give the bond for payment of succession duties. If so, as to the duties on outside movable property the Manitoba statute would seem to be distinguishable from the Quebec legislation. But if the liability of the Manitoba executor or administrator should also extend to duties in respect of movable property of which possession could be obtained only

(1) 45 Ch. D. 612, at p. 622.

under a foreign grant of probate or administration, or if outside movable property, though coming to the hands of the Manitoba executor or administrator, should be dealt with by a foreign court in the manner indicated in Lord Moulton's illustration, no doubt the duties imposed upon it by the Manitoba statute would contravene the prohibition against indirect taxation equally with the duties considered in the *Cotton Case* (1).

Upon a careful study of Lord Moulton's opinion, however, although I certainly do not find that the view which I expressed in the *Cotton Case*(2), at pages 532 *et seq.*, was approved of in the Judicial Committee, neither do I find that it was overruled or even questioned. Their Lordships merely preferred to rest their conclusion that the taxation of outside property in that case was *ultra vires* upon another ground. Having had no reason to change or modify it, I respectfully adhere to my opinion that succession duties such as those provided for by the Manitoba statute imposed in respect of any property physically or locally situate outside the province are not "taxation within the province" and are, therefore, *ultra vires* of a provincial legislature. To that extent I think the Manitoba "Succession Duties Act" as it stood in 1908 cannot be supported.

But I see no difficulty in severing the provision of that Act relating to the taxation of outside movable property from the rest of the Act. It is not essential to the scheme of the legislation. Neither the character, the incidence, nor the amount of the duties imposed on the property within Manitoba could be in any way

(1) [1914] A.C. 176; 15 D.L.R. 283. (2) 45 Can. S.C.R. 469.

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effected by the excision of the provision for the taxation of outside movables. The only effects of deleting it would be that the province would receive a somewhat smaller revenue under the statute and the beneficiaries of outside movable property would escape the burden of the taxation.

After indicating the indirect character of the tax imposed by the Quebec statute by instancing the procedure requisite for its collection in the case of foreign bonds or shares bequeathed to a person not domiciled in the province, Lord Moulton proceeds to say:—

> Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the provincial legislature it is by no means the only one. 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.

In this passage it seems to me that their Lordships condemn the Quebec succession duties as indirect taxation regardless of whether the property in respect of which they are levied is within or without the province.

But with regard to assets within the province the Manitoba legislation differs essentially from that of Quebec. Under the latter, as construed by the Judicial Committee, direct personal liability to pay the duties is imposed on a person who may never have any of the assets of the estate in his hands. Speaking of the sections of the statute which deal with the method of collection of the duties imposed upon the property of the decedent, Lord Moulton says:—

> 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.

Under the Manitoba statute the only liability imupon the executor or administrator or trustee and is confined to duties upon any estate, legacy or property which he has in charge or trust (sec. 15). Title to the entire succession of the decedent within the province posed, other than that upon the property itself, is vests in his personal representative. It is out of that which comes to his hands as personal representative that the executor or administrator is required to pay. He is empowered to collect the duty from the devisee or legatee before delivering over any property subject to duty and to sell so much of the property of the deceased as may be necessary to enable him to pay such duty (sec. 16). We have not, therefore, the case of one not intended to bear the burden being required to pay the duty and to recoup himself thereafter either from the assets of the estate or from the persons interested therein. The personal representative has imposed upon him the obligation of collecting for the province the duties imposed upon the property of the decedent which comes to his hands and is under his control. The security which he gives is for the faithful discharge of that duty. It is only upon default in fulfilling it that he incurs personal liability. To hold that such taxation is indirect merely because it is levied through the instrumentality of the personal representative seems to me not only to be something which the Judicial Committee did not decide in the *Cotton Case*(1), but to involve a limitation on the provincial power of direct taxation which would be largely destructive of it. Unless required to do so by a decision of their Lordships, or of this court, much

(1) [1914] A.C. 176; 15 D.L.R. 283.

