IN THE MATTER OF THE JUDICATURE ACT, ORDER XXXIII

AND

IN THE MATTER of the Estate of W. Herbert Brookfield, late of Chester, in the County of Lunenburg, in the Province of Nova Scotia, deceased.

1948
*Oct. 28

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*Feb. 1

THE ROYAL TRUST COMPANY, Administrator of the Estate of the late W. Herbert Brookfield, late of Chester, in the County of Lunenburg, in the Province of Nova Scotia, deceased, ... (PLAINTIFF); APPELLANT.

AND

HIS MAJESTY THE KING in the right of the Province of Nova Scotia, (DEFENDANT); RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Revenue—Succession Duty—Constitutional Law—Shares in United States companies, registered in names of nominees, endorsed in blank—No transfer office in Nova Scotia, where certificates situate—Situs of shares—Whether on death of testator domiciled in Nova Scotia, "property situate in Nova Scotia"—The Succession Duty Act (N.S.), 1945, c. 7—Canada-United States Tax Convention Act, 1944, (Dom.) c. 31.

"B", domiciled in Nova Scotia, caused to be registered in the names of employees at Halifax of the Royal Trust Company, shares of United States companies having no share registry in Nova Scotia. The certificates, endorsed in blank, had attached declarations of trust by the registered holders to the effect that they had no right or interest in the shares and had delivered them to the Trust Company to whom all dividends were to be paid. The Trust Company, in accordance with "B's" written instructions held the certificates for management and safekeeping. After "B's" death it was appointed administrator with the will annexed of his estate.

Held: that the shares were not "property situate in Nova Scotia" within the meaning of *The Succession Duty Act*, s. 9(8). The *situs* of the shares was where they could be effectively dealt with as between the

PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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company and the shareholders, namely the United States. Succession duty was therefore not payable under the *Succession Duty Act,* N.S., 1945, c. 7.

Stern v. *the Queen* [1896] 1 Q.B.D. 211, distinguished. Kerwin J. was of the opinion that even if that case be treated as an extension in England of the common law rule, it should not be so treated in Canada where the question of divided jurisdiction arises, but that the test of *situs* laid down in *King* v. *National Trust* [1933] S.C.R., 670, approved by *Rex* v. *Williams* [1942] A.C. 541, should be followed. Rand J. was of the opinion that the law-making sovereignty of England was to be distinguished from that of a province of the Dominion of Canada, and that the power "of direct taxation within the province", interpreted as it has been by the authorities cited, is to be exercised on the footing that there is only one *situs* for every class of property and that *situs* must be within the province, and for shares, there can be no such division of interest or powers in or annexed to them as would in the result attribute to them a *situs* in two or more places. In the circumstances of the case, Kellock J., with the concurrence of Estey J., said, the mere fact that the shares were not registered in the name of the deceased does not render inapplicable the principle of the decision in *Rex* v. *Williams; In re Ferguson* (1935) I.R. 21; *Attorney-General* v. *Higgins* 2 H. & N. 339.

Per Kerwin, Taschereau and Rand JJ., that the provisions of the *Canada-United States of America Tax Convention Act,* 1944, (Dominion) do not affect the power of the Province of Nova Scotia to collect and retain Succession Duty taxes.

APPEAL by the appellant, as Administrator with the Will annexed of W. Herbert Brookfield, deceased, from the decision of the Supreme Court of Nova Scotia *in banco* (1) whereby it was held—on a case stated as to—whether Succession Duty was leviable and payable for the use of the Province of Nova Scotia in respect of certain shares held by the late W. Herbert Brookfield at his death in companies of American registry, which shares were registered in the name of his nominees and had been endorsed by them in blank,—that Succession Duty was leviable and payable for the use of that Province.

R. A. Ritchie for the appellant.

T. D. MacDonald K.C. for the respondent.

KERWIN J.:—On October 7, 1937, W. Herbert Brookfield, domiciled and resident in Nova Scotia, made an arrangement with Royal Trust Company under which the latter from time to time, on his instructions, bought shares of

(1) (1948) 22 M.P.R. 140.

the capital stock of various companies incorporated under the laws of different states of the United States of America. Each of these companies had its head-office in the United States and maintained no share register or transfer office in Nova Scotia. The shares were registered in the names of various persons employed by the trust company at its office at Halifax and the certificates for such shares were endorsed in blank by the respective persons in whose names they were made out. To each such certificate, singly or by groups, was attached a declaration of trust, signed by the person in whose name the certificate was made out, declaring that such person held the shares as nominee of the trust company and that he had furnished the company with authority to collect and receive all dividends to which he, as registered owner, might become entitled.

