HIS MAJESTY THE KING EX REL. THE ATTORNEY-GENERAL OF QUEBEC (DEFENDANT) ..... } APPELLANT;

AND

CHARLES S. COTTON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 25, 26.
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ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Constitutional law—Construction of statute—B.N.A. Act, 1867, *s.* 92, *s.-s.* 2—*R.S.Q.* 1888, *s.* 1191(*b*), 1191(*c*); (*Que.*) 57 *V. c.* 16, *s.* 2; 6 *Edw. VII. c.* 11, *s.* 1—*Legislative jurisdiction—"Direct taxation within the province"—Succession duty—Extra-territorial movables—Decedent domiciled in province.*

The legislative authority of a province in the matter of taxation conferred by sub-section 2 of section 92 of the "British North America Act, 1867," which authorizes the levying of "direct taxation within the province," extends to the imposition of duties upon the transmission of movables having a local *situs* outside the provincial boundaries which form part of the succession of a decedent domiciled within the province. *Woodruff* v. *The Attorney-General for Ontario* (1908), A.C. 508, distinguished. Judgment appealed from (Q.R. 20 K.B. 164) reversed, Davies and Anglin JJ. dissenting.

At the time of the death of C.L.C., 11th April, 1902, the statutes in force in the Province of Quebec relating to succession duties provided that "all transmissions, owing to death, of the property in, usufruct or enjoyment of movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death, etc." Subsequently, by 6 Edw. VII. ch. 11, a clause was added (sec. 1191(*c*)), as follows: "The word 'property' within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province,

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

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whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile (or residing), in the Province of Quebec at the time of their death," which was in force at the time of the death of H. H. C., 26th December, 1906. Succession duties were levied, in respect of both estates upon the whole value of the property devolving including, in each case, movable property locally situated in the United States of America. The action was to recover back those portions of the duties paid in respect of the value of the movables situated outside the limits of the Province of Quebec.

Held, reversing the judgment appealed from (Q.R. 20 K.B. 164), Davies and Anglin JJ. dissenting, that the movable property situated outside the limits of Quebec forming part of the succession of H. H. C. was subject to the duty so imposed.

On an equal division of opinion among the judges of the Supreme Court of Canada the judgment appealed from stood affirmed in so far as it held that the movable property situated outside the limits of Quebec forming part of the estate of C. L. C. was not liable to such taxation.

APPEALS from the judgment of the Court of King's Bench, appeal side (1), affirming, with a variation, the judgment of the Superior Court, District of Quebec, by which the respondents' petition of right was maintained.

The respondents, by their petition of right, claimed the refund of succession duties paid by them and exacted by the Government of Quebec in virtue of the statutes of the Province of Quebec in respect of duties exigible on the transmission of property in consequence of the death of the owner. The amount demanded was $31,492.02, of which $10,545.55 had been paid in respect of part of the succession of the late Charlotte L. Cotton, and the remainder in respect of part of the succession of the late Henry H. Cotton, her husband; the claim was made on the ground that

(1) Q.R. 20 K.B. 164.

these portions of the estates consisted of personal property which was locally situate in the State of Massachusetts, one of the United States of America, and, consequently, not subject to the imposition of succession duty by the provincial legislature.

The Superior Court maintained the petition of right as to the whole of the amount demanded, with interest from the date of the institution of the action. On appeal to the Court of King's Bench this judgment was affirmed, in effect, by the judgment now appealed from, which merely modified the judgment of the Superior Court by deducting therefrom the amount of $393, and ordering that each party should bear its own costs. The ground on which the deduction was made was that the Superior Court, for the purpose of ascertaining on what amount the tax was payable, should have deducted a proportionate amount of the debts due by the deceased owners of the property in question from that part of the property which was locally situate in the United States of America, instead of deducting the entire indebtedness from that part of the estates locally situate in the Province of Quebec.

On the present appeal the respondents gave notice of cross-appeal from the judgment of the Court of King's Bench, in so far as it varied the judgment of the Superior Court, on the grounds that, if the only property subject to duty was that locally situate in the Province of Quebec, the amount of the debts should be deducted only from the property so liable to taxation; that, if it were otherwise, the value of the property situate outside that province would be affected and lessened in value, and that, as their claims had been sustained in the Court of King's

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Bench, notwithstanding the reduction in the amount of the judgment, the costs on the appeal to that court should have been allowed to them.

The questions in issue on this appeal are stated in the judgments now reported.

Aimé Geoffrion K.C. for the appellant.

T. Chase-Casgrain K.C. for respondents.

THE CHIEF JUSTICE.—The question for the opinion of the court in this case is: If a person domiciled in the Province of Quebec dies leaving movable property such as bonds and debentures "locally situate" in Boston, Massachusetts, one of the United States of America, can that part of the estate be considered or taken into account in calculating the amount of the duty to be levied on the transmission of his estate under the succession duty law of that province? For the meaning of the term "locally situate" see Dicey, Conflict of Laws (2 ed.), p. 309; Hanson, Death Duties (6 ed.), pp. 108-109; and notes of my brother Anglin.

There are in fact two estates in connection with which this question arises here: that of Mrs. Cotton and that of her husband, H. H. Cotton; and the action is to recover from the Government the amounts paid as succession duty on both estates through error of law, as is alleged. Each of the cases presents a different state of facts for consideration, and the statutes relied on by the Crown as applicable to the two successions are not in terms identical.

Dealing first with the succession of Mrs. Cotton, it appears that she died in Boston, on the 11th of April, 1902, having made her will there on the 17th

of April, 1900, disposing of a fairly large estate in bonds and debentures, the bulk of which was, at the time of her death, locally situate in Boston. In the interval between the making of the will and her death, the deceased's husband bought a house, at Cowansville, in the Province of Quebec, where he was born, and he had actually taken up his residence there, although some of the winter months were spent in Boston. After his wife's death, the husband continued to reside at Cowansville, to which place he brought her body for interment, and there he died. I accept the finding of the courts below that Mrs. Cotton was, at the time of her death, domiciled in the Province of Quebec and that her estate devolved under the law of that domicile, but, in my opinion, the statute imposing the duty levied by the Crown does not extend to that portion of her estate which was locally situate beyond the limits of the province. The statute reads:—

> All transmissions, owing to death, of the property in usufruct or enjoyment of movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death.

Taken in their strict and literal meaning the words "movable and immovable property *in the province*" relate *primâ facie* to property locally situate within the limits of the province and, as my brother Anglin says, that such was the intention of the legislature is made superabundantly clear by reference to the French version of the statute where the words used are

> toute transmission par décès, etc., de biens mobiliers ou immobiliers *situés dans la province*, etc.

If these words "situés dans la province" had been omitted and the language of the French law (art. 4,

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L. 22, Frim. An. VII.) from which the Quebec Act is taken adhered to, then all the French authors say that by application of the maxim *mobilia sequuntur personam* the meaning of the word "movable" might be enlarged so as to include all personal estate wherever it might be; but if effect is to be given to the language of the legislature, the result must be to say that by inserting the qualifying words "in the province" after the words "movable and immovable property" it was intended to exclude the application of that maxim and limit the impost to such movable property as, at the date of the death, would be found within the jurisdiction. The question on this branch of the case is not as to the power, but as to the intention of the legislature. Acts imposing death duties, like all other taxing statutes, must be construed strictly and in favour of the subject. Hanson's Death Duties (6 ed.), p. 78. I do not overlook the fact that in the declaration to be furnished the collector of provincial revenue the description and real value of all the property transmitted, whether movable or immovable and wherever situate, is to be supplied to that official; but no inference is deducible from this obligation which would extend the meaning to be given the section imposing the tax.

Dealing now with the estate of the husband, who died on December 26th, 1906, at Cowansville, in the Province of Quebec, having, by his will made there in notarial form, instituted the respondents his testamentary executors. A large amount of bonds and debentures physically situate in the United States formed part of that estate at its devolution. In the interval between the death of the wife and that of the husband, the law of Quebec was amended so as to sub-

ject to succession duty all movable property transmitted

wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

Mr. Justice White speaking for the court in *Knowlton* v. *Moore*(1), at p. 56, after making a careful review of the law concerning death duties in ancient and modern times, says:—

> Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit or the transmission from the dead to the living on which such taxes are immediately rested;

and Fuzier Herman, *vo.* "Successions," No. 1899, says:—

> Il suit de là que le droit de succession est dû chaque fois qu'il y a mutation, c'est-à-dire dessaisissement par mort, sans qu'il y aît à se préoccuper du titre en vertu duquel l'hérédité est dévolue. C'est donc le décès qui est le fait générateur du droit proportionnel. De même que, en droit civil (art. 718), les successions s'ouvrent par la mort, de même, en droit fiscal, c'est le décès qui, en opérant la mutation des biens, donne ouverture à la créance du Trésor. Ainsi que l'exprime un arrêt de la cour de cassation, l'impôt de mutation par décès "a le caractère d'une dette naissant avec l'ouverture de la succession et inhérente dès ce moment à tous les biens qui la composent."

In France, and the Quebec statute is an adaptation of the law of that country, it is universally accepted that the power to transmit or the transmission or receipt of property by death is the subject levied upon by all death duties. Fuzier Herman, *vo.* "Successions," No. 2028. The duty is not levied upon individual items of property which together make up the estate, but upon the transmission or devolution of the succession. The civil law of Quebec, in the light of

(1) 178 U.S.R. 41.

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which this statute must be read, is based upon the old Roman legal theory of universal succession or succession as a unit by means of which the legal personality of the deceased passed over to his heir.

Article 596 of the Civil Code says that succession means "the universality of the things transmitted" and that universality devolves at the domicile of the deceased (art. 600 C.C.). By the law of that domicile, the title under which the heirs receive the estate, the movable property of the deceased, wherever situate, is governed. In such a case the maxim of *mobilia ossibus inhærunt* finds its application, as my brother Duff clearly demonstrates in his notes, to which I would venture to add two authorities taken from the French law. In a note to Dalloz, 1897, 1, 139, M. Sarrut says:

> En vertu de la fiction *mobilia ossibus inhærent* l'universalité juridique d'une succession mobilière est censée adhérente à la personne du défunt; or le défunt était, en droit, au lieu de son domicile légal.

Pothier, Introduction générale, vol. 1, p. 7, No. 24.

> Les choses qui n'ont aucune situation sont les meubles corporels, les créances mobilières, les rentes constituées, autres que celles dont il a été ci-dessus parlé, quand même elles auraient un assignat sur quelque héritage: car cet assignat n'est qu'un accessoire. Toutes ces choses, qui n'ont aucune situation, suivent la personne à qui elles appartiennent, et sont par conséquent régies par la loi ou coutume qui régit cette personne, c'est-à-dire, par celle du lieu de son domicile.

To sum up briefly, I am of opinion that the right or title to the bonds and debentures situate in Boston passed on his death from the deceased to his heirs in the Province of Quebec by virtue of the law of that province and all the movable property transmitted by that title is subject to the duty which the legislation which creates the title chooses to attach as a condition of the transmission on those who

claim title by virtue of our law. Halsbury, vol. 13, p. 273, No. 373.

Let me test the soundness of this construction of the law by reference to section 6 of the Act we are now considering. That section is in these words:

> No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid.

Payment of the duty is a condition of the transfer and no title is vested until it is paid. If the executors or legatees sought to enforce their title to the bonds in Boston, it would be a good answer to their claim that not having paid the succession duty they had no title to the bonds. In which case, where would the title to that portion of the deceased's estate vest? If, therefore, the heirs must invoke the Quebec Act as their title, the condition subject to which that Act transmits the property to them — payment of legacy duties — must be fulfilled. It is unnecessary to say that, in my opinion, this case is clearly distinguishable from the case of *Woodruff* v. *Attorney-General for Ontario* (1). There is no question here of an attempt to tax property situate beyond the jurisdiction; the Quebec statute merely fixes the conditions subject to which it gives a good title to the property of the deceased. In a word, the tax is imposed as a condition of the devolution, a condition subject to which the heirs take title. The amount of the tax is fixed by reference to the aggregate value of the property and the degree of relationship of the successors to the deceased; but there is nothing in the law which pre-

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vents a government from taxing its own subjects as in this case on the basis of their foreign possessions.

I would allow the main appeal as to the estate of H. H. Cotton.

As to the cross-appeals, the necessary result will be their dismissal, because that is the conclusion to which the opinions of the three members of the court who would allow the main appeal in the case of Mrs. Cotton would necessarily lead and it, therefore, becomes unnecessary for me to express any opinion on the merits of these cross-appeals.

The conclusion, therefore, to which I have come is that as to the estate of Mrs. Cotton the appeal should be dismissed and that it should be allowed as to the estate of Mr. H. H. Cotton.

As to costs, the costs of the Superior Court should be paid by the Crown; the costs in appeal and here should be paid by the estate of Cotton, as also the costs on the cross-appeals.

DAVIES J. (dissenting).—In the case of *Woodruff et al.* v. *Attorney-General for Ontario* (1), the Judicial Committee held that there was no sound distinction in point of law between the two transactions or assignments of property in question in that case. As said in their judgment:—

> They were both concerned with movable property locally situate outside the province and the delivery under which the transferees took title was equally in both cases made in the State of New York.

