Supreme Court of Canada

Lovitt *v.* Attt. Gen. for Nova Scotia (1903) 33 SCR 350

Date: 1903-06-08

Irvine A. Lovitt and Others, Executors of the Estate of George H. Lovitt, Deceased (Defendants)

Appellants

And

The Attorney General for the Province of Nova Scotia (Plaintiff)

Respondent

1903: Feb. 18, 19; 1903: May 5; 1903: June 8.

Present:—Sir Elzéar Taschereau, C. J. and Sedgewick, Davies,. Mills and Armour JJ.

Present:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Successsion duties—Property exempt—Sale under will—Duty on proceeds—Costs—Proceedings by or against the Crown.

Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney General claimed succession duty on the whole estate.

*Held,* affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills JJ. dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were.

Costs will be given for or against the Crown as in other cases.

Appeal from a decision of the Supreme Court of Nova Scotia[[1]](#footnote-2) in favour of the Attorney General on a case stated for the opinion of the court.

The case so stated was as follows:

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George H. Lovitt, late of Yarmouth, in the Province of Nova Scotia, ship owner, departed this life at Yarmouth, on the fourteenth day of November, A.D. 1900, having first made his last will and testament, whereby he appointed the defendants, Irvine A. Lovitt, John Lovitt and Erastus H. Lovitt his executors and trustees of his estate.

Probate of the said will was duly granted by the Judge of the Court of Probate in the County or Yarmouth, on the nineteenth day of November, A.D., 1900, and a true copy of the said will is hereunto annexed.

The inventory filed in the Court of Probate by the said executors contains, among other property, the following:

|  |  |
| --- | --- |
| Province of Nova Scotia Debentures, issued under Chapter 3, Acts of N. S. for 1889 | $15,000 00 |
| Accrued interest on do | 491 70 |

The whole estate was appraised at the sum of $440,442.13, and debts and executor's commissions, amounted to $22,868.10.

Section 5 of chapter 3 of the Acts of the Legislature of Nova Scotia for the year 1889 enacts as follows:

"The debentures issued under authority of this Act shall not be liable to taxation for provincial, local, or municipal purposes in Nova Scotia."

The Attorney General for the Province of Nova Scotia claims, and the defendants deny, that the said sum of $15,491.70 so invested and held by testator in provincial debentures, should be included in the estate, for the purpose of fixing the amount of succession duty payable, and that duty should be paid in respect thereto.

The questions for the decision of the court are:

1. Should the sum so invested in provincial debentures be included in the valuation of the estate for

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the purpose of fixing the amount of succession duty payable?

2. If not, should the said sum be deducted from the residue or should a proportionate part be deducted from each legacy and duty be calculated on the basis of the amounts so reduced?

The first question having been answered in the affirmative the executors appealed to this court.

*W. B. A. Ritchie K.C.* for the appellant. The duty is a tax upon the estate, not on the legatee or devisee. *Re Estate of Swift[[2]](#footnote-3)* per Gray J.; *Bittinger's Estate[[3]](#footnote-4)*; *Attorney General* v. *Newman[[4]](#footnote-5)*.

The cases of *Lambe* v. *Manuel[[5]](#footnote-6)*, and *Thomson* v. *The Advocate General[[6]](#footnote-7)* were also referred to.

*Mackay* for the respondent. The duty is not a tax on property but on the privilege of taking property by will or intestacy. *Mager* v. *Grima[[7]](#footnote-8)*; *Minot* v. *Winthrop[[8]](#footnote-9)*. And see *Wallace v. Myers[[9]](#footnote-10)*.

THE CHIEF JUSTICE.—I would dismiss this appeal. I fully concur in Mr. Justice Grraham's reasoning in the court below. The wording of the statute is perhaps not strictly accurate, but these succession duties cannot generally be considered otherwise than duties not on the property itself, but on the transmission of that property, and the appellant has failed to convince me that the legislature of Nova Scotia intended to deviate from the principle upon which legislation of this nature is generally assumed to be based.