Mr. Brookfield died November 14, 1944, having previously made his last will and testament, wherein he appointed executrices but, they being unable or unwilling to act, administration with the will annexed was granted to the Trust Company. The trust company paid the Collector of Succession Duties for Nova Scotia a sum of money which included succession duty in respect of the property to which the testator was entitled in the shares. Later, the company paid the Collector of Inland Revenue of the United States a sum of money as Federal Estate Tax in respect of the said shares. The company claimed a refund of this latter amount from Nova Scotia on the theory that the provisions of the Canada-United States of America Tax Convention Act, chapter 31 Statutes of Canada, 1944, was applicable. The taxes therein referred to are the taxes imposed under the *Dominion Succession Duty Act* and as to the first question raised by the stated case, I agree with the Court *en banc* that such an Act and the Convention could not have any effect upon the power of the province to collect and retain succession duty taxes.

The second question is more difficult. Section 3(1) of the Nova Scotia *Succession Duty Act,* chapter 7 of the 1945 Statutes, provides:—

3 (1) For the purpose of raising a revenue for provincial purposes, and save as is hereinafter otherwise expressly provided, there shall be levied and paid for the use of the Province a duty (called Succession

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Duty), at the rates hereinafter specified upon all property hereinafter mentioned which has passed on the death of any person who has died on or since the 1st day of July, A.D. 1892, or which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased.

and section 8(*a*) enacts:—

8. Save as is hereinafter otherwise expressly provided the property on which succession duty shall be levied and paid under this Act at the rates hereinafter specified shall be as follows:—

(*a*) all property situate in Nova Scotia which has passed as aforesaid or which passes as aforesaid on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere * * *

The subject matter of the taxation is property "situate in Nova Scotia." Mr. Brookfield had the beneficial interest in the shares and undoubtedly at the time of his death that interest passed within the meaning of the Act; but the question is whether such interest is property situate in the province.

The court *en banc* decided that the question was concluded by the decision in *Stern* v. *The Queen* (1), but before dealing with that decision it is convenient to refer to certain propositions that have been established in cases of this nature. They were formulated by Chief Justice Duff, speaking for this court in *The King* v. *National Trust Company* (2), and were expressly approved and repeated by the Judicial Committee in *Rex* v. *Williams* (3). As pointed out by Lord Uthwatt for the Judicial Committee in *Treasurer of Ontario* v. *Blonde* (4), the authorities before the *Williams* case established that, if, for the purposes of Succession Duty Acts (such as the Nova Scotia Act), there be found within a particular provincial jurisdiction a place in which registered shares in a company can be effectively dealt with as between the shareholders and company, the shares are situate within that jurisdiction; but that in none of those cases was there present the feature that there were two places where the shares could effectively be dealt with, one within, and the other outside, the jurisdiction. Lord Uthwatt proceeded to say that the principle laid down in the *Williams* case was that if it were possible on rational grounds to prefer one of the alternative

(1) [1896] 1 Q.B. 211.
(2) [1933] S.C.R. 670.
(3) [1942] A.C. 541 at 559.
(4) [1947] A.C. 24 at 30.

places to the other as the place of transfer for the shares in question, the selection should be made accordingly. It was in applying this principle that Viscount Maugham in the *Williams* case stated that their Lordships had come to the conclusion that the existence in Buffalo, at the date of the death, of certificates in the name of the testator, endorsed by him in blank, must be decisive. Their Lordships did not think it right to express any opinion as to the conclusion which they would have come to if the certificates had not been endorsed and signed in blank by the testator, since the point did not arise for decision and there were some obvious distinctions arising in cases where the endorsement on certificates has not been signed by the registered holder. This reservation, it will be noticed, was made in a case where the judicial committee was faced with the problem of preferring one of two alternative places, one of which was within the jurisdiction of a province and the other outside Canada.

In the *Blonde* case, as here, there was no place within the claiming province where a transfer of the shares could be carried through but, differing from the present case, the certificates, while physically situate in the claimant province, had not been endorsed in blank by the registered holder. I assume without deciding that we are dealing with "street certificates." In stating in the *Blonde* case the first matter to be ascertained, Lord Uthwatt left aside the case of street certificates but in my view the presence in Nova Scotia of such certificates does not alter the effect of the proposition that in deciding in such cases as this whether a matter is "taxation within the province" within head 2 of section 92 of the *British North America Act,* the test is where the shares, not as between transferor and transferee, but as between the company and the owner, may be effectively dealt with. A transferee of such a certificate would, of course, obtain the right to take the necessary steps to become the registered holder of the shares represented by the certificate but that is not sufficient.