Had the judgment stopped there it would seem reasonably clear that the grounds of their Lordships' decision that the Ontario succession duties were not

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recoverable in that case, were the local situation of the property outside the province, coupled with a delivery of the property under which the transferees took title also in the State of New York. Under these facts and circumstances they did not agree with the Court of Appeal for Ontario which held that the assignment of 1902 fell within the Ontario Act imposing succession duties because it was, as that court held, a transfer of property made in contemplation of death to take effect only on and after the death of the transferor. As I understand the judgment of the Privy Council, up to this point, it did not matter whether the assignment so made was or was not made in contemplation of death and only to take effect on and after death. These facts, as found by the Court of Appeal, were immaterial in their judgment because, as they go on to say, "the pith of the matter" was the limitation in Canada's "Constitutional Act" of the powers of taxation given to the local legislatures, which limitation they said made

> any attempt to levy a tax on property locally situate outside the province beyond their competence.

This broad general statement it will be seen takes no account of the fact that such property may have been transferred abroad by the testator or intestate in his lifetime in contemplation of death and so as to avoid the succession duties. Such a factor as the transfer of the property abroad, which is given prominence to in the preceding part of the judgment, has no room in this part, where the Judicial Committee is apparently pointedly stating their opinion of the limitation placed upon the powers of the local legislatures in the grant to them of the power of "direct taxation within the province." The fact of there having been an as-

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signment of such property made abroad by the deceased in his lifetime in contemplation of death is in this statement of the limited character of the powers conferred on the local legislatures absolutely ignored as irrelevant, and the general proposition laid down that

> any attempt to levy a tax on property locally situate outside the province is beyond their jurisdiction,

that is, the jurisdiction of the local legislatures.

But the Judicial Committee do not stop there. If they had it might be contended that the language of their judgment, though broad and general enough to cover other cases, must be construed as applicable only to such facts as they were in that case dealing with, namely, where movable property was

> locally situate outside the province and the delivery under which the transferees took title was also made outside the province.

The latter words, however, of their judgment seem to render it impossible to attach such a limited meaning to the judgment, because they go on to deal with the arguments advanced by Sir Robert Finlay for the Attorney-General of Ontario. His argument, as reported, was to the effect that the legislation was *intra vires* the legislature because the tax was not a tax on property but one on the devolution or succession, that it was imposed on persons beneficially entitled by virtue of the will of the deceased or by virtue of the testamentary transfers made by him in his lifetime to take effect at his death. That these persons taxed were resident in the province and were directly liable for the duty.

Dealing with this argument the single remark the Judicial Committee make is:—

> Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature had forbidden to the province, taxation of property not within the province.

Such a remark would be pointless if they had held the transaction of 1902 to have been a *bonâ fide* absolute assignment and not to have been of the character contended for by Sir Robert Finlay and found by the judgment in appeal before their Lordships, namely, one made in contemplation of death and only to take effect on and after death. The latter construction of the transfer had to be reached, otherwise there was no ground for discussion as to the property being taxable under the Act. The limitation upon the powers of the provincial legislatures to levy direct taxation within the province, rendered it unnecessary for their Lordships, as they said,

> to discuss the effect of the various sub-sections of section 4 of the "Succession Duty Act," on which so much stress had been laid in the argument before them.

It is, therefore, evident to me that the judgment of the Privy Council in this case of *Woodruff* v. *Attorney-General for Ontario* (1) is of a wider and broader application than contended for by the appellant in this appeal, and that it is conclusive upon us in the appeal now before us. The distinction attempted to be made by Mr. Dorion, at the first hearing, between the two statutes of Quebec and Ontario levying these succession duties, namely, that the former expressly makes the taxation payable upon the transmission of the property, while the latter places it upon the property itself, is not a substantial distinction. In my judgment, under both statutes, the tax is one not on the property, but on its

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devolution or succession. (See *Lovitt* v. *Attorney-General for Nova Scotia*(1).) But no such distinction can be successfully invoked to take this appeal out of the binding effect of the judgment of the Privy Council in *Woodruff* v. *Attorney-General for Ontario*(2). That judgment was not based upon the mode in which the Legislature of Ontario attempted to levy the succession duties there in dispute, but upon the denial of the existence of any constitutional power in the legislature either directly or indirectly to impose such duties upon property not within the province. The head-note of the case correctly sums up what it really did decide, namely, that,

> it is *ultra vires* the legislature of the province to tax property not within the province; *Held*, accordingly, that the "Succession Duty Act" (R.S.O. 1897, ch. 24). does not include within its scope movable properties locally situate outside the Province of Ontario which *it was alleged* that the testator, a domiciled inhabitant of the province has transferred in his lifetime with intent that the transfers should only take effect after his death.

If I am right in my construction of this *Woodruff* decision, it is binding in this appeal, as the foreign bonds, stocks and other securities owned at her death by Mrs. Cotton, and at his death by Henry H. Cotton, and upon which, or the transmission of which, it was contended by the Crown in right of the Province of Quebec succession duties were payable under the provincial statute, were, at the times of the respective deaths of Mrs. Cotton and Henry H. Cotton, situate in Boston, Massachusetts, and not in the Province of Quebec, and had never been, so far as the record shews, physically situate in that province.

The appeal should, therefore, be dismissed.

(1) 33 Can. S.C.R. 350. (2) [1908] A.C. 508.

As regards the cross-appeal, I think this should be allowed. The Court of King's Bench modified the judgment of the Superior Court by deducting the debts of the estate from all the assets and not from the assets in the province only. I think the Superior Court was right in holding that the debts owing by the estate in the province should be deducted from the assets in the province only. In estimating the amount upon which succession duties should be paid, the executor or the courts have nothing to do with assets outside of the province which were beyond their jurisdiction, and which it is *ultra vires* of the legislature to tax. The statute says, section 1191(*b*), that these succession duties are to be calculated

> upon the value of the property transmitted after deducting debts and charges existing at the time of the death.

What the legislature was dealing with and all that it had power to deal with was the property within the province — just as the reference to debts had to do exclusively with debts due in the province. If I am correct in my construction of *Woodruff's Case*(1) in holding that property "locally situate outside of the province" was not liable to the succession duties, then it must, I think, be held that the words "property transmitted" in section 1191(*b*) had no reference to property outside of the province, but had exclusive reference to the property within the province which, and which alone, the legislature in the matter of these duties had power to deal with.

I would, therefore, allow the cross-appeal and restore the judgment of the Superior Court.

As regards costs, the respondent should be allowed

(1) [1908] A.C. 508.

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costs in all the courts and costs upon his cross-appeal in this court. The judgment in the court of appeal not allowing him costs in that court was based upon the assumption, wrongful to my mind, that the judgment of the Superior Court should be substantially modified. As I think the Court of King's Bench wrong upon that point, I would allow the respondent his costs of the appeal in that court as well as in this court, and also his costs in the cross-appeal.

IDINGTON J.—The issue raised herein is of very great importance. It involves the question of the interpretation and construction of the "British North America Act, 1867," section 92, sub-section 2, assigning to the exclusive power of the provincial legislatures

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

and of the interpretation and construction of an Act of the Quebec Legislature professedly acting within said power enacting that

> all transmissions, owing to death, of the property in, or the usufruct or enjoyment of, movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death:

or and as it now stands amended in 6 Edw. VII. ch. 11 (1906) (of Quebec).

The first question thus raised is whether or not this enactment is a competent exercise of the power given by the preceding enactment.

Before passing to the solution of this question, I wish to consider and dispose of the suggestions made by counsel for the respondent relative to the bearing

of the amending section 1191(*c*) and three or four following sections of said Quebec statute.

The contention set up is that these several later sections shew that it is not the transmission of property that is taxed, but the property itself.

Inasmuch as section 1191(*c*) of the Quebec Act is a declaration of the meaning of the word "property" where it occurs in the Quebec Act above referred to and quoted from, I am unable to see how it can affect the question at all if the act of transmission within the province is the subject of taxation and a proper basis therefor. And still less can the following sections thereof affect the question raised here, for it is frankly admitted by counsel that none of the property now in question here is of any of the kinds covered by these later sections.

Of course it may be a fair argument that finding these sections in the Act taxing the transmission of property, stated in the terms they respectively are stated, it is in truth a taxation of property that is involved. Whatever weight may be given thereto it seems to me impossible to reach such express language as quoted above as imposing taxation on anything but the transmission.

The case of *Lambe* v. *Manuel*(1) seems conclusive upon that point. In the language of Lord Macnaghten therein, page 72,

> the taxes are imposed by those Acts — this being one — on movable property are imposed only on property which the successor claims under and by virtue of Quebec law.

Another argument to support this contention of property being the subject of the tax was made for

(1) [1903] A.C. 68.

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appellant is this that immediately after transmission or granting of probate the personal representative is to be recouped in a specified way varying according to the distinction or character of each legacy. It seems to me this argument is more plausible than sound.

It is the first transmission that is in question and not the later transmission taking effect abroad as the result thereof.

I infer from the evidence adduced that it was erroneously supposed to be contended that the later transmission was had in view by the statute.

Neither the requirements of the rules of corporate bodies in which stock may have been held by deceased, nor those of a foreign state relative to the enforcing of claims therein are what is meant by the transmission named in the statute. It is that transmission, and only that, which vests any right, whatever it may be, in him getting by force of the law of Quebec, title to the property of deceased, that is meant by the use of the word in this statute. The purview of the Act shews that, if any doubt could otherwise exist.

I, with deference, doubt what Mr. Geoffrion seemed to concede resting upon the decision of Mr. Justice Pagnuelo in *In re Denoon*(1). The words of the Act are strong and the legislature competent to change the old law or keep its operative effect in suspense.

In another point of view the argument is met by the case of *Bank of Toronto* v. *Lambe*(2), where an analogous argument was put up.

The tax there had to be determined by the paid-up

(1) Q.R. 15 S.C. 567. (2) 12 App. Cas. 575.

capital of the bank and the number of offices or places of business it had in the province.

There, as here, the questions of direct or indirect taxation, the power over banks as such resting with the Dominion, and their rights to carry on business independently of provincial authority, and a foreign head office owning and controlling everything, were all relied upon.

The tax was held to be direct and the mode of fixing it was but the measure to be applied for ascertaining what the tax should be.

Here the tax is measured by the amount of property to be transmitted under certain conditions varying in each case just as in the cases of banks and other companies in that case.

Counsel for appellant then invokes the authority of the case of *Woodruff* v. *The Attorney-General for Ontario*(1), to shew that personal property actually situated in a foreign state cannot be taxed by a provincial legislature. The Ontario Act, R.S.O., ch. 24, is as fundamentally different from the Quebec Act we are called upon herein to consider, as such Acts can well be from each other. Section 4, sub-section (*a*) of the former is as follows:—

> (*a*) All property situate within this province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy.

Let any one compare the two for a moment and what I have just stated seems clear.

Before proceeding further it is proper to inquire whether notwithstanding the radical differences between the two Acts it has, as is contended, in truth

(1) [1908] A.C. 508.

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been decided, by the Privy Council in the said *Woodruff* v. *Attorney-General for Ontario* (1), that the provincial legislature cannot tax a transmission in and by Quebec law of personal property outside the province, and that the maxim *mobilia sequuntur personam* so much relied upon relative to the laws of other countries, cannot avail in this case.

If that was the real issue raised in that case, and it has been therein definitely decided, there is an end of the matter. If it was not the real issue, and the decision did not necessarily involve the decision of such issue, then it cannot bind us.

I may at once say that the statement of fact in the following sentence of the judgment, seems to me to dispose of the question of the fundamental grounds the judgment proceeds upon.

> They (*i.e.*, the two transactions there in question) both were concerned with movable property locally situate outside the province and the delivery under which the transferees took title was equally in both cases made in the State of New York.

Surely that is as wide apart from what is involved here as can well be. The title upon which the attempted taxation herein rests arose in Quebec by virtue of the transmission its laws give vitality to. It is upon the act of giving force and validity thereto that the taxation is imposed. Whether such transmission is taxable or not and the legal ambit thereof is entirely another question. But it is not involved in the denial of a right by virtue of such a statute as the Ontario Act to tax the property itself when in, or after taken to, a foreign country, and has been in the lifetime of the deceased there transferred to

(1) [1908] A.C. 508.

another, and thenceforward remains in the foreign state the property of such transferee.

The Ontario Act was so framed that it did not give rise to the very question raised here. When the interpretation of that Act was called for, in said case, the first subject calling for consideration was the scope of legislation whereof the keynote was the subsection I have just quoted. It purports to tax property situate within the province and in taxing property, not the owner in respect thereof, or the transmission thereof, lies the radical difference between the Acts there in question and what we have to pass upon. In trying to arrive at the correct interpretation naturally the taxing power of the province was referred to. An obiter dictum appears relative thereto that read in relation to the situation of the property there in question and the facts relative thereto might well be attributed thereto. But it by no means proves it is to be taken in the wide sense now contended for here, in relation to another set of facts giving rise to other legal considerations. The judgment reached does not need its support nor does it seem the basis thereof.