SEDGEWICK J.—I am of opinion that this appeal should be allowed.

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DAVIES J.—Part of the estate of George H. Lovitt, appellant's testator, consisted of debentures of the Province of Nova Scotia. These debentures were issued under chapter 3 of the Acts of 1889, (N.S.), which contains this provision;

The debentures issued under the authority of this Act shall not be liable to taxation for provincial, local or municipal purposes in Nova Scotia.

Testator, by his will, after having made certain specific bequests and devises, directed that the residue of his estate should be converted into money and that the same should be invested by his executors and held by them upon the trusts in his will mentioned. The respondent claims succession duty under chapter 8 of the Acts or 1895[[10]](#footnote-11), from the legatees in respect to the whole estate including the Provincial debentures, while appellants claim that the amount realized from the sale of the debentures should be exempt under the above provision of chapter 3 of the Acts of 1889.

The 4th section of the Succession Duty Act, 1895, exempted from its operation all estates the value of which, after payment of the debts and expenses of administration, did not exceed $5,000; and (2) property passing under a will, intestacy or otherwise to or for the father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of deceased where the value of the property so passing did not exceed $25,000. The 5th section is as follows:

5. Save as aforesaid all property situate or being within the Province of Nova Scotia, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto last dwelt within said province or not, passing either by will or intestacy, or which shall be voluntarily transferred by deed, grant or gift made in contemplation of the death of the grantor or bargainor, or made or intended to take effect in possession or enjoyment after such death,

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to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property or the income thereof, and all property wherever situate or being over which the trustee, executor or administrator shall or may exercise control, and which shall or may come into his possession, shall be subject to a succession duty, to be paid for the use of the province, over and above the fees provided by chapter 128 of the Revised Statutes, fifth series.

The subsections following regulated the rates of duty to be charged which varied and depended upon the amount of the estate and upon the degree of relationship to the deceased, of the person to whom the property passed.

Subsequent sections of the Act provided that the duty payable in respect to an annuity should be paid in four equal annual payments with a proviso that if the annuitant died before payments were completed no further duty should be payable. There were also special provisions regulating the time and manner of payment of the duty where any property was devised, bequeathed or descended to or for the benefit of different persons in succession. The 18th section declared that in addition to the person receiving the property, executors, trustees, &c., through whose hands it passed should be accountable for the duty.

The Supreme Court of Nova Scotia held that succession duties were payable upon the whole estate which came into the hands of the executors for distribution to the legatees under the testator's will and that the amount of the estate represented by these debentures was not exempted from the duty, on the broad ground that the succession duty was not a tax upon the debentures themselves or the money they represented, but a duty or burden imposed by the province upon the passing or devolution, or privilege of taking or receiving property under wills and intestate laws. The debentures in the hands of the executors were not

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liable to any tax or duty, nor when they were sold by the executors as provided for by the will would they be liable in the hands of any purchaser, but the passing or transfer of the proceeds when it came into the hands of the executor and was transferred by him to the beneficiaries under the will operated to bring into effect the succession duty. If these proceeds of the sale of the debentures, when they became part of the estate and were so transferred to and divided amongst the beneficiaries, were exempted from the succession duties and the debentures passed to the purchaser free of duty or tax, the anomalous condition would have existed of the estate profiting by the sale at an enhanced price of the debentures because of their exemption from duty and holding and dividing the proceeds under the will among the legatees also without paying duty. But it is fair to say that even if the testator had specifically devised the debentures to a legatee the transfer to the legatee by virtue of the provincial law would be subject to the payment of the duty or burthen placed upon it by the act. It comes back again to the principle underlying and governing the judgment appealed from that the duty is not a tax upon the property as such at all but a burthen, bonus, excise duty or assessment as variously defined, imposed by the Government upon the passing or devolution of the property by will or intestacy to the beneficiaries, such duty or burthen being regulated and determined in its amount or extent by the relationship of the beneficiary to the testator.