The judgment in *Stern* v. *The Queen, supra,* so strongly relied upon by the respondent and followed by the court *en banc,* was delivered by Wright J. on behalf of a Divi-

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sional Court. It was concerned with certificates of shares in a foreign company. In the statement of facts it is stated that while the forms of transfer and powers of attorney had in regard to a large number of the shares been signed by the firms or persons in whose names the certificates were made out, with regard to some of the shares, of which the certificates were in the name of Stern Bros., such forms had not been signed by them. Nevertheless, the case apparently proceeded on the basis that all the certificates were included in the first class. It is evident that Wright J. intended to follow *Attorney-General* v. *Bouwens* (1). At the time, the view was held that he really extended the operation of that decision (12 L.Q.R. 105), and in the Court of Appeal in *Winans* v. *Rex* (2) at 1026, the Master of the Rolls states that the *Bouwens* case was "possibly carried further in the case of *Stern* v. *Reg.*" (3).

In the *Winans* case it was admitted for the purposes of argument that the bonds were all bearer bonds passing by delivery and that they were capable of being dealt with, and were in fact dealt with, for money on the stock exchange. The case had, therefore, nothing to do with shares. It had to do with taxation under the Finance Act of 1894 which was held to be analogous, not to the Legacy and Succession Duty Acts but to the old Probate Duty Acts, and it was in that connection that Lord Atkinson, on the appeal to the House of Lords [1910] A.C. 27, at page 35, cited the *Bouwens* and *Stern* cases for the proposition that probate duty would before the passing of the 1894 Finance Act have undoubtedly been payable in respect of the bonds. The only other law lord who referred to the *Stern* case was Lord Gorell who, at page 39, states that the *Bouwens* case was followed in *Stern*.

I am inclined therefore to assume that the approval of the *Stern* case by Lord Atkinson and Lord Gorell was confined to cases of bonds. Even if that be not so and if the *Stern* case be treated as an extension in England of the common law rule in the *Bouwens* case, it should not be so treated here in constitutional cases. In England there is no question of divided jurisdiction but certainly in Canada

(1) (1838) 4 M. & W. 171.
(2) [1908] 1 K.B. 1022.
(3) [1896] 1 Q.B. 211.

it would make serious inroads upon the test of the *situs* of shares as being where they may be effectively dealt with as between the company and the owner.

Another argument of the respondent is put thus in his factum:—

> The notional rule of the *Brassard* (1) case fixes the *situs* of the property of a registered owner of shares as the *locus* of the share registry because that is where the rights that make up that property may be dealt with:—the rights to vote, attend meetings and receive dividends. The rule would completely lose its logic if applied to such a case as the present where the deceased held none of these rights.

In the first place, Duff J., as he then was, in *Smith* v. *Levesque* (2), points out that *situs* ascribed to intangible property for the purpose of determining the authority of the executor to deal with it is not, strictly speaking, a fictitious *situs*. Then, so far as the respondent's present contention is based upon the fact that the deceased was not the registered owner nor in possession of the certificates, the trust company and its employees, in my view, were merely Mr. Brookfield's agents, bound to follow his instructions as to voting, attending meetings and receiving dividends. The contention that the real nature of Mr. Brookfield's property was a right of action under a Nova Scotia trust, is to overlook the realities of the situation. Even if the trust company and its employees were trustees, the trusts ended when the certificates, endorsed in blank, came into possession of the trust company as administrator with the will annexed of the deceased.

The appeal should be allowed. Notwithstanding the form of the stated case and of a written agreement signed on behalf of the parties, I understand that if the above views prevail, the proper order to be made is that the answer to the following question submitted for determination, namely:—

> Whether succession duty was leviable and payable for the use of the Province of Nova Scotia in respect to the property to which the said W. Herbert Brookfield was at the time of his death entitled or which passed upon his death by reason of the facts related in Paragraphs 5, 6 and 7 of the Stated Case herein?

is that such succession duty was not leviable and payable for the use of the province of Nova Scotia and that the province of Nova Scotia was not right in exacting the said

(1) [1925] A.C. 371. (2) [1923] S.C.R. 578 at 585-586.