And that is made abundantly clear when the judgment expressly refers to the case of *Blackwood* v. *The Queen*(1) as containing the reasoning which covers the case and I infer was in fact adopted in disposing of it.

If ever a case was decided on what was supposed by the court to have been the intention of the legislature, as expressed in its enactment, that was the case of *Blackwood* v. *The Queen*(1). The entire rea-

(1) 8 App. Cas. 82.

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soning of the judgment was elaborated in order to the making of that clear. The conclusion is thus summed up therein:—

> All these things, the person to pay, the occasion for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax.

Whilst impliedly admitting the power of the colony of Victoria to go much further by using language shewing such a purpose, it would have been idle to elaborate as was done if the power in Victoria did not exist. All the case called for in such event was, if so, to declare accordingly.

The court adds that the reasons which led English courts to confine probate duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statute which imposed it, apply in full force to the Victoria statute and the case arising upon it; yet the court made it quite clear that said reasons were only illustrative of how such Acts had been treated and their interpretation might form a guide for reaching the meaning of the Victoria statute.

For in the early part of the judgment the court points out that the discussion relative to the terms "probate duty" and "legacy duty" could only be used as descriptive of two classes of statutes familiar to English lawyers and adds: "If used for any more exact application they are misleading."

Now passing that we have the following declaration in the Quebec Act as amended which clears all this up if doubt ever existed. The amending clause was apparently designed to clear it up whether needed or not.

The clause is section 1191(*c*), as follows:—

> 1191(*c*). The word "property" within the meaning of this section shall include all property, whether movable or immovable, actu-

ally situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.

This is most explicit as to what is to be covered by the transmission to be taxed and most comprehensive. Perhaps it comprehends too much, but as to that we are not concerned here, for the case now in hand of the transmission of the estate of the late Mr. H. H. Cotton who was domiciled at his death in the province, falls within the latter part of the clause just quoted and is preceded by language evidently intended to reach as far as the powers possessed might go to express the intention not found in the Victoria Act or the Ontario Act.

Nor are we concerned with the amendment since made to rectify what were possibly too extensive claims. Neither of these amendments is retrospective.

The clause should be held good for that which the legislature had the power to enact when the excess of authority, if any, was as here easily severable from what was *ultra vires* or capable of being read as expressing only what was *intra vires*.

I am only concerned thus far to see if there was an expression of intention such as was sought for but could not be found in the Victoria Act. For the present I assume, but by no means say, the language needed clarification.

It seems to me there can in regard to this Act thus amended be no doubt of its intention to impose a tax on the transmission in Quebec by force of its law, of the personal estate wherever situate.

The next and most important question which

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arises here is this: Does such express intention limited within what is necessary to cover the case of the transmission of the late Mr. H. H. Cotton's estate wheresoever situate, come within what it is competent for the Legislature of Quebec to enact?

This question starts several others. In the first place the taxability of any transmission of property in any case; the principle upon which it can be rested; and the kind of property respecting which its transmission may be taxed. I cannot think any doubt can exist as to the right to tax the transmission. The basis of such right as well expressed in *Winans* v. *Attorney-General*(1) by Lord Loreburn, page 30:—

> 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.

The basis of taxation and for transfer from the deceased to others is not exactly in the same way here in evidence, as there, but as to transfer is fully more so. The deceased had property in the province for which his executor could get no title or reach it without probate or authentic will (whichever happened to be the case), and that could only be got upon the conditions determined by law. Even if one of these conditions happened in the event to be most onerous, and possibly uncollectable by an action taken by the Crown, I fail to see how the respondents can now and here attack it.

Again, the *Lambe* v. *Manuel*(2) case, the converse of this upon the same statute before the amendments referred to, proceeds upon the recognition of the title got by the transfer or transmission involved

(1) [1910] A.C. 27. (2) [1903] A.C. 68.

in the grant of probate in another province where the deceased had his domicile at death.

It seems to me to give impliedly just that recognition of the grant relative to goods in another province which I have already suggested.

It may at least *primâ facie* be here given in a limited sense to the *mobilia sequuntur personam* rule.

In the next place arises the question of the power of the Quebec Legislature confined as already mentioned within the limits assigned by the "British North America Act" regarding direct tax and its imposition within the province.

Great stress is laid upon a passage in the judgment in the Woodruff case apparently denying the power of taxation of property beyond the province.

If I am right in pointing out as above that the court was proceeding upon the statement of facts quoted above, and the peculiarity of these facts, then the expression can only fairly be held to relate to the position of affairs at the death of the testator in that case.

The property had been passed in a foreign state to others and the maxim *mobilia sequuntur personam* could not on such a state of facts be applied in any of the various ways it has been made applicable in law.

The language of the Ontario Act did not permit of that being done on the facts dealt with in that case.

And as already suggested the expression relied upon might have a relevancy thereto, but cannot be fairly extended to something else not needed for the disposal of that case.

I cannot think the expression was intended to mean more, but if so it was *obiter dicta*.

Everything else aside from that partakes of *obiter*

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dicta, which, of course, must be given that respectful consideration due at all times to eminent authority. And giving that it is our duty, if an examination of the principles of law to be applied do not seem to us to permit of the application of what is expressed in *obiter dicta,* to say so, or at all events not feel bound thereby.

With great respect, I cannot assent to the said *obiter dicta* or its apparent assumption that "direct taxation within the province" necessarily means only taxation in respect of property physically within the province.

Counsel for respondents in his argument relied so much upon these observations it seemed as if his whole hope rested therein and the courts below have gone thereon entirely.

A man may be domiciled within a province and be made answerable for taxes imposed upon him in respect of property outside the province, but over which the laws of the province may have given him the only foundation he can have for dominion or legal possession.

For example, a man domiciled within a province may build railway cars and lease them to one of the railway companies running into the United States, and sometimes have them at home and sometimes abroad. Can he not be taxable in respect of such property ?

The Canadian farmer may use land on each side of the line between this country and the United States and his flocks or herds may be driven from his house and farm steading in any one province to the end of his farm and pasture in the foreign state. Can he not be taxed for or in respect of such personal property ?

Is the right of taxation to be determined by the mere accident of where these cars, flocks or herds may be at a given time? Is the income derivable therefrom to depend also on such accident? Reason seems to say no. It is his domicile in the province that gives the power of taxation in his case validity.

Yet in taxing such property or the man in respect of such property, there is in a sense taxation of property which may be outside the province. The man is taxed and may be made to pay in respect of property abroad.

Is it conceivable that the right of taxation of a multitude of other and especially commercial properties can depend on anything else than the domicile of the man answerable for the tax and who is enjoying all his rights or property therein by virtue of the legislation of his province and the contracts he has formed therein? And for the protection of such rights should he not share part of the common expenses of such protection?

There are no doubt cases of personal property within a province owned by some one outside the province which can be taxed also.

Then we have the income tax which forms no mean part of the aggregate municipal taxation. Yet it often rests upon no other foundation in law than the domicile of the man taxed.

The income tax has never been questioned. Yet the sources from which the income flows may be in every quarter of the globe.

The legislature of the province, where he thus earning it is domiciled, having had committed to it the exclusive power over property and civil rights and imposed upon it the duty of protecting him there-

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in, has also the power of direct taxation to meet the expenses of discharging such duty. Surely the fact that the income may never have reached home and may be left abroad to earn more, is not to determine the power of imposing such a tax.

Lest it may be said taxation of income is indirect, I submit what was said in *Bank of Toronto* v. *Lambe* (1), at page 582, in the course of the judgment dealing with the power of direct taxation given the provinces. It is 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 run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

If, therefore, we may safely assume an income tax derivable from foreign ventures and not necessarily reaped and brought into the home custody of him liable to such tax, why should we in this case be confined to the test of the particular thing being physically within the province as the true limit of the power of taxation within a province?

It is to be observed also that the same court, in *Blackwood* v. *The Queen* (2), thus expressed its views in reference to the power of taxation. It said at page 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.

This power, I submit, is that of direct taxation. It is not said that the extreme exercise suggested as

(1) 12 App. Cas. 575. (2) 8 App. Cas. 82.

possible would be a proper exercise of such power. It could not be exercised over any one domiciled in another country or province. But by every principle of convenience and reason relative to the partition of the powers thus existing and being apportioned between the respective jurisdictions of dominion and provinces, there is nothing that forbids and much that leads to the conclusion that it was intended to assign to the provinces whatever powers of direct taxation a province or state could properly exercise and usually exercised or had the power to exercise.

Direct taxation, except for local purposes, had never been resorted to by the old Province of Canada, and, so far as I am aware and as it is generally understood by the term, has not yet been resorted to by the Dominion, save possibly by the excise duties.

The Dominion quite consistently therewith might also by virtue of the power assigned it possibly resort thereto. But when the conditions existent relative to direct taxation were such as to induce the belief that its resort thereto by the Dominion might only be in a very remote contingency, why should we assume that the usual and general power was not that assigned to the provinces which alone were likely to exercise it; and that it was not intended to enable them to exercise it in their respective dealings with their own citizens ?

There is nothing to indicate that the general power declared as above to be possible, was reserved for the Dominion only, or that some implied limitation was intended, reserving and preserving part of it in a dormant condition, only to be exercised on extreme occasions, or for special purposes. In contradistinction to the power extending over all persons and given

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the dominion to resort to any mode of taxation, it was quite natural in assigning direct taxation to express it as appears.

I submit, what was intended was that which the language indicates, when we have regard to the nature of the Act which consists of a concise description of a number of enumerated powers.

It is an extremely improbable thing that for the mere purposes of raising a revenue for provincial purposes by direct taxation, any abuse such a power may be in this particular regard susceptible of, was dreamed of as a thing to be guarded against, by any one. If it had, we would likely have found other expression given thereto.

Moreover, we must bear in mind that of those federated provinces, Nova Scotia and New Brunswick had long enjoyed just as complete powers in this regard as the colony of Victoria of which the legislation was in question in the judgment I have referred to. It does not seem to have occurred to the court in making the remarks I have quoted, that any distinction then existed between the powers of that colony relative to such taxation and those of any other country.

Are we to assume that these other provinces surrendered in this regard what in theory they had enjoyed up to Confederation ? The same is true of the old Province of Canada; but as it was divided into two provinces, the illustration drawn therefrom is not so direct.

"Direct taxation within a province" and "direct taxation of property within a province" are, I submit, not interchangeable terms. It is the former term that is used, and if the meaning of the latter term

was what it purposed surely it would have been so expressed.

And when we find that the Privy Council has not adhered to the literal expression of the same power by limiting it to the "revenue for provincial purposes," but has heretofore found in that, despite the words used, power to delegate it to corporate municipal and school boards, I do not think we should seek in another spirit of interpretation, relative to words in the same sentence, to restrict the power by something not expressed and to something quite unusual. Parliament was not accurately defining the powers of a petty corporation to be created, but designating in general terms where that line was to be drawn in dividing the legislative powers of a great state. It must be borne in mind that the legacy duty had long been in force in England and that the "Succession Duty Act" had been passed some twelve years before the "British North America Act," and that both, within the memory of those transacting affairs, had been the subject of judicial construction whereby the line was drawn at where the rule *mobilia sequuntur personam* would put it. See *Thomson* v. *The Advocate-General*(1); and *Wallace* v. *Attorney-General* (2); each dealing with the respective Acts referred to. And to this day the rule said maxim implies has been applied in the *Manuel Case*(3) I have referred to, to govern in one way the construction of this very Act now in question before its amendment. The principle being so declared the converse case surely must be held and applied herein.

Or is this interpretation in *Lambe* v. *Manuel*(3)

(1) 12 Cl. & F. 1. (2) 1 Ch. App. 1.
(3) [1903] A.C. 68.

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when restrictive in its operation to be all right, and in the converse case all wrong ?

The view held in *Wallace* v. *Attorney-General*(1) may since have varied by statute but that does not affect the line of argument I suggest.

Again I shall not readily impute to the framers of the "British North America Act" the purpose of so limiting the powers of a province in this regard that the economic results of such limitations inevitably would be, by so limiting its taxing power, to drive a large portion of capital owned by those domiciled in a province to use it in a foreign country.

In conclusion it seems to me the man domiciled in a province is liable to such direct taxation for the specified purposes of provincial revenue as may be usually exercised over him for the like purpose in any other state.

When living he is liable to taxation upon his income derivable from his investments abroad, and if the legislature sees fit all else he has abroad, and when he is dead the transmission of his estate in so far as it requires the protection and support of the law (as in Quebec under the principles of the Civil Law or Code) the sanction or authority of the province exercised by or through the ordinary channels it has created for the purpose can only be obtained upon the terms the province has seen fit to enact as to the condition of giving that legal support or needed sanction or authority.

However much all I have advanced by way of illustration relative to the taxing power may be subject to limitation or reservation, I am unable to see

(1) 1 Ch. App. 1.

how or by what process it is possible to compel a province to give that sanction save on its own terms.