The statute in question is one modeled upon and closely following similar statutes of the States of New York and Pennsylvania, (ch.713 Laws of 1887, N.Y.; No. 37 Laws of 1887, Pa.,) and does not follow the Imperial legislation by which legacy succession and estate duties were imposed. In the sections imposing the duty the

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phraseology of the Nova Scotia Act now under consideration and the New York and Pennsylvania Acts are almost identical. Mr. Justice Graham who delivered the judgment of the Supreme Court of Nova Scotia has cited and reviewed most of the cases determined in the New York and Pennsylvania Courts of Appeal and in the Supreme Court of the United States, where questions substantially the same as that now before us were determined. There is a concensus of opinion in all these courts and in many courts of appeal of other States of the Union on statutes of a similar kind, to the effect that these statutes must be construed as imposing a burden upon the passing, transmission or devolution of the property as distinguished from taxes imposed upon property real or personal as such because of its ownership or possession. I fully agree with the conclusions reached by the Supreme Court of Nova Scotia and for the reasons given by Mr. Justice Graham. I would merely add to the authorities cited by him that of *Knowlton v. Moore[[11]](#footnote-12)*. The judgment of the Court was pronounced by Mr. Justice White, who said, p. 47:

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. Taxes of this general character are universally deemed to relate not to property *eo nomine,* but to its passage by will or by descent in cases of intestacy as distinguished from taxes imposed on property real or personal as 6uch, because of its ownership or possession. In other words the public contribution which death duties exact is predicated on the passing of the property as the result of death as distinct from a tax on property disassociated from its transmission or receipt by will or as the result of intestacy.

See also Dos Passos on Inheritance Tax Law, par. 8. I am of the opinion that the succession duty imposed by the Succession Duty Act 1895 is not a tax upon property as such but rather an impost upon the

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privilege of taking or transmitting property by will or intestacy, and that while the value of the property is the measure of the amount of the duty it is upon the privilege that the duty is imposed. In the case of limited interests such as life estates it is the estimated value of the limited interest and not the property which fixes the amount of the duty payable, but the nature of the tax remains the same. The duty upon a life interest is not payable out of the corpus, but out of the income. The duty varies according to the degree of relationship of the person succeeding to the property to the person from whom or from whose estate the property comes, and it is only paid once, that is when the beneficiary takes or receives the amount of his gift, legacy or devise as the case may be.

For these reasons I am of opinion that the judgment of the Supreme Court of Nova Scotia should be affirmed and this appeal dismissed with costs.

MILLS J:—One George H. Lovitt, in Yarmouth, Nova Scotia made a will in which he disposed of, among other things, certain bonds which had been issued by the Government of Nova Scotia under a statute passed by the Legislature in 1889, and which expressly provided that the debentures issued under the authority of that Act should not be liable to taxation, for provincial, local or municipal purposes in Nova Scotia.

There was enacted by the Legislature in the previous year a statute to amend and consolidate the Acts relating to municipal assessments, by section 6 of which, funds invested in provincial or municipal debentures were exempt from taxation. Section 5 of that statute enacts

That no income shall be taxed which is derived from provincial or municipal debentures, exempted from taxation by Acts of this Province.

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By the statute of 1895, known as the Succession Duty Act, it was provided by section 5, that save as aforesaid, all property situate or being within the Province of Nova Scotia, and any interest therein, or any income therefrom, whether the deceased person owning or entitled thereto last dwelt within said Province or not, passing either by will or intestacy, or which shall be voluntarily transferred by deed, grant or gift, made in contemplation of the death of the grantor, or bargainor or made or intended to take effect in possession or in enjoyment after such death, to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property, or the income thereof, and all property wherever situate or being over which the trustee, executor, or administrator shall or may exercise control, and which shall or may come into his possession, shall be subject to a succession duty, to be paid for the use of the Province, over and above the fees provided by chapter 128, of the Revised Statutes fifth series.