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tax and is required to make a refund of the sum of $14,347.09 without costs of any of the proceedings in this court or in the court *en banc*.

TASCHEREAU, J.:—W. Herbert Brookfield died in November, 1944, and at the time of his death, had his domicile in the province of Nova Scotia. The administration of his estate, valued at more than $450,000 was given to the Royal Trust Company, appellant in the present case.

Prior to his death, the testator caused to be registered in the names of certain persons, shares of incorporated companies having their respective head-offices in the United States of America, and no transfer offices in the province of Nova Scotia. It is common ground that these shares were held on the testator's behalf, for management and safe keeping, in the vaults of the Royal Trust Company in Halifax. The certificates were endorsed in blank by the respective persons in whose names they were made out, and to each certificate was attached a Declaration of Trust.

Some time after the death of Mr. Brookfield, the Royal Trust Company, as administrator of the estate, paid to the Collector of Succession Duties for the province of Nova Scotia, the sum of $65,258.97, in which amount were included duties on the shares previously referred to. An amount of $17,897.92 was also paid to the Collector of Inland Revenue of the United States, being the Federal American taxes due on the transfer of said shares. The appellant, then claimed a refund from the province of Nova Scotia amounting to $14,347.09, and a stated case was submitted to the Supreme Court of Nova Scotia *en banc*. The question was the following:—

> Whether succession duty was leviable and payable for the use of the Province of Nova Scotia in respect to the property to which the said W. Herbert Brookfield was at the time of his death entitled or which passed upon his death by reason of the facts related in Paragraphs 5, 6 and 7 of the Stated Case herein?

The unanimous answer was that such duties were leviable and payable, and that the province of Nova Scotia was right in exacting the tax, and was not required to make a refund thereof.

I agree with the Supreme Court *en banc* of Nova Scotia (1), that the Royal Trust, as administrator, cannot base its claim for a refund on the ground that under the *Canada-United States of America Tax Convention Act,* (Statutes of Canada, 1944, chap. 31) the taxes are not due. I fully concur in the following statement made by Mr. Justice Doull:—

> I am of opinion that this convention can have no application to a question of *situs* arising under the Nova Scotia *Succession Duty Act.* I do not agree with the suggestion that the Dominion Parliament has power to change the Nova Scotia enactment, if such enactment is within the power of the Nova Scotia Legislature under the *British North America Act,* but in the present case, no such question arises for the convention by its terms deals only with "the tax imposed under the *Dominion Succession Duty Act.*" Equally true it is that while Canada is defined as the "Provinces, the Territories and Sable Island," the definition is only "in a geographical sense." The convention does not purport to affect any Provincial power.

But with due deference, I cannot agree with the court below on the second point.

The relevant section of the Nova Scotia *Succession Duty Act* is the following:—

> 8. Save as is hereinafter otherwise expressly provided the property on which succession duty shall be levied and paid under this Act at the rates hereinafter specified shall be as follows:—
>
> (*a*) all property situate in Nova Scotia which has passed as aforesaid or which passes as aforesaid on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere * * *

The words "property situate in Nova Scotia", mean property, and in the present case, "shares that can be effectively dealt with in Nova Scotia, as between the shareholders and the company". I am of the opinion that these shares purchased with the deceased's money, in which of course, he had a beneficial interest, issued in the name of nominees and endorsed by them in blank, cannot be dealt with in Nova Scotia, as between the shareholder and the company, but only in the United States, where are the share registers and transfer offices.

I would allow the appeal, but without costs here, or in the court *en banc.*

RAND, J.:—At the threshold of any consideration of the *situs* of shares of stock in relation to succession duty lie two

(1) (1948) 22 M.P.R. 140.

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recent rulings of the Judicial Committee. In *Brassard* v. *Smith* (1), the test of the local situation, the place where shares are to be taken to be situate, was enunciated in the question, where can they be effectually dealt with? In *Rex* v. *Williams* (2), this was declared to mean, dealt with as between the shareholder and the company. *Situs*, in other words, is at the *locus* of the controlling act from which the relation of shareholder immediately arises. As between transferor and transferee the test would be virtually useless since a shareholder can, speaking generally, effectively transfer the right to a share in any part of the world.