The will of the late Mr. Cotton was made in Quebec, where he undoubtedly was domiciled when it was made and at his death, and his will rested for its validity on the laws of Quebec, and was expressly made subject to the conditions imposed by this statute before it could obtain any force or effect.

The respondents have not shewn that in respect of this estate there was any mistake made in that regard or that the securities in respect of which, or upon the basis of the value of which, they paid this tax did not, or rather respondents in order to acquire title thereto did not, require this sanction.

I can conceive of a case wherein a foreign state or another province may have expressly provided for a statutory or other representative of a deceased person who in life was domiciled elsewhere, getting his personal property situate within its jurisdiction without any evidence of what had taken place in the jurisdiction of his late domicile. This, however, is not in accord with the known international law relative to personal property.

Primâ facie his personal property had according to the legal maxim *mobilia sequuntur personam* its location in the province where he was in life domiciled at the time of his death. And fully agreeing in and duly observing all that has been said in the case of *Blackwood* v. *The Queen* (1), relative to the interpretation of legislation which deals with personal property or estate by an Act of this kind not warranting the application of the said maxim to interpret the statute

(1) 8 App. Cas. 82.

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which does not make clear the purpose of its covering by the application of the said maxim all beyond the state of his domicile I yet think when the legislature has expressed a clear intention to cover all that, then the maxim may well be taken as a starting point of presumption which the plaintiff in a case such as this to recover back must rebut if it can be rebutted.

Whether or not because of another form of law and another mode of thought than ruled the minds of the framers of the Victoria Act dealt with in that case, the word transmission is used and a more direct and comprehensive result is reached.

Those enjoying the benefits of the transmission by virtue of Quebec law and Quebec courts must pay for or upon the transmission.

We had the *Attorney-General for Quebec* v. *Reed* (1), in the first but not on second argument, pressed upon us, but the respondents' factum still presents it as covering the alternative argument that if it was not property that was being taxed, then it was not direct, but indirect taxation.

In a like case I would feel bound to follow this authority, but fortunately the reasoning it proceeded upon and ground given in support thereof, have since been revised in the *Bank of Toronto* v. *Lambe* (2) case, by the same court and relieves from any embarrassment which otherwise might have been felt.

I would add that to my mind if we imposed no taxes but those which would not fall in part at least on someone else than he first paying, we never would be troubled with taxes.

No one possessing clearness of vision can imagine

(1) 10 App. Cas. 141. (2) 12 App. Cas. 575.

that a single tax upon land is not in part borne by others than the land owner who pays it.

Its payment or the burden of its payment has to be reckoned with and met by every member of society. Its simplicity is attractive.

It is admitted the probate of the late Mrs. Cotton's will executed in Boston was first applied for and got in Quebec.

And her husband as the executor of her will obeyed that law, concluded he was, and consequently his wife must be held to have been domiciled in Quebec at the time of her death.

I am unable to see how in face of the proceedings at the time the declarations made then and upon which the Court of Probate, if the will was probated as admitted, can be overturned by such evidence as now adduced. The amending section 1191(*c*) defining the word "property" is not applicable to her case, but as already suggested the statute did not, in my opinion, or my reading of the *Lambe* v. *Manuel*(1) case, need it.

The law of Quebec operated on each estate, was recognized as having so operated and I fail to see how his representatives can now claim to defeat the law in either case.

The appeal should be allowed with costs and doing so seems to render consideration of the cross-appeal needless.

DUFF J.—This appeal raises the question whether an Act of the Legislature of Quebec imposing certain duties described as "succession duties" in respect of

(1) [1903] A.C. 68.

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transmissions of property under the law of that province in consequence of death is within the competence of that legislature in so far as such transmissions affect movable property locally situate outside that province.

The court below held the Act to be in that respect *ultra vires* conceiving itself to be governed in the determination of the point in question by the decision of their Lordships of the Privy Council in *Woodruff* v. *Attorney-General for Ontario* (1).

In that case their Lordships had to pass upon the power of the Legislature of Ontario to impose a tax in respect of particular items of property locally situate outside the province on the occasion of a transfer of that property *inter vivos* effected by delivery of it in the State of New York.

The two cases seem to be clearly distinguishable; and I do not think we are relieved from considering the points raised on this appeal either by the decision itself in *Woodruff* v. *Attorney-General for Ontario* (1) or by any of the observations of the distinguished and lamented judge who delivered their Lordship's judgment. The learned judges in the courts below appear, if I may say so with the greatest respect, to have overlooked (in its bearing on this case) the fundamental difference in point of law between the devolution under the law of a province of a movable succession comprising movables having an extra-provincial *situs* and a transfer *inter vivos* of the title to particular movables (having such a *situs*) effected by delivery of them outside the province; and thus, as I conceive, to have missed the broad distinction between the question presented in this case and that pro-

(1) [1908] A.C. 508.

nounced upon in the decision by which they considered themselves to be governed.

It is a principle now generally recognized in countries where either the common law or the civil law prevails that as regards movables (wherever they may be situated in fact) a testate or intestate succession is for many purposes considered as an integer devolving under and governed by a single law — that namely which was the personal law of the decedent at the time of his death. "The logical consequences of this general principle are kept intact by the application of the fiction *mobilia ossibus inhærent.*" (Bar, Private International Law, sec. 362.) The principle is recognized by articles 6, 599 and 600 of the Civil Code of Quebec; the latter of which in effect adopts in this connection the rule of English law that the "personal law" is the law of the territory in which the *decujus* had his domicile.

This principle has never, by the law of England at all events, been regarded as excluding the authority of the law of the *situs* in respect of the particular movable items comprised in a succession; but it does involve the regulation by the law of the domicile of the distribution of the beneficial surplus belonging to the succession after the satisfaction of such claims as debts and expenses of administration. By that law then is determined the extent to which the property is subject to testamentary disposition and the conditions upon which the beneficiaries become entitled to accede to a share of the estate through such disposition or by operation of law; and among the generally recognized logical consequences of this principle (preserved as above mentioned by the maxim *mobilia ossibus inhærent*) is

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that the legislative authority of the domicile is acting within its proper sphere in assuming for public purposes a share of the surplus as a toll exacted from the beneficiaries by way of condition upon or as an incident of the accession to the benefits of the succession. Bar 254, 255; Wharton, 183, 184, 185; Dicey, 751, 752, 753; *Eidman* v. *Martinez*(1), at page 591; *State of Maryland* v. *Dalrymple*(2); West, Inheritance Tax, 180 to 188.

In the fiscal legislation of the United Kingdom these principles have for nearly a century had full play. The enactments of the statute (55 Geo. III. ch. 184) imposing legacy duty were expressed in general terms comprehensive enough in themselves to apply to all persons and to all bequests of or payable out of personal property wherever situate. It was held in a well-known series of cases that the statute must be construed in accordance with the principle expressed in the maxim quoted above. In 1842 in *Thomson* v. *Advocate-General*(3) all the Lords (accepting the unanimous opinion of the judges) affirmed that the legislature must be supposed to have been legislating with reference to the principle *mobilia sequuntur personam*. In 1865 (in *Wallace* v. *Attorney-General*(4)) Lord Cranworth in construing the general words found in the "Succession Duty Act" of 1853, said that the incidence of legacy duties was regulated by the principle that such imposts should be charged upon benefits accruing under "the laws of this country."

Nobody doubts, of course, the competence of the Imperial Parliament to pass legislation obligatory

(1) 184 U.S.R. 578.
(2) 3 L.R.A. 372, at p. 374.
(3) 12 Cl. & F. 1.
(4) 1 Ch. App. 1.

upon the courts of the Empire professing directly to affect property situate in foreign countries whatever the ownership under which it is held. But there are certain recognized principles of international conduct which in the absence of a clear indication to the contrary the courts will assume Parliament has not disregarded. It was in these cases considered to be no infringement of these rules that Parliament should impose legacy duties in respect of a succession composed in part of movables having an actual *situs* in a foreign country, provided the decedent had at the time of his death a domicile within the United Kingdom. This restriction of the duty to the estates of persons so domiciled was sufficient, as Lord Herschell said in *Colquhoun* v. *Brooks*(1), at page 503, to "bring the matter dealt with within our territorial jurisdiction."

I dwell upon this phrase of Lord Herschell's in order to emphasize the fact that this jurisdiction of the law-making authority of the domicile to tax the benefits derived from a movable succession as a whole has not been regarded in the courts of the United Kingdom as in any way resting on the extra-territorial authority which a sovereign power asserts in respect of its own subjects wherever they may be or as having any necessary relation to the nationality of the decedent. It is regarded simply as an exercise of the "territorial jurisdiction." Therefore, no distinction has been drawn in this connection between the legislative authority of a colony invested with powers of self-government or of a state or province which is the member of a federation and that of a Parliament possessing unrestricted sovereign powers.

(1) 14 App. Cas. 493.

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In the numerous cases which have come before the Privy Council from the Australasian colonies touching the scope of enactments imposing death duties the constitutional competence of the legislatures of those colonies to proceed in these matters on the principle *mobilia sequuntur personam* seems never to have been doubted. *Harding* v. *Commissioners of Stamps for Queensland*(1). Indeed, as Mr. Dicey has pointed out, since the Treaty of Independence with the American colonies in 1783, the policy of the Parliament of the United Kingdom has been to treat the colonies as in the matter of such taxation possessing fiscal independence. In the United States, it is perhaps superfluous to observe, in this respect the several States have been regarded as exercising an independent sovereignty.

Is the taxing authority of a province of Canada affected by any restriction which makes such a province incompetent to apply these principles in framing its plan of taxation in respect of successions ? Nobody can doubt that prior to Confederation the Province of Nova Scotia (let us say) possessed such authority. How far then was this authority curtailed by the "British North America Act ?" I make no apology for quoting once again what one may perhaps call the classic passage in Lord Watson's judgment in *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*(2), at pages 441 and 442, where he explains the constitutional relation in which the provinces stand to the Canadian Union.

> Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to

(1) [1898] A.C. 769.

(2) [1892] A.C. 437.

disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Governments should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial governments. But, in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

The subject of taxation was not under the Act exclusively assigned as a domain of legislation to either the Dominion or the provinces. The Dominion in that field is given unrestricted authority; the provinces have a concurrent, but more limited, authority. The scope of this provincial authority is defined by the words

direct taxation within the province for the raising of a revenue for provincial purposes.

In this case we are concerned only with the condition that the taxation shall be "within the province." Some point, it is true, was raised on the words "direct taxation;" but since the decisions of the Privy Council in *Bank of Toronto* v. *Lambe*(1), and *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*(2), it does not appear to be any longer open to question that duties imposed upon or in respect of benefits acquired under a will or intestacy are direct taxes within the meaning of the provision under discussion.

(1) 12 App. Cas. 575. (2) [1897] A.C. 231.

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The point for consideration then is this: Was the authority (which the provinces unquestionably possessed before Confederation) to impose duties upon or in respect of the benefits acquired under a succession comprising in part extra-territorial movables abrogated by the provision of the "British North America Act" which limits the provincial power of taxation to "taxation within the province."

The question at issue cannot, I think, be fully appreciated without taking into account the authority of the provinces to legislate upon the subject of "Property and Civil Rights in the Province." It is, of course, settled that the Dominion in the exercise of its authority relating to the subjects of legislation mentioned in section 91 may while acting within its own proper sphere legitimately pass laws which in their operation affect property and civil rights within the provinces; but it is equally well settled that over property and civil rights regarded as subjects of legislation in themselves the Dominion (except when acting under the specific provisions of that section) possesses no legislative authority. *Citizens Ins. Co.* v. *Parsons* (1), at pages 110 and 111. The subject of successions, the *decujus* being domiciled in Quebec, is one of those subjects which is within the exclusive authority of the Legislature of Quebec — in respect of which the authority of that legislature is in Lord Watson's phrase "as supreme" as before the passing of the Act. The right of a beneficiary entitled to share under such a succession is regulated by that legislature alone. In the courts of any country, which accepts the law of the domicile as prescribing the rules of succession,

(1) 7 App. Cas. 96.

the right of a person claiming to share in the benefit of such a succession would fall to be determined by the application of such rules as that legislature prescribes as applicable to such a case.

In accordance with the principles already indicated the "logical consequences" of this control of such successions by the Province of Quebec "kept intact" by the application of the fiction *mobilia ossibus inhærent* seem to involve this — every such succession may be deemed for the purpose among others of determining the incidence of duties imposed upon benefits accruing from the devolution of it to have as an entirety its seat in Quebec. On what ground, then, are we so to restrict the words "taxation within the province" as to exclude such successions from the taxing authority of that province? There appears to be no ground for doing so. The possibility of those words being so restricted does not appear to have occurred to the Judicial Committee when considering the case of *Lovitt* v. *The King*(1).

I have not been able to discover anything in *Woodruff* v. *The Attorney-General for Ontario*(2) which affects the force of these considerations. There was in that case no question of a testamentary or intestate succession. The Province of Ontario had attempted to exact duties in respect of transfers made *inter vivos,* though in contemplation of death, of movables having at the time the transfers were made a *situs* in the State of New York according to both the law of Ontario and the law of New York. The transfers were, as their Lordships held, effected by delivery in New York. It is argued, however, that a passage

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

(2) [1908] A.C. 508.