1. When the value of the property of the deceased after payment of all debts and expenses as aforesaid, exceeds $25.000 and passes to the persons named in this subsection; or

2 Where the value of the property after such payments exceeds $100,000 a duty of $5.00 per every hundred.

3. Where the value of a property after payment as aforesaid exceeds $5,00 so much as passes to the benefit of a lineal ancestor other than father or mother, or to any brother or sister of the deceased, a duty of $5.00 per every hundred dollars.

In this case among the assets were $15,000 in provincial bonds issued under the provincial Act in question, not being liable to taxation under that provision of the statute which I have quoted, and the inquiry was for the purpose of determining whether these bonds should be considered in fixing the amount of property subject to the succession duty.

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The first question to be considered is whether the imposition of such a duty is taxation upon property, or whether it is a sum paid for the transmission from the last owner to the person entitled to receive it. I attach no importance to the contention that a succession duty is not a tax imposed upon the property, but is a mere charge for the privilege of transmission. If it did not so frequently fall within the domain of experience, I would scarcely consider it credible that any one could persuade himself by an argument of this kind. Let me suppose for a moment, that this property had been devised to some one who at the time had no property; instead of receiving the full amount bequeathed, he would find in its transmission that five per cent of its value had been taken out by the executor or administrator, as the case might be, to pay the Government for the privilege of receiving it, and that instead of receiving the whole of what had been bequeathed to him, he would find that $50.00 was retained out of every thousand to pay the succession duty. Could he be persuaded that the property which had been bequeathed to him was not subject to taxation, that this was not a charge upon the property at all, but a toll taken for permitting it to pass from his dead ancestor to himself?

It matters not whether the tax is direct or indirect, whether it is a charge upon the property, or upon leave to receive it, it is still a tax imposed for a public purpose, upon the property bequeathed, and the sum total is diminished by the amount of succession duty so charged. Here, the tax is imposed for a specific purpose,—it is to raise a revenue for the support of a particular institution. It is money levied upon the estates of deceased persons for this purpose, and being *so* levied, it is as much a tax as any other which it is possible for a legislature to impose.

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Webster defines a tax as a rate or sum of money assessed on the person or property of a citizen, by government for the use of the state. Taxes in free Governments are usually made upon the property of citizens according to their income, or according to the value of their estates. Tax is a term of general import, including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tributes, subsidies, excise, imposts, or customs. But more generally, tax is limited to the sum laid upon polls, lands, houses, horses, cattle, professions, and occupations. Tax is defined in the encyclopedic dictionary as a contribution imposed by authority upon the people to meet the expenses of government, or other public services. A government imposition is a charge made by the state on the income or property of individuals, or on the products consumed by them. A tax is said to be direct when it is demanded from the very person whom it is intended, or desired should pay it, as a poll tax, an income tax, property tax, taxes for keeping servants, etc. An indirect tax is one demanded from one person who is expected and intended to recoup or indemnify himself at the expense of another, as in customs or excise duties.

It is a matter of no consequence whether the tax is meant to be a charge upon the property, or upon the transmission of the property; it is in either case a burden imposed for a public purpose, to be met by the person, in the case of succession duties, to whom the property may go. Some taxes are paid periodically; some are paid upon the happening of a particular event; but no matter in which way, they are alike taxes—burdens, imposed by the state for public purposes. A charge imposed, as a stamp duty upon a bill of exchange, or note, though imposed but once for all, is not less a tax, than a charge imposed periodically upon

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lands, or upon income—such charges are monies taken from some one by the state, to meet some public requirement. Taxes may be made on legacies, and on inheritances, when the money or capital held by one party is, by reason of his death, in the course of transmission to another. If the property is still retained in the family, it may well be that they are worse off than before, and the tax upon the succession may diminish the amount of capital by the amount of the tax at a time when the income is lessened by the death of the one chiefly relied upon for support, and when the disbursements may be largely increased. Succession duties are usually levied on testamentary gifts. Sometimes they are confined to collateral successions only. It may well be, that a government and legislature exempt certain public securities from taxation, in order that those securities may so command a higher market value. It would be a gross breach of faith, after having received a larger sum from the sale of public securities by reason of their being exempt from taxation, to impose a further charge upon them. This would be, in fact, receiving a double taxation, first, in the form of an advanced price, and secondly by the imposition of a further burden upon them.