The latter judgment affirms certain other propositions relating to death duties imposed by Canadian provinces: first, that as between provinces, moveable or immoveable property transmitted owing to death can have only one local situation; that the *situs* of intangible property must be determined by some "principle or coherent system of principles" deducible from the common law of England; and that a provincial legislature is not competent to prescribe the conditions fixing *situs* for the purpose of defining the subjects of its taxing powers under section 92(2). The further rule was laid down that "the solution must be the same in this case (where there were two valid registries, one in Ontario and one in Buffalo, New York) as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec."

These pronouncements, re-affirmed in *Treasurer of Ontario* v. *Blonde* (3), treat mere transferability or merchantability of the right to become a shareholder, in the initial stages of the enquiry, as having little if any relevance to *situs;* but they recognize as matters of a determinative nature what the law creating the shares has provided to evidence their characteristics as property. Registration in a book and representation by a certificate are tangible badges which set conditions to complete transferability of the shares as well as facilitate dealings with

(1) [1925] A.C. 371.
(2) [1942] A.C. 541.
(3) [1947] A.C. 24.

them. If, as in the case of bearer shares, in analogy to bearer bonds, the issuing jurisdiction has in effect embodied in a certain instrument the exclusive symbol of the total rights created, then, certainly, as a rule, the *situs* is taken to be the locality in which the instrument may at any time be.

Mr. MacDonald's contention is that the merchantability of street certificates differentiates the case here from the previous controversies. His argument is this: a share certificate endorsed in blank by the registered holder and transferred to a purchaser by delivery has come thereupon to represent a separate unit of property consisting of the beneficial interest in the share coupled with a power in the bearer to become a shareholder, with the delivery of the certificate concluding the transaction between the parties; the right thus acquired, as against the company, to make a transfer of ownership on the registry satisfies the requirement that direct and immediate legal relations must arise between the transferee and the company as the result of acts done at the *situs*. The difference between the two cases is obvious: in the one a person is or can be made a shareholder by acts within the jurisdiction; in the other, by such acts he is clothed with power only to make himself a shareholder by means of his further acts outside: and the test remains unsatisfied. For his proposition, however, Mr. MacDonald has the support of *Stern* v. *The Queen* (1), and the question comes down to this: whether in a province under the rules laid down, the legislative situation is such as will permit the distinction to be acted on.

Under a law-making sovereignty the subject-matter of taxation may in fact be anything on which power can be exerted or in respect of which the payment of money can be made the condition of the doing of an act or exercising a right within its territorial boundaries. In the *Stern* case there were street certificates within England which were essential to an entry of transfer on the register outside of England; and the legislative authority of England extended in effect to restrain the use of those certificates until, or to charge other property admittedly in England with, the payment of certain monies related to them. Whether

(1) [1896] 1 Q.B. 211.

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these monies are taken to be probate or estate duties or legacy or succession duties does not, for purposes of jurisdiction in taxes, appear to be material.

But a province of the Dominion is not apparently in that degree of sovereignty. The power of "direct taxation within the province", interpreted as it has been by the authorities cited, is to be exercised on the footing that there is only one *situs* for every class of property and that that *situs* must be within the province. And for shares, there can be no such division of interests or powers in or annexed to them as would in the result attribute to them a *situs* in two or more places.

It is not suggested that the law of New York has embodied the visible and exclusive evidence of these rights in one tangible and moveable symbol to be looked upon and dealt with as a chattel as in *Attorney-General* v. *Bouwens* (1), and that being so, we are remitted to the considerations by which the shares are localized in the place where they may be effectually dealt with. But it is conceded that an entry of the purchaser's name on the registry of the shares in New York would be essential to admitting him to membership in the company and the case comes then directly within the principles laid down.

The appeal must, therefore, be allowed but as agreed without costs in both courts.

KELLOCK J., (concurred in by Estey J.):—The stated case shows that at his death on the 14th of November, 1944, the testator was domiciled and resided in Nova Scotia. Some time prior to his death the shares here in question, all common shares, were registered, pursuant to the instructions of the deceased, in the names of nominees of The Royal Trust Company, the share certificates being endorsed in blank. In every instance a "Declaration of Trust" was also executed by the nominee, stating that the shares were registered in the name of the shareholder as the nominee of The Royal Trust Company and that the certificates had been delivered to the Trust Company together with an irrevocable authority to collect and receive the dividends. It appears also that these certificates were

(1) (1838) 4 M. & W. 171.

so delivered pursuant to the direction of the deceased for safekeeping and management. They were therefore in the possession of the deceased through his agent.