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in the judgment of Lord Collins lays down two propositions, 1st, that taxation, by a province, of property locally situated outside the province is *ultra vires,* and 2ndly, succession duties levied, by a province, upon benefits accruing from a succession devolving under the law of the province and composed in part of movables locally situate outside the province are taxes imposed on extra-provincial property within this rule. It is needless to say that if such were the sense of a passage which forms the ground, or one of the grounds, of the judgment it is not for this court to refuse to follow it or to seek to fritter it away by insubstantial distinctions.

I think this is a misreading of their Lordships' judgment. It is not without some bearing upon the point of the meaning of the judgment that the appeal then before their Lordships did not involve the consideration of the validity of taxes imposed upon a succession such as we have here and that their Lordships' judgment does not in terms mention such a succession.

Indeed, it seems to me that the second of the above mentioned propositions can be deduced from the judgment only through an assumption that it follows as a logical consequence from the first. A moment's consideration will shew that this is not the case. Such benefits are generally recognized as being subject to the taxing power of the province as we have seen upon the principle that the totality of objects constituting a succession is subject to the personal law of the *decujus* and consequently that the rights of persons claiming such benefits are governed by this personal law and are regarded as having their seat in the territory subject to it. There is, however, no prin-

ciple generally recognized under which transactions *inter vivos* respecting particular movables objects are held to be governed by the *lex domicilii*. The more generally accepted view appears to be that according to the principle indicated by the maxim *mobilia sequuntur personam* the *lex domicilii* does not become applicable to such transactions as those which were in question in *Woodruff* v. *Attorney-General for Ontario* (1), but that, broadly speaking, it is only in respect of those transactions which, (to use Mr. Westlake's phrase,) a person's property is conceived and dealt with, (e.*g.*, marriage contract,) "as an entirety grouped round the owner's person as a centre" that the *lex sitûs* has resort to the law of the domicile for its legal rules; and this on the ground that in such cases, as in the case of movable successions, convenience imperatively requires that they be governed by a single law. Westlake, p. 181-186, 191-195; Savigny (Guthrie's translation) 176, note (2); Wharton, vol. II., 680-684; Bar, 488-491; Fœlix, paragraph 62; 1 Aubry et Rau, p. 103; 1 Demolombe, pp. 110 and 111. According to the law of Ontario (which follows the law of England) there seems to be no room for controversy that the transactions in question in that case were governed by the law of New York. The authorities are fully reviewed by Mr. Westlake (pp. 191-195), and his argument appears to leave no doubt upon the point. The donees consequently derived nothing through the law of Ontario. That was the view presented by Mr. Danckwertz in his argument before the Privy Council on behalf of the appellants and that was evidently the view upon which their Lordships acted.

(1) [1908] A.C. 508.

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It is perhaps not to be expected that statutes such as that before us — which impose duties in respect of transmissions of the estates of domiciled residents including property situate abroad, and at the same time upon all property within the jurisdiction transmitted by death, wherever the domicile of the decedent may be — could escape criticism as putting into operation two seemingly incompatible principles. Strictly we are concerned in this case only with the question of the power of the legislature in respect of the first mentioned class of duties; and constitutionally the legislature's action in imposing such duties so far as it is constitutional, cannot be affected by the circumstance that it has also professed to exact them (if it have done so) in circumstances to which its authority does not apply. The truth is, however, that the practice very widely prevails of taxing all personal property having a *situs* within the territorial jurisdiction of the taxing power on the occasion of a transmission of title by or in consequence of death. The law of England, for example, maintains "the paramount authority of the *situs* over the assets themselves as distinguished from the beneficial in the clear surplus." Westlake, p. 125; and the estate duty applies to all such items having an actual local *situs* in the United Kingdom.

"No one doubts," says Mr. Justice Holmes, delivering the judgment of the Supreme Court of the United States, in *Blackstone* v. *Miller*(1), at page 204,

> that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman* v. *Martinez*

(1) 188 U.S.R. 189.

(1). See *Mager* v. *Grima*(2); *Coe* v. *Errol*(3); *Pullman's Palace Car Co.* v. *Pennsylvania*(4); *Magoun* v. *Illinois Trust and Savings Bank*(5); *New Orleans* v. *Stemple*(6); *Bristol* v. *Washington County*(7); and for state decisions *Matter of Estate of Romaine* (8); *Callahan* v. *Woodbridge*(9); *Greves* v. *Shaw*(10); *Allen* v. *National State Bank of Camden*(11).

No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*(3); *Knowlton* v. *Moore*(13).

There is certainly nothing in the "British North America Act" pointing to the conclusion that a Canadian province is confined to either one or the other of these principles of taxation. One province may adopt that which gives special prominence to the circumstance that the succession is regulated by the law of the domicile, another to the fact that the title to particular items of movable property is controlled by the law of the *situs*. Toll may be exacted as an incident of the accrual of the benefit or as a condition of the passing of the title. And since either may be validly acted upon to the exclusion of the other, I do not see upon what ground it can be said that both principles may not be brought, so to speak, under the same roof and combined in a single system. The decision of the Judicial Committee in *Lovitt* v. *The King*(14) appears to support this view.

(1) 184 U.S.R. 578, at pp. 586, 587, 592.
(2) 8 How. 490, at p. 493.
(3) 116 U.S.R. 517, at p. 524.
(4) 141 U.S.R. 18, at p. 22.
(5) 170 U.S.R. 283.
(6) 175 U.S.R. 309.
(7) 177 U.S.R. 133.
(8) 127 N.Y. 80.
(9) 171 Mass. 595.
(10) 173 Mass. 205.
(11) 92 Md. 509.
(12) 178 U.S.R. 41.
(13) [1912] A.C. 212; 43 Can. S.C.R. 106.

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This disposes of the question touching the duties charged against the benefits under the will of Henry Cotton.

It is not without some hesitation that I have concluded that the duties imposed by the earlier statute must be held to be leviable in the respect of Mrs. Cotton's estate as a whole. As to the question of domicile, Henry Cotton's admission creates a presumption which has not been displaced and the point now relied upon appears to have been taken for the first time in this court. The question upon which I have had some doubt relates to the construction of the statute itself. The provision to be considered is:—

> 1191(*b*). All transmissions, owing to death, of the property in, usufruct or enjoyment of, movable and immovable property in the province shall be liable to the following taxes.

That is the English version. In the French version, however, instead of the words "property in the province," we have "propriété située dans la province;" and the contention is that these words shew the legislature to have been aiming at transmissions only of property having an actual physical *situs* within the province or property which considered apart altogether from the fact of its constituting part of a succession devolving under the law of the province has a *situs* within the province by construction of law. After a most careful examination of the judgments in the case of *Lambe* v. *Manuel*(1) I think the decision in that case relieves us from considering the construction of the statute in this aspect. I think the effect of that decision is that the *situs* indicated by the phrase above quoted from the French version is the *situs* as determined in the case of movables by the application

(1) [1903] A.C. 68.

of the maxim *mobilia sequuntur personam.* The question which arose in *Lambe* v. *Manuel*(1) was whether certain movables which formed part of the patrimony of a person who had died domiciled in the Province of Ontario, (but which admittedly, if that circumstance were to be left out of consideration, has a *situs* within the Province of Quebec) were dutiable under the enactment referred to. It was held they were not dutiable and on the ground as it appears to me that in the application of the phrase above quoted "située dans la province" the principle *mobilia sequuntur personam* must govern. In that case the contention on behalf of the Attorney-General was the contention which is now made on behalf of the respondents, viz., that the principle upon which the legislature had proceeded was that all property having (irrespectively of the operation of the maxim *mobilia sequuntur personam*) a local situation in the province should be subject to the duties imposed by the Act. That construction was rejected by the Superior Court, by the court of appeal and by the Judicial Committee successively. The ground upon which the Superior Court proceeded as appears by the judgment of Sir Melbourne Tait, was that the legislature had acted upon the principle consistently adopted by the English courts in construing the Legacy Duty Acts, viz., that for the purpose of determining the incidence of duties imposed upon transmissions of benefits in consequence of death the situation of the property is to be determined by the maxim referred to. His views are summed up in the last paragraph of his judgment, which is in the following words:—

(1) [1903] A.C. 68.

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I have come to the conclusion that I should interpret article 1191(*b*) in accordance with the rule of our law and of the English law regarding movable property above stated and hold that it means all transmissions of such property in the province, belonging to persons domiciled therein at the time of their death, in other words, transmissions resulting from a succession devolving here and that in the eye of the law *the movable property in question is not situated in this province* and is not subject to the tax sought to be imposed. This construction will not only be consistent with such rule, but also with the other provisions of the Act.

In the court of appeal the judgment of Mr. Justice Bossé is to the same effect as appears by the following passage:—

Il nous faut donc déclarer que, lors du décès, les biens dont il s'agit avaient leur assiette dans la province d'Ontario et qu'ils doivent être considérés comme situés dans Ontario, lieu du domicile due *de cujus*. Ils échappent partant, au droit de fisc de la province de Québec.

Notre statut rend la chose encore plus claire en imposant un droit sur les seuls biens situés dans la province de Québec.

Il n'était pas, d'ailleurs, nécessaire de faire cette restriction: nous ne pouvons pas taxer les biens situés à l'étranger.

The view indicated by this passage is emphasized by the citations made by Bossé J., from the judgment of Lord Hobhouse in *Harding* v. *Commissioners of Stamps for Queensland*(1), at page 773.

The judgment of the Judicial Committee was delivered by Lord Macnaghten and in the course of that judgment His Lordship says, referring to the reasons given by Sir Melbourne Tait and Mr. Justice Bossé:—

The decisions of the Quebec courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*(2), and *Wallace* v. *Attorney-General*(3), and by this board in the case of *Harding* v. *Commissioners of Stamps for Queensland*(1).

(1) [1898] A.C. 769. (2) 12 Cl. & F. 1.
(3) 1 Ch. App. 1.

Now, what are the principles established in the cases to which His Lordship refers? These principles can best be stated in the *ipsissima verba* of the learned judges by whom those cases were decided. In *Thomson* v. *Advocate-General*(1), the Lord Chancellor, Lord Lyndhurst, said, at page 21:—

> An Englishman made his will in England: he had foreign stock in Russia, in America, in France, and in Austria. The question was whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument by my noble and learned friend who argued the case, in the first place, that it was real property, but, finding that that distinction could not be maintained, the next question was whether it came within the operation of the Act, and although the property was all abroad, it was decided to be within the operation of the Act as personal property, on this ground, and this ground only, that as it was personal property, it must in point of law, be considered as following the domicile of the testator, which domicile was England.
>
> Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, personal property, being in this country at the time of the death, you must take the principle laid down in the case of *In re Ewin*(2), and it must be considered as property within the domicile of the testator, which domicile was Demerara. It is admitted that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is to be decided. The only distinction is that to which I have referred, and which distinction is decided by the case *In re Ewin*(1) to be immaterial.

At page 26, Lord Brougham observed: —

> The rule of law, indeed, is quite general that in such cases the domicile governs the personal property, not the real; but the personal property is in contemplation of the law, whatever may be the fact, supposed to be within the domicile of the testator or intestate.

And finally at page 29 these words are attributed by the Report to Lord Campbell:—

(1) 12 Cl. & F. 1. (2) 1 Cr. & J. 151.

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If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and therefore does not come within the Act; this seems to be the most reasonable construction to be put upon the Act of Parliament.

In *Attorney-General* v. *Napier*(1), — it may be added — Parke B. thus refers to the decision in *Thomson v. The Advocate-General*(2) :—

In the case of *In re Ewin*(3) the doctrine was first broached that the true criterion whether the parties were liable to legacy duty depended upon the fact whether the testator at his death was domiciled in England; and that is the rule adopted by the learned judges in their decision in the case of *Thomson* v. *The Advocate-General*(2); and Lords Lyndhurst, Brougham and Campbell put it upon the great principle that personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death.

The effect of the other two cases mentioned by His Lordship may be stated in the language of Lord Hobhouse in *Harding* v. *Commissioners of Stamps for Queensland*(4), at page 774:—

The matter appears to be well summed up in Mr. Dicey's work on the Conflict of Laws at page 785, in which he paraphrases Lord Cranworth's application of the principle *mobilia sequuntur personam* by saying that the law of domicile prevails over that of situation.

These then are the principles we are to apply; and, applying these principles, it seems impossible to escape the conclusion that for the purposes of this enactment the *situs* of movables forming part of a succession devolving under the law of Quebec must be taken to follow the domicile of the decedent.

ANGLIN J. (dissenting). — The Crown appeals against the judgment of the Court of King's Bench of the Province of Quebec disaffirming its right to re-

(1) 6 Ex. 217.
(2) 12 Cl. & F. 1.
(3) 1 Cr. & J. 151.
(4) [1898] A.C. 769.

tain succession duties levied against the estates of the late Charlotte Cotton and her husband, Henry H. Cotton, in respect of movable property consisting of bonds, stocks, promissory notes, jewellery and pictures actually situate in the United States of America at the date of the demise of each decedent.