It is a fair question to consider whether the words of the statute, properly interpreted, imply an absolute or qualified exemption from taxation. It has been held that a general declaration of exemption from taxation of every kind will not exempt from an assessment for street improvements specially beneficial to the exempted property. *Sheehan* v. *The Good Samaritan Hospital[[12]](#footnote-13)*. An exemption from all taxes and assessments has been held to exempt from assessments for benefits as well as exemptions from general taxes. *The State* v. *City of Newark[[13]](#footnote-14)*.

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In a New York case, where a public cemetery was, by law, exempt from "all public taxes, rates and assessments," it was nevertheless held by the court not to be exempt from the paving assessment. Folger J. said in that case:

We think that the current of authorities in this and some of the sister states runs to this result: that public taxes, rates, and assessments are those that are levied and taken out of the property of the person assessed for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him towards the expense of carrying on the government, either directly, and in general that of the whole Commonwealth, or more immediately and particularly, through the intervention of municipal corporations, and that those charges and impositions which are laid directly upon the property in a certain circumscribed locality, to affect some work of local convenience which in its results is of peculiar advantage and importance to the property especially assessed for the expense of it, are not public but are local and private so far as this statute is concerned. *Buffalo City Cemetery* v. *City of Buffalo[[14]](#footnote-15).*

In another case, *City of Patterson* v. *Society for Establishing Useful Manufactures[[15]](#footnote-16)* the exemption was from "taxes charges, and impositions" but it was held not to extend so far as to exempt from assessment for grading and paving a street. In another New Jersey case *The State* v. *City of Newark[[16]](#footnote-17)* the exemption was "from charges and impositions," and the same ruling was had. These cases shew that the exemption is from taxation imposed for ordinary revenue, and that it does not exempt from special charges from which special advantages are derived. But where the language is explicit, exempting from all taxes and assessments, it has been held to exempt from assessments by which the property is to benefit as well as from the burden of general taxation.

Succession to an inheritance, it is true, may be taxed as a privilege and notwithstanding the property is

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already taxed, but it ought to be clear and explicit that the legislature intended the burden. The question we have here to consider is whether under the statute of Nova Scotia the property is exempt from the burden of a succession duty. It is expressly provided by the statute that, "the debentures issued under the authority of this Act shall not be liable to taxation for provincial, local, or municipal purposes, in Nova Scotia." This is as far as the legislature could go; it could not protect him if domiciled elsewhere, as then the maxim *mobilia sequuntur personam* would apply; but here the legislature went to the full extent of its authority in declaring that neither the provincial legislature, nor any body acting under its authority, should tax these bonds. But it is said that this tax is not a tax upon the bonds, but a tax upon their transmission. The statute declares otherwise. The distinction may have served the purpose of enabling the courts in the United States to surmount a constitutional difficulty, but it has no applicability here. There is a burden, as the law has been construed, imposed on the holders of these bonds, from which the Legislature of Nova Scotia expressly promised they should be exempt. By the statute of 1889, ch. 3, sec. 5, it is provided that the debentures issued under the authority of that Act, shall not be liable to taxation for provincial, local, or municipal purposes in Nova Scotia. This succession duty is a tax imposed for provincial purpose—to provide a fund for defraying in part the care of the insane, by a succession duty on certain estates. It is not a charge for the privilege of transmission, but a charge upon the estate, and declared to be so in express words. The law is not less violated were it true that the charge is not upon the property, but upon its transmission; but this contention is without foundation, as it is negatived by the words