The respondent contends that the case is not within the principle of the decision in *Rex* v. *Williams* (1), for the reason that although the deceased was the beneficial owner, he was not the registered owner. It is said that (1) in the case of certificates endorsed in blank, where the deceased was not the registered shareholder, the physical location of the certificates fixes the *situs* for succession duty purposes, their marketability there, according to the contention, being the determining consideration; and (2) that in any event the only property which passed on the death was a *chose in action* under a Nova Scotia trust.

The statute which is applicable is the *Succession Duty Act* of Nova Scotia, 9 Geo. VI, c. 7. By section 3, subsection 1, provision is made for the levying of a succession duty upon all property mentioned in the statute passing on the death of any person who has died on or since the 1st day of July, 1892. By subsection 2 "property passing on the death" is deemed to include for all purposes of the Act:

> (*a*) property of which the deceased was at the time of his death competent to dispose.

By section 2 (*b*) the expression "property" includes real and personal property of every description, whether tangible or intangible, and every estate and interest therein. By subsection 2 (*a*) of section 2, a person shall be deemed competent to dispose of property for the purposes of the Act:

> if he has such an estate or interest therein or such general power as would if he were *sui juris* enable him to dispose of the property.

In *Bradbury* v. *English Sewing Cotton Co.* (2), Lord Wrenbury said at page 767:

> A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation.

Certain rights or incidents are attached thereto, such as the right to attend meetings and to vote, etc.

In the case at bar the property passing on the death of the late Mr. Brookfield was, in my opinion, the full

(1) [1942] A.C. 541. (2) [1923] A.C. 744.

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beneficial interest in the shares and was not merely a *chose in action*. I think it unnecessary to say more as to the second branch of the argument.

Coming to the first branch, the deceased in *Rex* v. *Williams, supra,* an American citizen, domiciled in the state of New York, was the owner of certain shares of Lake Shore Mines Ltd., a company incorporated by letters patent issued under the *Ontario Companies Act*. The share certificates were at all material times physically located in the state of New York and they had been endorsed in blank by the testator. At the date of the death, the company had an office in Toronto and one in Buffalo, in the state of New York, at both of which transfers of shares might properly be made. The executors had taken out probate in the state of New York and subsequently ancillary letters probate in Ontario, where the testator possessed property apart from the shares. The question for decision was as to whether the testator's property in the shares was liable to succession duty in Ontario. It was held that the shares were not so subject, not being property situate in Ontario. In the course of delivering the opinion of the Board, Viscount Maugham referred to the earlier decision of the Board in *Brassard* v. *Smith* (1), where the rule was laid down that in cases where there is but a single province in Canada in which shares of a company may be effectively dealt with, i.e., where they can be transferred on the books of the company, the *situs* of the shares for fiscal purposes is in that province. At page 558 he said:

> The first observation is that the phrase used in laying down the principle clearly means "where the shares can be effectively dealt with as between the shareholder and the company, so that the transferee will become legally entitled to all the rights of a member", e.g., the right of attending meetings and voting and of receiving dividends.

In the circumstances present in the *Williams'* case, as already noted, the shares were transferable either in Ontario or in New York, and it was held that the presence of the certificates, endorsed as mentioned, in New York, was the determining element. As to whether a different rule applies as between two provinces than as between one or more provinces and a foreign country, their Lordships stated at page 559:

(1) [1925] A.C. 371.

They observe that the solution must be the same in this case as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec.

The same principle was applied in *Treasurer of Ontario* v. *Aberdein* (1).

The present problem differs from the problem presented by the facts in the *Williams'* case in that in the case at bar the deceased was not the registered owner.

In the *Williams'* case Viscount Maugham said at page 556:

> The rule laid down in *Brassard* v. *Smith* (2) would in practice be useless if the place where the certificates for shares were found at the time of the death should be taken to be necessarily the *situs* of the shares. Their Lordships have no hesitation in holding that the *situs* of the certificates is not, taken alone, sufficient to afford a solution to the present problem.

In adverting to the fact that the certificates in the *Williams'* case had been endorsed in blank, their Lordships said at page 557:

> This had the admitted result of making a delivery of the certificates with the endorsements signed in blank a good assignment of the shares, since it passed a title to the assignees both legal and equitable, with a right as against the company to obtain registration and to obtain new certificates; *Colonial Bank* v. *Cady* (3). It must be accepted, therefore, as a fact, that the certificates were currently marketable in the State of New York as securities for the shares, and that they were documents necessary for vouching the title of the testator to the shares.