That the actual *situs* of the tangible portion of this property was foreign is, of course, unquestionable. According to the rules stated in *Commissioner of Stamps* v. *Hope*(1), at pages 481-2, and accepted in *Payne* v. *The King*(2), at pages 559-60, the intangible portion also had a "local existence" — was "actually situate," or, as put in the cases (*Thomson* v. *Advocate-General*(3); *Winans* v. *Attorney-General*(4); *Woodruff* v. *Attorney-General for Ontario*(5), "locally situate" and, as far as property of that class can be, was "physically situated" (*Winans* v. *Attorney-General* (6)) either at Boston or elsewhere in the United States — certainly not in the Province of Quebec. No reason was advanced in argument, and I know of none, why those rules should not obtain in that province.

Although in many of the cases property so situate is described as "locally situate" I am unable to appreciate the force of the word "locally" in this phrase (*Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine*(7), *per* Lord James of Hereford at page 228; *Treasurer of the Province of Ontario* v. *Pattin* (8), unless, indeed, it is used in a sense which makes it interchangeable with the word "actually" — in the

(1) [1891] A.C. 476.
(2) [1902] A.C. 552.
(3) 12 Cl. & F. 1, 17.
(4) [1910] A.C. 27, at p. 29.
(5) [1908] A.C. 508, at p. 573.
(6) [1910] A.C. 27, at p. 31.
(7) [1901] A.C. 217.
(8) 22 Ont. L.R. 184, at p. 191.

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case of tangible property as the equivalent of "physically" and in the case of intangible property to denote that attribute of locality which it possesses according to such rules as those laid down in *Commissioner of Stamps* v. *Hope*(1); in *Commissioner of Stamps* v. *Salting*(2), and in *Re Hoyles*(3). To signify property thus situate, as well as property having a physical *situs,* within or without the territorial limits of the taxing province or state I shall in this opinion employ the phrase "actually situate."

Charlotte Cotton died on the 11th of April, 1902; Henry H. Cotton on the 28th of December, 1906. Both dates are important because the Quebec succession duties law was materially amended and was consolidated in the interval.

It is admitted that Henry H. Cotton was domiciled in the Province of Quebec when he died. The respondents allege that his domicile, which, of course, was also that of Mrs. Cotton, was at the time of her death in the State of Massachusetts. In the view of the case taken by the provincial courts it was unnecessary to pass upon the question of Mrs. Cotton's domicile, and it was left undetermined.

Henry Cotton made two solemn declarations respecting his wife's domicile which were filed with the provincial revenue officers. In the first, made in 1902, he stated that Mrs. Cotton's domicile at the time of her death was in the State of Massachusetts: in the second, made in 1904, that it was in the Province of Quebec. The decision of the Privy Council in *Lambe* v. *Manuel*(4), is put forward as the reason for his change of view. But the bearing of that decision on

(1) [1891] A.C. 476.
(2) [1907] A.C. 449.
(3) 27 Times L.R. 131.
(4) [1903] A.C. 68.

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the question as to the domicile of Mrs. Cotton is scarcely apparent.

When sixteen years of age Henry Cotton left the Province of Quebec and went to reside in Boston. He lived and carried on business there for thirty-six years. He became a naturalized American citizen. He married a lady born and brought up in the State of Massachusetts. During the summer he often paid visits with his wife to Cowansville, Quebec, where his mother resided. In 1901 he appears to have decided to retire from business. He came as usual to Cowansville that summer. During this visit he and his wife resided, as had been customary, with his mother. He, however, then bought a property in Cowansville and proceded to improve it with a view to making it his future permanent residence. In the autumn he returned as usual with his wife to Boston. They both appear to have remained there until Mrs. Cotton died in April, 1902. In his second declaration filed with the revenue officers he swore that he believed his domicile was at Boston when he married.

Notwithstanding the difficulty of establishing that a domicile of origin has been changed (*Winans* v. *Attorney-General*(1)), I have no doubt upon these facts that Henry Cotton had acquired a domicile in the Commonwealth of Massachusetts. It may require less cogent evidence to make out a case of change or loss of an acquired domicile, or domicile of choice, but upon the facts in evidence, notwithstanding the second declaration of Henry Cotton, my conclusion would be that, although he had, sometime before his wife died, formed an intention of abandoning his

(1) [1904] A.C. 287.

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Massachusetts domicile and of again acquiring a domicile in the Province of Quebec, he had not up to the time of her death actually carried out that intention; that, although he had taken some preliminary steps with that end in view, the actual change of domicile had not been made and he still retained his domicile in the State of Massachusetts, as well as his American citizenship.

The respondents, however, did not allege in their pleadings that Mrs. Cotton died domiciled in Boston. On the contrary, by claiming the return only of duties paid on her foreign assets they appear to admit and to base their action on her domicile being in Quebec. Moreover, in their factum in the Court of King's Bench, and again in their factum in this court, they state that Henry Cotton's "wife died in Boston, where he had returned to live *temporarily.*" It would be regrettable if a misapprehension of counsel as to the proper inference to be drawn from, or as to the legal effect of the facts established, should prevent the appellants asserting their legal rights. Fortunately, so far as it affects Mrs. Cotton's estate, this case may be disposed of on another ground which leads to the same result as if she were held to have been domiciled at Boston when she died.

The provincial courts have held that, although the Quebec "Succession Duties Act" in terms imposes a tax on the transmission of the inheritance, the legislature intended that that tax should in fact be fastened on the property itself which passes from the decedent to his heirs or legatees; and that, in so far as it imposes this tax on movable property actually situate outside the province, the Act is *ultra vires* and unconstitional, this case being in their opinion ruled by the

decision of the Judicial Committee in *Woodruff* v. *Attorney-General for Ontario* (1). Upon this ground the plaintiffs have been awarded judgment for the repayment by the Crown of the succession duties which it received from both estates in respect of the property in question.

The respondents, in support of the judgment in their favour, also assert that, upon its proper construction, the Quebec "Succession Duties Act" applicable to the estate of Mrs. Cotton did not purport to impose a tax in respect of movable property of domiciled decedents, which was actually situate outside the province. Because before considering the constitutionality of any statute it is desirable, if possible, to appreciate its precise scope and purview and also because it seems fitting that a court should not determine an issue as to the constitutionality of a statute unless the cause before it cannot otherwise be satisfactorily disposed of, it will be proper first to deal with the contention of the respondents that the Quebec statutes in force in 1902 did not purport to impose succession duties on movable property actually situate abroad. It will be convenient at the same time to consider whether the intention of the legislature was to impose a tax upon the transmission of the property or upon the property itself. Counsel for both parties rejected a suggestion that the tax might be regarded as imposed on the beneficiaries, that upon a proper construction of the Act only beneficiaries within the province would be subject to it and that it should on that ground be held *intra vires*.

When Mrs. Cotton died the Act in force was the statute 55 & 56 Vict. ch. 17, amended by 57 Vict. ch. 16;

(1) [1908] A.C. 508.

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58 Vict. ch. 16, and 59 Vict. ch. 17; section 1191(*b*) (57 Vict. ch. 16, sec. 2), so far as material reads as follows:—

> 1191(*b*) All transmissions, owing to death, of the property in, usufruct or enjoyment of, movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death.

There followed a table of rates varying according to the value of the estate and the degree of relationship borne by the several beneficiaries to the decedent. The statute then contained no definition of the word "property."

In the form in which it stood at the time of Mrs. Cotton's death — except for an immaterial amendment (59 Vict. ch. 17) — the Quebec succession duties law was considered by the Privy Council in *Lambe* v. *Manuel*(1). In that case the question presented was whether certain bank stocks, registered and transferable at Montreal, Que., and a mortgage debt secured by hypothec on land in Montreal, which formed part of the estate of a decedent domiciled in the Province of Ontario, were liable to succession duties in Quebec. All this property was held not to be taxable because

> according to their true construction the Quebec "Succession Duties Acts" only apply in the case of movable property to transmissions of property resulting from the devolution of a succession in the Province of Quebec.

That the transmission of the property took place outside Quebec and not under Quebec law was the ground on which it was held that the Quebec statutes did not purport to authorize the imposition of the succession duties claimed. This judgment proceeds upon the

(1) [1903] A.C. 68.

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view that by section 1191(*b*) the legislature intended to impose a tax on the transmission of the property passing and not on the property itself. The statute in express terms declares that "all transmissions owing to death * * * shall be liable" — "toute transmission par décès * * * est frappé." Notwithstanding that the value of the property determines the rate of taxation and that in several sub-sections the duty appears to be treated as charged upon and as payable out of the estate, it must, I think, be assumed that the legislature intended what it said when it expressly imposed the tax on the transmission. The decision in *Lambe* v. *Manuel*(1) appears to me to be conclusive upon that point, although it does not determine what is the real incidence or subject of the tax imposed. That question was not before the board. I am, therefore, with respect, of the opinion that, whatever may be in fact their ultimate incidence, the Quebec succession duties were intended to be imposed directly and primarily not upon the property of the succession, but upon its transmission.

In *Lambe* v. *Manuel*(1) the Judicial Committee proceeds upon a well-known principle of construction in determining that the word "transmissions," though not expressly qualified or restricted, should be held to include only transmissions taking place under the law of the province. Lord Macnaghten makes this abundantly clear, when he says that the decision is

> entirely in consonance with well-established principles which have been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*(2), and *Wallace* v. *Attorney-General*(3), and by this board in the case of *Harding* v. *Commissioners of Stamps for Queensland*(4).

(1) [1903] A.C. 68.
(2) 12 Cl. & F. 1.
(3) 1 Ch. App. 1.
(4) [1898] A.C. 769.

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Their Lordships did not, as was contended at bar by counsel for the present appellants upon the first argument of this appeal, treat the words "in the province" found in section 1191(*b*) as qualifying or restrictive of the word "transmissions." The phrase "in the province" is referred to only in the statement of the object of the action in the earlier part of the judgment, where it is applied to the subject "movable or immovable property." If there could be any doubt upon the point — I have none — a glance at the French version of section 1191(*b*) makes it certain that this is its proper application:—

1191(*b*) Toute transmission, par décès, de propriété, d'usufruit ou de jouissance de biens mobiliers ou immobiliers, *situés dans la province*, est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décès.

But for the appellants it is urged that by the words "in the province" — "situés dans la province" — the legislature meant to include not only property actually situate in Quebec, but also movable property which, though actually situate elsewhere, is for purposes of succession and enjoyment, according to the maxim *mobilia sequuntur personam* (*Blackwood* v. *The Queen*(1)), governed by the law of the testator's domicile, which has been assumed to be in the Province of Quebec. I am unable to accede to that view. *Primâ facie* the expressions "in the province" — "situés dans la province" — refer to property actually situate in Quebec. They are applied in the statute to immovable as well as movable property. To immovables the maxim invoked has, of course, no application. The force of the expressions is restrictive,

(1) 8 App. Cas. 82, at p. 93.

not expansive. Had the legislature meant to include all movable property passing under the law of Quebec — all property of which the transmission occurs in Quebec or is governed by Quebec law — wherever actually situate, I cannot conceive that it would have employed the terms "situés dans la province." In another section of the same Act (55 & 56 Vict. ch. 17), 1191(*a*), we find the expression "situés dans la province" — "within the province." There it clearly means physically or actually situated in Quebec. This affords "one of the safest guides to the construction" of the same words in section 1191(*b*), which immediately follows; *Blackwood* v. *The Queen*(1). If we may consider the subsequent action of the legislature in defining the word "property" as including all property, whether movable or immovable, actually situate within the province (3 Edw. VII. ch. 20), in afterwards extending this definition so that by express terms "property" was made to include all the movable property wherever situate of a domiciled decedent (6 Edw. VII. ch. 11, sec. 1191(*c*)) and in finally removing entirely the words "in the province" — "situés dans la province" — from section 1191(*b*) (7 Edw. VII. ch. 14, sec. 2), the view which I have taken of the proper construction of that section as it stood in 1902 would appear to be fortified. If by an application of the maxim *mobilia sequuntur personam* the words "situés dans la province" should be construed as including the movables actually situated abroad of a domiciled decedent, the concluding clause of the definition of the word "property" introduced in 1906 was quite unnecessary. *Winans* v. *Attorney-General* (2).

(1) 8 App. Cas. 82, at p. 94. (2) [1910] A.C. 27, at p. 34.

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Comparing the Quebec "Succession Duty Acts" and their development with the corresponding Acts of the Province of Ontario (55 Vict. ch. 6, sec. 4; R.S.O. 1897, ch. 24, sec. 4(*a*)) and their development (1 Edw. VII. ch. 8, sec. 6; 7 Edw. VII. ch. 10, sec. 6), it appears to me that, probably actuated by fears that a tax imposed upon or in respect of property not actually situate within the province would not be "taxation within the province" ("British North America Act," sec. 92(2)) the authorities of both provinces, in order to ensure the constitutionality of their legislation, at first advisedly confined themselves to the imposition of succession duties in respect of property actually situate within the province. Perhaps grown bolder as the needs of revenue became more pressing, or it may be more grasping and prepared to risk a contest upon the constitutionality of a mere severable amendment, or, possibly, having had their fears and doubts as to their jurisdiction allayed, both provinces later on sought to extend the scope of this taxation so that they might obtain succession duty revenue in respect of movable property of domiciled decedents actually situate abroad.