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of the statute. Sec. 5 provides that all properties situate or being within the province of Nova Scotia, and any interests therein, or income therefrom, passing either by will or intestacy, and *all property* wherever situate or being, over which the trustee, executor, or administrator shall or may exercise control, and which shall or may come into his possession, *shall be subject to a succession duty.* This duty is a first charge upon the property, and it is made the duty of the executor or administrator (sec. 18) *to retain out of the properly the amount of the duty,* and he is *not to deliver the property subject to the duty,* until he has deducted his duty therefrom, and by section 19, the executor or administrator is authorised to sell *so much of the property as may be necessary for the payment of the duly.* It is a burden upon the estate, the same as any other indebtedness, which must be met out of the estate. The Act imposes not simply a charge upon the person who may receive the estate, but a tax upon the property itself, and it is to be diminished in the hands of the executor or administrator, by the payment of this claim made on the part of the provincial government. It is the property which passes that is subject to the duty. It is not a burden imposed for the privilege of transmission but a burden imposed for the purpose mentioned, and it is impossible to successfully contend in the face of the provisions of the statute, that the burden is not a tax upon the property, but a tax on the act of transmission. The words of the statute are *all property situate,* or being within the Province of Nova Scotia, or *any interest therein, ox income therefrom,* shall be subject to a succession duty to be paid for the use of the province; it is upon the property, and not on the right of succession that the statute imposes the burden, and therefore, the rule which the courts in the United States have found it necessary to adopt, in order to

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escape from a constitutional difficulty, has no applicability here; the words of the statute are plain, the burden is imposed not simply upon the transmission but upon the property which is the subject of transmission. In the case of *Pullen* v. *The Commissioners of Wake County[[17]](#footnote-18)* Rodman J. says,

We do not regard the tax in question as a tax on property, but rather as a tax imposed upon the succession, on the right of the legatee to take under the will.

In *Strode* v. *The Commonwealth[[18]](#footnote-19)*, Chapman P. T. said;

Now this is not to be viewed as a tax assessed upon the estate of the decedent, or of any one, but a restriction upon the right of acquisition by those who, under the law regulating the transmission of property, are entitled to take as beneficiaries without consideration. The state is still made one of the beneficiaries. It lays its hands upon the estates under such circumstances, and claims a share, and whether the share exempted is exacted as a tax, or duty, or whatever else, is of no consequence.

And the learned judge considered that the tax was therefore an exercise of the same power as a change in the law of descent.

I need not analyse this doctrine, and show how far a constitutional difficulty has carried the courts of the neighboring republic away from the doctrine of the common law in respect to property. This rule does not apply to the case before us. The words of the statute are against it. We would be ignoring them were we to say that this succession duty is not a tax upon the property.

No doubt if a state chose to do so it could provide that no one should have any right of property preaching beyond a life estate; that upon the death of the owner the property should vest in the state, and be made to retest in certain individuals, upon the payment of a certain percentage of its ascertained value, but it would

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require a very clear statement that this was the intention of the legislature, before it would be accepted. It is declared here, that the property in question is to be exempt from all taxes, (an expression which includes succession charges as well as any other,) provincial, local, and municipal, which embraces every form of tax that can be imposed by the provincial legislature, or by any municipal body under its authority. This exemption was no doubt adopted to appreciate the value of the bonds, and to obtain for them a higher price than if no such exemption existed, and it is not consistent, in my opinion, with the honour of the legislature to suppose that they endeavoured to mislead the purchaser, and to secure from him a higher price for their securities than they would otherwise have commended In the case of *Thompson* v. *The Advocate General[[19]](#footnote-20)* in which after deciding that the property in question was not liable to the legacy duty by reason of the domicile of the deceased not being a British domicile, Lord Campbell observed:

I think this caution should be introduced, that this exemption applies only to legacy duty, and not to probate duty. But with respect to the probate duty, if it is necessary to take out probate (the property being in Great Britain) for the purpose of administering the property, it would still be considered as situate in Great Britain, and the probate duty would attach.