Again at page 558:

> The late owner in the normal case was absolutely entitled to the shares as the registered owner of them in the books of the company, and, if resident in a country or province different from that in which the shares can be effectively dealt with, could nevertheless have sold the shares and completed the transaction by an attorney or otherwise.

In the present case the deceased, although not the registered owner, was in a position to deliver the certificates, endorsed in blank, to whomsoever he pleased and thereby to pass to his assignee the interest of the registered shareholder (*Colonial Bank* v. *Cady, supra,* per Lord Watson at 277) as well as his own interest, with a right as against the company to obtain registration and new certificates. It is difficult perhaps to see why, if the respondent's con-

(1) [1947] A.C. 24 at 31.
(2) [1925] A.C. 371.
(3) (1890) 15 App. Cas. 267.

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tention be correct, the ability of a registered owner to sell his shares and to satisfy his contract by delivering endorsed certificates, does not touch the question of *situs*, while the same capacity on the part of a beneficial owner has not the same effect.

In the *Williams'* case their Lordships went on to say at page 560:

> The certificates endorsed and signed as they were cannot be regarded as mere evidence of title. They were valuable documents situate in Buffalo and marketable there, and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario. On the testator's death his legal personal representatives in the State of New York became the lawful holders of the certificates, entitled to deal with them there. Any sale by them would be "in order", and the purchaser could obtain registration in the Buffalo registry. If we contrast the position in Ontario the difference is obvious. Nothing effective could lawfully be done there without producing the certificates * * * In a business sense *the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.*

In the case at bar the shares could be "effectively dealt" with only in some one or more of the United States. The transferee could not become "legally entitled to all the rights of a member" in Nova Scotia; see Viscount Maugham at page 558. It seems to me therefore that, in the circumstances of the present case, the mere fact that the shares were not registered in the name of the deceased does not render inapplicable the principle of the decision in *Rex* v. *Williams*. The certificates here in question all require the production of the certificate for the purpose of transfer.

The conclusion as above to which I have come was the conclusion arrived at in somewhat similar circumstances in the Supreme Court of the Irish Free State in *In re Ferguson* (1). In that case shares in a British company belonging to a person of unsound mind, which had been transferred into the name of the accountant of the Courts of Justice, were held to have their *situs* in England where the register of shareholders was located. The statute there considered was the Finance Act, 1894, the relevant provisions of which are all reproduced in the Nova Scotia statute set out above. The court applied the principle of

(1) [1935] I.R. 21.

Attorney-General v. *Higgins* (1), and *Brassard* v. *Smith*, *supra*, as well as *Erie Beach Co., Ltd.*, v. *Attorney-General for Ontario* (2). The argument presented in the present case on behalf of the respondent was rejected in *Ferguson's* case. Hanna, J., at page 49 says:—

> Mr. McCann distinguishes all these cases by the fact that in each of them the legal interest and the beneficial ownership were in the same person. In my view that cannot affect the position, even if we resort to the dissection of the legal situation as the Revenue Commissioners invite us to do. If the Chief Justice desired by an order to deal with the shares, it could not be effective save by operating upon the register in Great Britain where the property is situate and seeking in aid, if necessary, the jurisdiction of the British Courts. The executors also, in the final resort, must go to the register in Great Britain or appeal to the British Court. Accordingly, I think that the distinction drawn by Mr. McCann in this case does not effect the principle once the Court comes to the conclusion that it is the shares that pass.

Fitzgibbon J., at page 65 in delivering the judgment on appeal said:

> The law is summed up by Lord Merrivale, quoting from Baron Martin's judgment in *Attorney-General* v. *Higgins*: (3) "When transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares." The Revenue Commissioners can have no doubt that estate duty is payable in Great Britain upon these shares by reason of the death of Sarah Ferguson; it has been decided by us that it was the property in these shares that passed upon her death; and it follows that the respondents are entitled to an allowance of the sum paid in duty in Great Britain.

At page 66 Fitzgibbon J., also said in dealing with the same point:

> We do not agree with this contention, having regard to the circumstances in which the name of the Accountant came to be placed upon the registers, but in any event the decision of Eve J. in *In re Aschrott* (4), is an authority for the proposition that the same principles apply even when the name of the deceased person is not actually upon the register of shareholders at the time of his death.