I am convinced that as the law stood in the Province of Quebec at the time of Mrs. Cotton's death only so much of her estate as was actually situate in that province was liable to the succession duties imposed by section 1191(*b*) above quoted. In respect of her foreign bonds, etc., her estate was not liable to Quebec succession duties, because, whatever may have been the power of the legislature in that respect, the statute as it then stood did not purport to impose a tax upon the transmission of property actually situate outside the province.

But when Henry Cotton died the consolidated succession duties provisions of the Act, 6 Edw. VII. ch. 11, were in force. By that statute the portion of section 1191(*b*) above quoted was re-enacted in the same terms, except that the words, "or the," were inserted before the word "usufruct." There was added, however, section 1191(*c*) :—

1191(*c*). The word "property" within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.

The words "in the province" — "situés dans la province" — still remained in section 1191(*b*), being stricken out after Mr. Cotton's death by the Act, 7 Edw. VII. ch. 14.

There is a manifest repugnancy arising from the presence in the same Act (6 Edw. VII. ch. 11) of the words "in the province" found in section 1191(*b*) and the definition of the word "property" in section 1191(*c*). By the former the tax is confined to transmissions of property which is within the province; by the latter it is extended to property without the province. The two provisions are irreconcilable.

Having regard, however, to the history of this legislation and to the manifest intention of the legislature to extend the application of succession duties, first, in 1903, to all property of non-domiciled decedents actually situate within the province — obviously in order to meet the decision in *Lambe* v. *Manuel* (1) — and again, in 1906, to movable property of

(1) [1903] A.C. 68.

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domiciled decedents actually situate outside the province, I am of the opinion that in the consolidation of 1906 the words "in the province" — "situés dans la province" — should be deemed to have been allowed to remain in section 1191(*b*) *per incuriam*. Their deletion in the following year tends to confirm this view. Moreover, a construction which rejects them accords with the rule that if two sections of the same Act are repugnant the latter must prevail. *Wood* v. *Riley*(1), *per* Keating J.; *The King* v. *Justices of Middlesex*(2). The principles of statutory construction are, I think, the same in the Province of Quebec as in the other provinces of Canada where the English common law prevails.

It follows that at the time of the death of Henry Cotton, who was then admittedly domiciled in Quebec, his movable property actually situate abroad was subject to succession duties under the statutes of that province, if its legislature had the power to impose such taxation.

In determining this question of provincial legislative jurisdiction in Canada, decisions upon the proper construction, the scope, purview and effect of statutes enacted by Parliaments or legislatures whose powers of taxation are unrestricted are of little, if any, practical value. A consideration of them rather tends to confuse the issue.

In the matter of taxation, as in other matters, our provincial legislatures possess only such powers as the "British North America Act" confers upon them. By section 92 they are empowered

(1) L.R. 3 C.P. 26, at p. 27. (2) 2 B. & Ad. 818, at p. 821.

To make laws in relation to

(2) Direct taxation within the province in order to the raising of a revenue for provincial purposes.

These words clearly confer not a general power of taxation, but a power subject to a triple limitation. The taxation must be direct; it must be within the province; it must be imposed in order to the raising of a revenue for provincial purposes. The taxation in question is admittedly imposed "in order to the raising of a revenue for provincial purposes." But the respondents contend that it is neither "direct" nor "within the province." Of these two restrictions the first is obviously concerned with the delimitation of the line between provincial and Dominion powers, saving to the Dominion the field of indirect taxation; whereas the second appears to be designed to prevent encroachment by one province upon the domain of another, or of a foreign state. The latter limitation seems to me to present the more formidable objection to the constitutionality of the taxation here in question. The conclusion which I have reached upon it renders it unnecessary for me to consider the question whether a tax in terms imposed upon the transmission of property, but in its ultimate incidence falling upon the property transmitted, is direct or indirect taxation.

That the words "within the province" were introduced either as declaratory of a restriction on the provincial power of taxation which would have been implied, or in order to impose such a restriction, admits of no question. But the precise nature and extent of the limitation which is thus expressed as it affects the right to pass death duty legislation has been a subject of much debate. If these duties could

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be regarded as imposed upon the transmission only and not at all upon the property transmitted, in the case of the domiciled decedent the taxation in respect of his movable property abroad as well as at home might be "within the province:" if they should be regarded as imposed on the property transmitted, the taxation in respect of movable property of a non-domiciled decedent situate in the province, although the transmission of it takes place, usually, but not always (Dicey on Conflict of Laws (2 ed.), p. 753), under foreign law, would be "within the province."

Can it be that a provincial legislature empowered to levy taxation only within the province may validly impose death duties in respect of movable property actually situate abroad under the guise of a tax upon transmission, invoking the maxim *mobilia sequuntur personam* to bring such property constructively within the province, and at the same time, repudiating that maxim, may legitimately exercise the same taxing power in respect of movables which under it would be constructively situate aboard though actually situate within the borders of the province ? That it has the latter power is definitely established by the recent decision of the Privy Council in the *The King* v. *Lovitt* (1.) Has it also the former ? I cannot believe that it has under the restrictive words of the "British North America Act" with which we are now dealing. I adhere to the view which I expressed in *Lovitt* v. *The King* (2), at page 161, which is not affected by the disposition of that case by the Judicial Committee, that if the legislature of a Canadian province can

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

(2) 43 Can. S.C.R. 106.

by legislative declaration make anything property "within the province" which would not be such according to the recognized principles of English law * * * this constitutional limitation upon its power (of taxation) would be a mere dead letter.

Could such a legislature validly enact that, as a condition of obtaining from its courts letters probate or of administration required for the reduction into possession and administration of assets, however trifling in value, actually situate within the provincial borders, a tax must be paid based on the value of the entire estate of the decedent, including movables (and in that case perhaps immovables also) actually situate elsewhere and in respect of the administration and collection of which such letters were wholly unnecessary — a tax which, however or by whomsoever payable in the first instance, would in most cases ultimately have the effect of reducing the value to the beneficiary of such foreign assets passing to him by succession? There is nothing in the law of nations which forbids the legislature of a sovereign state imposing such a tax. *Blackwood* v. *The Queen*(1). But, if the legislature of a Canadian province may do so, the restriction upon the provincial taxing power under the words "within the province" would, in the case of succession to movables, seem to be illusory.

In construing the restrictive words of the "British North America Act," "within the province," we must, I think, ascribe to the Imperial Parliament the intention that the restriction thereby placed upon the provincial power of taxation should be definite and certain and should be the same in every province. *The Queen* v. *Commissioners of Income Tax*(2); *Lord Saltoun* v. *Advocate-General*(3). This excludes the

(1) 8 App. Cas. 82, at p. 96. (2) 22 Q.B.D. 296, at p. 310.
(3) 3 Macq. 659, at pp. 677, 678, 684.

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idea that, confining itself to one or the other, each province may in this matter select its own basis of taxation — transmission and constructive *situs* according to the maxim *mobilia sequuntur personam,* or property and actual *situs*. If some provinces, adopting the maxim *mobilia sequuntur personam,* should impose a tax in respect of the movable property of their domiciled decedents "actually situate" abroad and others should declare dutiable all property actually situate within their respective local areas regardless of the domiciliation of the deceased owners, double taxation of some movables and entire exemption of others would result. Uncertainty, inconvenience and confusion would ensue; and the sanctity of the legislative domain of one province might be successfully invaded by the legislation of another.

It may be urged that such consequences could be obviated if the provinces would agree amongst themselves upon the basis of this taxation. But there is no assurance that all would concur in such an arrangement; and the jurisdiction conferred by sub-section 2 of section 92 of the "British North America Act" does not depend upon and cannot be determined by an agreement between provincial governments.

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. To determine what is the real subject of taxation the substantial result and not the mere form of the taxing Act must be considered. The ultimate effect of succession duties such as are provided for by the Quebec statutes, whether imposed directly upon the transmission or directly upon the property, is to reduce the amount of the estate to which the beneficiaries suc-

ceed. (Cooley on Taxation (3 ed.), p. 32.) Whether paid by the personal representative or secured by his bond before he obtains probate or letters of administration, or paid by him before handing over the property to the beneficiaries, or by the beneficiaries themselves prior to, or upon receipt of the property to which they succeed, the substantial result is the same — they come out of, or lessen the value of that which passes by the succession. The tangible thing affected by the tax is the property which passes. In substance the taxing state takes for itself directly or indirectly a part of the property transmitted from the decedent to his beneficiary.

Where a testator by his will provides that his legacies shall be exempted from death duties, he in effect adds to each bequest the amount of the duty which it would otherwise have borne. In such a case, therefore, although — it may be for the advantage of the beneficiary, or it may be for the convenience of the estate — the testator has provided that payment of the tax shall be made out of the residuary estate and not out of the property bequeathed to each individual beneficiary, the tax is none the less imposed in respect of that property and is in substance a tax upon it. In whatever form of words — tax upon transmission, tax upon succession to property devolving under the law of the province, or tax upon probate — the duty may be imposed, if the beneficiary ultimately has to pay it as a condition of receiving his share of the estate or has to accept that share reduced by its amount, or if the tax is paid out of the residuary estate in exoneration of the specific or pecuniary legatee, the result is that the real incidence of the tax is upon the property of the succession.

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This is always the case where taxation is levied in respect of particular property of whatever nature, whether the taxing Act constitutes the tax a lien or charge upon such property and provides for its seizure and sale if necessary to satisfy the impost, or the remedy prescribed for the recovery of the tax is by personal action or proceedings against the persons required to pay it.

That the property so to be affected should itself be within the province at the time when the taxation attaches in respect of it seems to me to be *primâ facie* the restriction which the Imperial Parliament intended to impose upon the provincial power of taxation in respect of property. Under the Quebec law the duties attach upon the transmission of the property — that is, at the moment of the decedent's demise. Its situation at that time determines its liability to provincial taxation. That the *situs* of the subject of taxation is the test by which provincial jurisdiction to tax it should be settled seems to be undisputed in the case of immovable property. In the case of movable property the large portion of it which is tangible has an actual physical *situs* equally with immovables. It is only intangible personalty which must of necessity be given a *situs* by fiction of law. If the maxim *mobilia sequuntur personam* be applied for the purpose of determining in respect of what property a Canadian province is by the "British North America Act" given the power of direct taxation all movable property, tangible and intangible alike, will be given a fictitious *situs* notwithstanding that tangible movables have an actual *situs* which is physical and that intangible movables have in contemplation of law an equally well-established actual *situs* — and that

for purposes of taxation. *Commissioner of Stamps* v. *Hope*(1); *Payne* v. *The King*(2); *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine*(3); *Commissioner of Stamp Duties* v. *Salting*(4). In fact movables actually situate outside the borders of the province are as far beyond the "direct power" of the Quebec Legislature as immovables similarly situate. *Blackwood* v. *The Queen*(5).

It is contended that to hold that, where provincial taxation is levied in respect of property, the property must be within the province is in effect to insert the words "on property" before the words "within the province" in sub-section 2 of section 92 of the "British North America Act," *Treasurer of Ontario* v. *Pattin* (6), and that the insertion of these words would exclude the imposition of many purely personal direct taxes — such as a poll tax — which it was certainly intended that the provinces should have the power to impose. But the view which I take of the "British North America Act" provision is that it should be read as authorizing direct taxation only where the real subject of the tax — whether person, business or property — is within the province. In testing the validity under this construction of any particular provincial tax it would, of course, be necessary to determine what is the real subject of taxation.

Under the Quebec Act imposing death duties for the reasons I have stated I am of the opinion that the real subject of taxation is the property passing, notwithstanding the clearly expressed intention of the legislature to fasten the tax upon the transmission.

(1) [1891] A.C. 476.
(2) [1902] A.C. 552.
(3) [1901] A.C. 217.
(4) [1907] A.C. 449.
(5) 8 App. Cas. 82, at p. 96.
(6) 22 Ont. L.R. 184, at p. 191.

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I think it improbable that the Imperial Parliament meant to confer on the provincial legislatures the right to tax any property real or personal beyond their "direct power." *Blackwood* v. *The Queen*(1). The Lovitt decision has established that it was not intended that a province should be denied the power to tax property actually situate within its borders merely because for some other purposes (*Blackwood Case*(1), at page 93), such property is in law deemed to be constructively elsewhere.

Apart from authority I would for the foregoing reasons hold that the Quebec Legislature in attempting to impose death duties in respect of property actually situate outside the province exceeded its constitutional powers.