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more directly in point, I am not prepared to accept that position. As to the duties imposed upon property locally situate within the province the Manitoba "Succession Duties Act," in my opinion, provided for

> direct taxation within the province in order to the raising of a revenue for provincial purposes,

and was, therefore, *intra vires* of the provincial legislature.

I have not overlooked Lord Moulton's observations, at page 194, that in the Quebec case "there is nothing corresponding to probate in the English sense," and at page 195, that

> this (the payment of duties) 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,

or Lord Robson's remarks in *Rex* v. *Lovitt*(1), at page 223. I cannot think that their Lordships meant to suggest that the succession duties imposed by the New Brunswick statute, which is in this respect indistinguishable from the Manitoba statute, were in the nature of probate fees and therefore not to be deemed taxation. But, if they did, these expressions of opinion were *obiter* and I am, with all proper deference, of the opinion that the duties imposed by both these statutes are not in any sense "fees charged in respect" of the grant of probate or administration. They are imposed in addition to and independently of the fees charged for these services — "over and above the fees provided by the 'Surrogate Courts Act.'" They are levied indifferently upon movable property within and without the province — upon all the decedent's property within the province to which title is conferred

(1) [1912] A.C. 212.

by the Manitoba probate or administration and upon his movable property without the province to which it confers no title. Their amount varies according to the degree of consanguinity between the decedent and the beneficiary and the amount of the estate. I deem these succession duties taxation — not fees payable for services — and as taxation subject to the restrictions of sub-section 2 of section 92 of the "British North America Act."

For these reasons I would, with respect, dismiss this appeal.

BRODEUR J.—The first question to be determined is whether the debts in respect of which succession duty is claimed by the respondent are "within the Province of Manitoba."

There does not seem to be any serious difficulty as to the debt which is called the "Little debt." The deceased and the debtor were both residing in that province. It may be that Little has not in the province sufficient means to pay what he owes, but at the same time there is nothing to shew that he will not discharge his obligation. It is a simple contract debt due by a resident of the province and it is liable to the succession duty claimed.

As to the debts due in respect of the "Kirkella lands," there is a more serious dispute. It is claimed by the appellants that they are not "property within the province" as required by sub-section (*a*) of section 5, chapter 161, Revised Statutes of Manitoba ("Succession Duties Act").

The deceased in his lifetime owned certain lands in the Province of Saskatchewan and they had been sold by him to different purchasers.

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All those sales were evidenced by agreements for sale under seal and those agreements were in the possession of the deceased in Manitoba at the time of his death.

These agreements for sale are specialty debts and applying the principle enunciated by Lord Field in *Commissioner of Stamps* v. *Hope*(1), at page 482, a debt under seal, or a specialty, has a species of corporeal existence by which its locality might be reduced to a certainty, and it is *bona notabilia* where it is conspicuous and is under the jurisdiction in which the specialty was found at the time of death.

Another very important question has been raised as to whether the "Succession Duties Act" is *intra vires*.

It is claimed by the appellants on the authority of the judgment rendered by the Privy Council in the case of *Cotton* v. *The King*(2), that the taxation imposed by the "Succession Duties Act" is indirect and, therefore, beyond the powers of the provincial legislatures.

It is true that the very wide and inclusive language used in some parts of that judgment might be construed in that way. But in the *Cotton Case*(2) the question at issue was whether the Legislature of Quebec, in view of the restrictive language of section 92 of the "British North America Act," which gives to the provinces the power to impose "direct taxation within the province," could tax property situate outside the province.

At the time of his death the deceased, in the *Cotton*

(1) [1891] A.C. 476. (2) [1914] A.C. 176; 15 D.L.R. 283.

Case (1), was domiciled in Quebec, but the provincial government levied succession duties on bonds, debentures and shares that were all locally situate in the United States.

So the question that presented itself in that case was as to the right of a province to tax property situate outside of the province, and it is in connection with that feature of the case that the question of indirect taxation was raised. I do not think it was intended to declare that a province could not require, as a condition for local probate, that a succession duty should be paid on property within the province.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Mulock, Armstrong & Lindsay.*

Solicitors for the respondent: *Graham, Hanneson & McTavish.*

(1) [1914] A.C. 176; 15 D.L.R. 283.