And their Lordships were all agreed that where the deceased leaves a will, all the personal property, situate in Great Britain, passing under that will, is liable to probate duty, but not to legacy duty

In *Wallace* v. the *Attorney General[[20]](#footnote-21)*, it was held that a succession duty was not payable upon legacies given by the will of a person domiciled in a foreign country. The Lord Chancellor said—"That no claim could be sustained for a legacy duty, was not disputed. The law on that subject was finally settled in the House

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of Lords, in *Thompson* v. *The Advocate General[[21]](#footnote-22)*". And the converse proposition was settled by the *Attorney General* v. *Napier[[22]](#footnote-23)*. It was held in England in the case of *The Lord Advocate* v. *Fleming[[23]](#footnote-24)*, that where a policy for life insurance on the life of a father was voluntarily assigned by him to his daughter, several years before his death, during which time she paid the premium, she was held not liable to the payment of succession duty, as she had become entitled to the property prior to the death of her father.

To say that a tax may be imposed upon property in passing from one person to another, is a proposition perfectly consistent with the settled law of property, but to maintain that such an imposition is not a tax, but a charge imposed upon the beneficiary for the privilege of being allowed to succeed, is a proposition inconsistent with the words of the statute by which the duty is created, and in my opinion will be very difficult to bring within the taxing power of the Province in the face of *The Attorney General for Quebec* v. *The Queen Insurance Co.[[24]](#footnote-25)* decided by the Judicial Committee, and also with *The Attorney General for Quebec* v. *Reed[[25]](#footnote-26)*.

In my opinion the debentures in question are exempt from taxation, and ought not to be included in the value of the estate for the purpose of fixing the amount of succession duty payable, as such charge is inconsistent with the terms of the statute by which the issue of these debentures was authorized.

ARMOUR J.—I agree in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitor for the appellants: Lewis Chipman.

Solicitor for the respondent: A. A. Mackay.

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On a subsequent day a motion was made to vary the judgment as settled by the Registrar by striking out the portion giving costs to the respondent.

*Borden, K.C,* in support of the motion, contended that except where it was altered by statute the common law rule that the Crown never paid nor received costs was in force in Canada, and there is no such statute in Nova Scotia. He cited 3 Blackstone, p. 533 sec. 400; *The King* v. *Archbishop of Canterbury[[26]](#footnote-27)*; *Reg.* v. *Beadle[[27]](#footnote-28)*; Maxwell on Statutes 3 ed. p. 186.

*Burritt* contra.

Judgment on the motion was delivered for the majority of the Court by;

THE CHIEF JUSTICE—The Court is of opinion that the motion must be refused with costs.

Section 62 of the Supreme and Exchequer Courts Act provides as follows:

The Supreme Court may, in its discretion, order the payment of the costs of the court appealed from, and also of the appeal, or any part thereof, as well when the judgment appealed from is varied or reversed as where it is affirmed.

For twenty-five years this section, as all the other sections of the Act, has been construed as applicable to the Crown. It was so interpreted, for instance, in the cases of *Attorney General* v. *Flint [[28]](#footnote-29)* and *The Queen* v. *The Bank of Nova Scotia[[29]](#footnote-30)*; and in *The Maritime Bank* v. *The Queen[[30]](#footnote-31)*, and *The Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick[[31]](#footnote-32)* no costs were given in this court because the court was of opinion that they were not proper cases for so doing, but upon appeal to the Privy Council costs were given to the Crown against the appellants upon, the dismissal of their appeals[[32]](#footnote-33)*.*

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The jurisprudence of this Court in the matter, until overruled by the Privy Council, will be followed in cases in which the Crown is concerned as well as in all other cases.