In *Aschrott's* case the testator, a German subject, was entitled to stock, shares and securities in English, South African and American companies which had been purchased for him by certain German banks acting through their London agencies. The certificates were in all cases situate in London and the securities themselves were transferable in London at the outbreak of the war of 1914 and at the date of the testator's death in 1915. The securities were

(1) (1857) 2 H. & N. 339.
(2) [1930] A.C. 161.
(3) 2 H. & N. 339.
(4) [1927] 1 Ch. 313.

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held in large blocks by the London agencies and had not prior to his death been specifically allocated to the testator so that it would appear that none of the certificates were in his name. By virtue of the provisions of the Treaty of Peace Orders all the shares became charged with the claim of the Custodian of Enemy Property. The question for decision in the case was whether estate duty was payable on all or any of the securities which in turn depended, as put by Eve J., on the question "were these shares in companies registered in South Africa and America, but having offices in England where certificates could be produced, transfers passed, and the names of transferees entered on the register, property situate out of the United Kingdom?" It was held that the shares had their *situs* in England.

If it be the province where the shares are situate which has the constitutional authority to levy a succession duty upon the death of the owner, it seems past question that, upon the death of the person in Nova Scotia who is the registered shareholder but who is not the beneficial owner, if the register, of the company is situate in another province, say Quebec, the latter province would be entitled to levy succession duty in respect of nothing more than the interest of the nominee, i.e., the bare legal interest. The value of such interest would appear to be nominal only.

In the court below reliance was placed on the case *Stern* v. *The Queen* (1). In that case the testator died in England owning shares in foreign companies, the certificates being in England and standing in the names of persons other than the testator. Some were endorsed but some had not been at the time of the death. It was held that the certificates being currently marketable in England were liable to probate duty.

That case was decided upon a stated case which contained the statement, *inter alia,* that the delivery of a certificate endorsed by the registered owner in blank constitutes as between the parties to the transaction a good assignment of "the shares" both in law and in equity passing the title to the shares both legal and equitable. In giving judgment Wright J. said at p. 218:

> There is in this country * * * a document the existence of which vouches and is necessary for vouching the title of some one to the

(1) [1896] 1 Q.B. 211.

foreign share, so that in the absence of that document no one at all could establish a title to the share * * * It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary.

It would appear that the considerations which determined the decision were the existence of the endorsed certificates within the jurisdiction and their marketability there, together with the fact that as between transferor and transferee, the legal and equitable title to "the shares" was vested in the transferee.

Marketability as later laid down in the *Williams'* case "does not touch the question of *situs*", and the "*situs* of the certificates is not, taken alone, sufficient to afford a solution to the problem."

Unless the decision in *Stern's* case proceeded on the ground, apparently assumed by counsel in *Aschrott's* case at 317, and in *Blonde's* case at p. 27, that the shares in question in that case were transferable on branch registers in England, I cannot consider it a governing authority as to the *situs* of shares for the purposes of succession duty in one of the provinces of Canada where *situs* has been authoritatively determined to depend on the considerations already discussed and not mentioned in *Stern's* case.

In *Winans* v. *Attorney-General* (1), a case concerned with bonds, Lord Atkinson at page 35 treated *Stern's* case and *Attorney-General* v. *Bouwens*, as founded on a common principle, as did also Lord Gorell at pp. 38-39. At page 31 Lord Atkinson said:

> It is not disputed that the bonds are payable to bearer, are marketable in England, are not registred in the name of the deceased, nor is his name mentioned in them, are transferable in England by delivery, and that no act other than delivery need be done in or out of England to complete the title of *the transferee.*

All of this applies to the certificates here in question except the last, and the first and "leading" enquiry in the case of shares is the location of the place of transfer where the transferee will become *legally* entitled to all the rights of a member. That consideration is the same for the transferee whether or not he receives a certificate directly from the registered shareholder. In a case of shares as distinct

(1) [1910] A.C. 27.

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from the case of bearer bonds *Attorney-General* v. *Bouwens* has been determined not to be, but *Attorney-General* v. *Higgins,* the governing authority.

In the judgment in *Blonde's case* (1), Lord Uthwatt left open the question of the *situs* of "street certificates". Until a different rule is established by their Lordships in such cases however, my view is as above. Bearer share warrants are subject to different considerations. In such case the legislation usually provides that delivery of the warrant in itself effects a transfer of the shares without more.

I would allow the appeal. There should be no costs in this court or below.

Appeal allowed without costs.

Solicitor for the appellant: *Roland A. Ritchie.*

Solicitor for the respondent: *Thomas D. MacDonald.*