But I also think the matter concluded by the authority of the decision of the Privy Council in *Woodruff* v. *Attorney-General for Ontario*(2). I concede that the facts in that case are readily distinguishable from those before us. It may also be said that *Woodruff* v. *Attorney-General for Ontario*(2) might have been disposed of, without determining the constitutional question now under consideration, on the ground that there a complete transfer of the property had taken place in a foreign state by an act *inter vivos* and the property itself was actually situated without the province, and the Ontario statutes, therefore, had no application. But their Lordships of the Judicial Committee did not see fit to rest their decision upon that ground. On the contrary they say:—

> The pith of the matter seems to be that, the powers of the provincial legislature being strictly limited to "direct taxation within

(1) 8 App. Cas. 82, at p. 96. (2) [1908] A.C. 508.

the province" ("British North America Act," 30 & 31 Vict. ch. 3, sec. 92, sub-sec. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub-sections of section 4 of the "Succession Duty Act," on which so much stress was laid in argument. Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province — taxation of property not within the province.

The reasoning of this board in *Blackwood* v. *The Queen*(1) seems to cover this case.

"The contention of the Attorney-General" referred to can scarcely have been aught else than the reported argument of counsel representing him that the transfers were testamentary in substance;

the duty claimed was not a tax on property, but a tax on the devolution or succession: the duty was imposed on persons beneficially entitled * * * ; the persons taxed were resident in the province.

It is to this argument that Lord Collins makes reply that directly or indirectly — although the transfers should be deemed testamentary and although the tax should be regarded as primarily imposed on the transmission, or on the beneficiaries — it involves the very thing forbidden — taxation of property not within the province. Not content with expressly basing his judgment on this ground, his Lordship emphasizes its importance by the statement that it is "the pith of the matter."

Woodruff v. *Attorney-General for Ontario*(2) cannot be brushed aside by the familiar observation that the language used must be read in the light of, and confined to the facts of, that case, and is applicable only to legislation couched in the form of that then before the court. Their Lord-

(1) 8 App. Cas. 82. (2) [1908] A.C. 508.

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ships have anticipated and precluded such an argument in their statement that the contention of the Attorney-General directly or indirectly — *i.e.*, either upon assumptions that the transfers were really testamentary and that the Ontario Legislature should be deemed to have imposed its tax not on the property, but on the succession or devolution or on the persons beneficially entitled, or upon contrary assumptions — involved taxation of property not within the province; and "any attempt to levy a tax on property locally situate outside the province" is *ultra vires* of a provincial legislature.

Neither may this portion of their Lordships' judgment be regarded as *obiter dictum*. As put by Lord Macnaghten, in delivering the judgment of the Judicial Committee, in *New South Wales Taxation Commissioners* v. *Palmer*(1), at page 184:—

> It is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

See also *Membery* v. *Great Western Railway Co.* (2), *per* Lord Bramwell, at page 187.

As I understand the judgment of their Lordships of the Judicial Committee in *Lovitt* v. *The King*(3), it determines nothing inconsistent with the view I have expressed. Their actual decision turns upon the construction of a deposit receipt which they held to be primarily payable at St. John. The asset which it represented, being a simple contract debt, therefore had a local *situs* in New Brunswick. As property locally situate in that province their Lordships held

(1) [1906] A.C. 179. (2) 14 App. Cas. 179.
(3) [1912] A.C. 212.

that it might be made subject to the succession duty taxation of New Brunswick, notwithstanding that the testator died domiciled in Nova Scotia; and, the legislature having clearly expressed its intention to impose succession duties upon such property, their Lordships decided that those duties must be paid. Although in the course of the judgment passing reference is made to section 92 of the "British North America Act," and in the discussion of the maxim *mobilia sequuntur personam* invoked by the respondent some expressions occur which are perhaps consistent with a view contrary to that which I hold, the right of a provincial legislature to impose taxation in respect of movable property locally situate outside the province, and the double taxation of the same estate by two different provinces which might ensue are aspects of the case now before us which *Lovitt* v. *The King*(1) did not present and as to which the absence from their judgment of all allusion to *Woodruff* v. *Attorney-General for Ontario*(2) would seem to warrant the conclusion that their Lordships did not express an opinion.

For these reasons I conclude that in the case of Henry Cotton the taxation in question was *ultra vires* of the provincial legislature, and that on that ground the plaintiffs are entitled to succeed.

In the case of Mrs. Cotton, the plaintiffs would be entitled to succeed upon the same ground if the Quebec statutes in force when she died purported to tax movables of a decedent actually situate abroad; but they are, in my opinion, entitled to judgment in her case because the Quebec "Succession Duties Acts" as they stood at the time of her death did not purport to im-

(1) [1912] A.C. 212; 43 Can. S.C.R. 106.

(2) [1908] A.C. 508.

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pose a tax in respect of movable property not actually situate within the province and possibly also because Mrs. Cotton was not domiciled in Quebec at the time of her death.

I should, perhaps, note that, as the statute was amended in 1903 and consolidated in 1906, although the tax purports to be imposed upon the transmission, it is extended to the Quebec movables of a non-domiciled decedent the transmission of which takes place abroad and under the law of the decedent's foreign domicile. By further amendment made in the consolidation of 1906 the legislature sought to render dutiable the foreign movables not only of the domiciled decedent, but also of the decedent who is resident, though not domiciled, in the Province of Quebec. I allude to these peculiar features of the legislation to make it clear that they have not been overlooked and also because they indicate how far the legislature was prepared to go.

It was not urged on behalf of the appellants that the monies claimed by the plaintiffs could not be recovered because they were paid voluntarily and not in mistake of fact, but in mistake of law. Counsel no doubt refrained from presenting this contention because it appears to be well established under the system of law which obtains in the Province of Quebec that where a person voluntarily makes a payment because he erroneously believes he is compelled by law so to do, he may successfully maintain an action *en répétition de l'indû*. Articles 1047 and 1048 C.C. In that case the error is in that which was the principal consideration for making the payment (art. 992 C.C.) and, though voluntarily paid, the monies may be re-

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covered. *Leprohon* v. *Mayor of Montreal*(1); *Boston* v. *L'Eriger*(2); *Leclerc* v. *Leclerc*(3); *Bain* v. *City of Montreal*(4), *per* Strong J., at page 265, *per* Taschereau J., at page 285.

The main appeal should, therefore, be dismissed with costs.

I agree in the disposition made of the cross-appeals on the ground indicated in the opinion of my Lord the Chief Justice.

BRODEUR J.—This case, it seems to me, should be decided according to the principles laid down by the Privy Council in the case of *Lambe* v. *Manuel*(5) and the decision of *Woodruff* v. *Attorney-General for Ontario*(6) cannot be successfully invoked.

There is a vast difference between the two statutes that were submitted to the courts in those two cases.

In the case of *Lambe* v. *Manuel*(5), the "Succession Duty Act" of Quebec was at issue, and in the matter of Woodruff, the Ontario "Death Duty Act" had to be interpreted.

The Quebec law imposes a succession duty *on the transmission or devolution of the estate.*

In the Ontario statute, on the contrary, *the property itself is taxed.*

Let me quote the two statutes side by side and we will easily see the difference that exists between those two enactments:—

(1) 2 L.C.R. 180.
(2) 4 L.C.R. 404.
(3) Q.R. 6 Q.B. 325.
(4) 8 Can. S.C.R. 252.
(5) [1903] A.C. 68.
(6) [1908] A.C. 508.

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Quebec Law.

All transmissions owing to death of the property in usufruct or enjoyment of movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted.

The word "property" within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

Ontario Law.

Save as aforesaid, the following property shall be subject to a succession duty as hereinafter provided, to be paid for the use of the province over and above the fee payable under the "Surrogate Courts Act;" (*a*) all property situate within this province, etc. * * * passing either by will or intestacy.

The word "property" in this Act includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

We are asked to decide whether movable property, consisting in bonds and shares of foreign companies belonging to a deceased person domiciled in Quebec is liable to death duties.

The Privy Council in the case of *Woodruff* v. *Attorney-General for Ontario*(1) had to deal, as I have already said, with a statute taxing the property itself. As the bonds in question in that case were due by foreign corporations, were in a foreign country, and had not passed by will or intestacy, it is no wonder that applying the provisions of the section 92, sub-section 2, of the "British North America Act" they have declared that under such a statute the Attorney-General of that province could not reach movable property whose *situs* were not in Ontario.

The Ontario law does tax movable property situate

(1) [1908] A.C. 508.

in the province and belonging to an outsider, but it does not affect any such property situate in another country.

The Quebec law, on the contrary, as interpreted by the Privy Council in the case of *Lambe* v. *Manuel*(1), cannot reach movable property situate in the province, because the duty that was authorized was not a duty on the property itself, but on the transmission of the property.

The testator in the case of *Lambe* v. *Manuel*(1) was domiciled outside of Quebec and left shares of banks having their place of business in Quebec.

The Privy Council confirmed the decision of the Provincial courts and adopted the views expressed by Sir Melbourne Tait and Mr. Justice Bossé that the Quebec "Succession Duty Act" only applies, in the case of movables, to transmissions of property resulting from the devolution of a succession in the Province of Quebec; or, in other words, that the taxes imposed on movable property are imposed only on property which the successor claims under, or by virtue of, the Quebec law.

It was declared that, in order to reach those securities they should be transmitted according to the laws of Quebec and that what was taxed was the right to inherit.

Applying those broad principles of *Lambe* v. *Manuel*(1) to the facts of this case, I come to the conclusion that Mr. and Mrs. Cotton's representatives are liable because the transmission of shares and bonds has been made according to the laws of Quebec, and that the duty is imposed upon the devolution or upon the privilege for their successors to take or

(1) [1903] A.C. 68.

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receive property under their wills. By fiction of the law, movable property is considered to be situate wherever the owner resides. It is referred to the domicile of the owner and governed by the law of that domicile (art. 6 C.C.). It becomes subject to the law governing the person of the owner.

Relying upon the following decisions in England, where the maxim *mobilia sequuntur personam* has been adopted, *Thomson* v. *Advocate-General*(1); *Wallace* v. *Attorney-General*(2); *Harding* v. *Commissioners of Stamps for Queensland*(3), I have come to the conclusion that the government had rightly collected duties on those securities and shares and that the action *en répétition de deniers* instituted by the respondents should be dismissed.

In order to fortify my opinion, I may quote Hanson "Legacy and Succession Duties," where he says:—

> It has already been pointed out that in order to render personal property liable to duty it is necessary that it should be situate within this country, and that as property of a movable nature accompanies in construction of law the person of its owner the situation of the owner's domicile at the time of his death and not the actual local situation of the property itself is the true test of the liability to duty.

I had some doubts, however, as to whether Mrs. Cotton's estate was liable to duty. The statute in force at her death did not contain a definition of the word "property," as quoted above.

That definition was made after the judgment in the case of *Lambe* v. *Manuel*(4). But the Quebec judges, in their decision as affirmed by the Privy Council, were so strong in their idea that what the statute contemplated was to tax any transmission re-

(1) 12 Cl. & F. 1.
(2) 1 Ch. App. 1.
(3) [1898] A.C. 769.
(4) [1903] A.C. 68.

sulting from a succession devolving here under the laws of the province, that my doubts were removed.

We must not forget that under our laws in Quebec the transmission of a succession takes place instantaneously at the death. "Le mort saisit le vif" is the old saying, and in that regard the laws of the two provinces of Ontario and Quebec shew a difference. (Arts. 596-599 and 600 C.C.)

The respondents have claimed before this court that Mrs. Cotton was not domiciled in Quebec when she died in Boston in 1902.

That question was not raised by the pleadings. On the contrary, it is there implicitly admitted that her domicile was in that province, when they acknowledged that her movable property locally situate there was duly taxed. According to the judgment of *Lambe* v. *Manuel*(1), her movable property even situate in Quebec was not subject to duty if she was domiciled elsewhere. The respondents in admitting by their pleadings that Mrs. Cotton's movable property in Quebec was liable to taxation admitted virtually that she was domiciled here.

Besides her husband has stated in his affidavit of the 10th February, 1904:—

> I have examined again that difficult question of domicile, and all the facts and circumstances of the case and I have come to the conclusion and admit that since the month of April, 1901, and, therefore, at the time of the death of my wife, my domicile (which was, of course, her domicile) was at Cowansville, in the said district.

The question of domicile, when a person does not reside all the time at the same place, is determined by his own intention; and if the person whose domicile is in question comes and declares that his domicile

(1) [1903] A.C. 68.

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is in a certain country, I believe that his legal representatives are bound by his extra-judicial admission, and such an admission can be sucessfully invoked against them.

I am of opinion then that the domicile of Mrs. Cotton at her death was in Quebec and that the respondents could not successfully raise that issue.

A cross-appeal has been made by the respondents by which they claim that the Court of King's Bench should not have reduced the amount of the judgment rendered by the Superior Court. They claim by this cross-appeal that the debts of a succession should be entirely deducted from the part of the amounts situate in this province when there is one part of the estate not liable to duty and situate elsewhere. As I am of opinion that, in this case, all the assets of the succession had to pay succession duty, I am not called upon to discuss the point raised. The cross-appeal then should be dismissed and the appeal allowed with costs of this court and of the courts below.

Appeal allowed in part with costs; Cross-appeal dismissed with costs.

Solicitors for the appellant: *Dorion & Marchand.*

Solicitors for the respondents: *Casgrain, Mitchell, McDougall & Creelman.*