NESBITT J.—I neither concur in nor dissent from the judgment given on this motion. I express no opinion either way.

Motion refused with costs.

REPORTERS' NOTE.—In the following cases, where the Crown was concerned costs were allowed by this court: *Severn* v. *The Queen[[33]](#footnote-34), City of Fredericton* v. *The Queen[[34]](#footnote-35)*, *Quirt* v. *The Queen[[35]](#footnote-36)*, *Mercer* v. *Attorney General of Ontario[[36]](#footnote-37)*, *St. Catharines Milling Co.* v. *The Queen[[37]](#footnote-38)*, *Reid* v. *Ally. Gen. of Quebec[[38]](#footnote-39)*, and by the Privy Council in *Hodge* v. *The Queen[[39]](#footnote-40)*, and *Russell* v. *The Queen[[40]](#footnote-41)*.

1. 35 N. S. Rep. 223. [↑](#footnote-ref-2)
2. 137 N. Y. 77. [↑](#footnote-ref-3)
3. 129 Pa. St. 338. [↑](#footnote-ref-4)
4. 31 O. R. 340; 1 Ont. L. R. 511. [↑](#footnote-ref-5)
5. [1903] A. C. 68. [↑](#footnote-ref-6)
6. 12 Cl. & F. 3. [↑](#footnote-ref-7)
7. 8 How. (U. S.) 490. [↑](#footnote-ref-8)
8. 162 Mass. 113. [↑](#footnote-ref-9)
9. 38 Fed. R. 184. [↑](#footnote-ref-10)
10. The Succession Duty Act, 1895. [↑](#footnote-ref-11)
11. 178 U.S. R. 41 (1899). [↑](#footnote-ref-12)
12. 50 Mo. 155. [↑](#footnote-ref-13)
13. 36 N.J. (L.R.) 473. [↑](#footnote-ref-14)
14. 46 N. Y. 506. [↑](#footnote-ref-15)
15. 24 N.J. (L.R.) 385. [↑](#footnote-ref-16)
16. 27 N.J. (L.R.) 185. [↑](#footnote-ref-17)
17. 66 N. C. Rep. 361. [↑](#footnote-ref-18)
18. 52 Pa. St, 181. [↑](#footnote-ref-19)
19. 12 Cl. and F. 1. [↑](#footnote-ref-20)
20. 1 Ch. App. 1. [↑](#footnote-ref-21)
21. 12 Cl. & F. 1. [↑](#footnote-ref-22)
22. 6 Ex. 217. [↑](#footnote-ref-23)
23. [1897]. A. C. 145. [↑](#footnote-ref-24)
24. 3 App. Сas. 1090. [↑](#footnote-ref-25)
25. 10 App. Cas. 141. [↑](#footnote-ref-26)
26. [1902] 2 K. B. 503 at p. 569. [↑](#footnote-ref-27)
27. 7 E. & B. 492. [↑](#footnote-ref-28)
28. 16 Can. S. C. R. 707. [↑](#footnote-ref-29)
29. 11 Can. S. C. R. 1. [↑](#footnote-ref-30)
30. 17 Can. S. C. R. 657. [↑](#footnote-ref-31)
31. 20 Can. S. C. R. 695. [↑](#footnote-ref-32)
32. 8 Times L. R. 677. [↑](#footnote-ref-33)
33. 2 Can. S. C. R. 70. [↑](#footnote-ref-34)
34. 3 Can. S. C. R. 505. [↑](#footnote-ref-35)
35. 19 Can. S. C. R. 510. [↑](#footnote-ref-36)
36. 5 Can. S. C. R. 538. [↑](#footnote-ref-37)
37. 13 Can. S. C. R. 577. [↑](#footnote-ref-38)
38. 8 Can. S. C. R. 408. [↑](#footnote-ref-39)
39. 9 App. Cas. 117. [↑](#footnote-ref-40)
40. 7 App. Cas. 829. [↑](#footnote-ref-41)