ROY A. HUNT, ALFRED M. HUNT, TORRENCE M. HUNT, ROY A. HUNT, JR., RICHARD McM. HUNT and MELLON NATIONAL BANK AND TRUST COMPANY ..... APPELLANTS;

1967 *June 6, 7 1968 Mar. 13

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Estate tax—Situs of company shares—Unpaid tax on estate of deceased non resident—Seizure of shares by writ of fieri facias in Exchequer Court—Company incorporated in Canada—Situs of shares for purposes of judicial execution—Exchequer Court Act, R.S.C. 1952, c. 98, s. 74—Estate Tax Act, 1958 (Can.), c. 29, ss. 38(e), 47.*

The estate of Mrs. H, who died in 1963 resident and domiciled in the United States, included a large number of shares of Aluminium Limited, a company incorporated under the *Companies Act* of Canada and having its head office and principal place of business in Montreal. The company maintained a register of transfers of shares in Montreal and also maintained branch registers in the United States, where the share certificates were physically situated. An assessment against the estate was not contested but the tax was not paid. A writ of *fieri facias* was issued out of the Exchequer Court, directed to the sheriff of the judicial district of Montreal. The seizure of the shares was then made. By a petition of right, the executors of the estate claimed that the seizure of the shares was invalid. The Exchequer Court dismissed the petition of right. The executors appealed to this Court where the sole question in issue was whether the shares were situated in Canada for the purposes of judicial execution.

*Held*: The appeal should be dismissed.

*PRESENT: Fauteux, Abbott, Martland, Ritchie and Hall JJ.

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The shares were validly seized. The true principles to be applied in this case were those set out in *Braun v. The Custodian*, [1944] S.C.R. 339. There was no valid reason why the same considerations should not apply to determine the situs of shares for the purpose of judicial execution as for the purpose of a dispute as to ownership. In both cases, the dominant consideration was the jurisdiction of the court to which the company was ultimately subject.

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*Revenu—Impôt successoral—Situs des parts d'une compagnie—Non paiement de l'impôt successoral d'un non résident—Saisie des parts par un bref de fieri facias émanant de la Cour de l'Échiquier—Compagnie constituée en corporation au Canada—Situs des parts pour les fins de l'exécution en justice—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 74—Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, arts. 38(e), 47.*

La succession d'une dame H, décédée en 1963 alors qu'elle avait son domicile aux États-Unis et y était une résidente, comprenait un grand nombre de parts de Aluminium Limited, une compagnie constituée en corporation en vertu de la *Loi sur les compagnies* du Canada et ayant son siège social et son principal établissement dans la cité de Montréal. La compagnie tenait un registre des transferts d'actions à Montréal et tenait aussi des registres annexes aux États-Unis, où les certificats des actions étaient physiquement situés. La cotisation du ministre n'a pas été contestée mais la taxe n'a pas été payée. Un bref de *fieri facias* a été délivré par la Cour de l'Échiquier, adressé au shérif du district judiciaire de Montréal. Les parts ont été alors saisies. Par une pétition de droit, les exécuteurs de la succession ont soutenu que la saisie des parts était invalide. La Cour de l'Échiquier a rejeté la pétition de droit. Les exécuteurs en appelèrent à cette Cour où la seule question à débattre était de savoir si les parts étaient situées au Canada pour les fins de l'exécution en justice.

*Arrêt*: L'appel doit être rejeté.

Les parts ont été validement saisies. Les principes que l'on doit appliquer dans cette cause sont ceux qui ont été énoncés dans *Braun v. The Custodian*, [1944] R.C.S. 339. Il n'y a aucune raison valable pour ne pas appliquer les mêmes considérations dans la détermination du situs des parts pour les fins d'une exécution en justice que pour les fins d'une dispute relativement à la propriété de ces parts. Dans les deux cas, la considération dominante est la juridiction de la cour à laquelle la compagnie est en fin de compte soumise.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1] sur une pétition de droit. Appel rejeté.

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APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

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[1] [1967] 1 Ex. C.R. 101, [1966] C.T.C. 474, 66 D.T.C. 5322.

*John de M. Marler, Q.C.*, and *R. J. Cowling*, for the appellants.

*D. S. Maxwell, Q.C.*, and *D. G. H. Bowman*, for the defendant.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment of the President of the Exchequer Court[1], rendered August 18, 1966, whereby it was declared that certain shares of Aluminium Limited were validly seized under a writ of *fieri facias* issued out of the Exchequer Court of Canada.

The circumstances giving rise to the present dispute are set forth in a statement of facts, agreed to by the parties. The late Rachel McM. M. Hunt died in the City of Pittsburg, Pennsylvania, on February 22, 1963. At her death she was domiciled in, and a citizen of, the United States of America. The appellants were named as Executors under her will, and probate of her will was granted to them on March 18, 1963.

At the date of her death, the late Mrs. Hunt owned 43,560 shares in the capital stock of Aluminium Limited. Aluminium Limited is a company incorporated under the *Companies Act* of Canada, and at all relevant times had its head office and principal place of business in the City of Montreal. Almost all of the meetings of directors, and all meetings of shareholders of Aluminium Limited, are held at the company's head office in the City of Montreal and the central management of the company is located there. At the date of death of the deceased, the company maintained a register of transfers of shares in its capital stock and all books required to be kept by it pursuant to s. 107 of the *Companies Act* in the City of Montreal. It also maintained branch registers of transfers in Pittsburg, New York, London (England), Toronto and Vancouver. The shares of Aluminium Limited were listed on the Montreal, Toronto, Vancouver, New York, Midwest, Pacific Coast, London, Paris, Basle, Geneva, Lausanne and Zurich Stock Exchanges. At the date of death, the share certificates relating to the shares owned by the deceased were physically situated in the City of Pittsburg.

[1] [1967] 1 Ex. C.R. 101, [1966] C.T.C. 474, 66 D.T.C. 5322.

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On May 14, 1963, estate tax, in the amount of $156,620.73, was assessed pursuant to Part II of the *Estate Tax Act,* Statutes of Canada 1958, c. 29. Under that Part, there is imposed an estate tax of 15 per cent of the aggregate value of property situated in Canada of a person domiciled outside Canada. For the purposes of Part II of the Act, the situs of shares in a corporation is deemed by s. 38 of the Act to be the place where the corporation is incorporated. Accordingly for the purposes of Part II of the *Estate Tax Act,* the shares of Aluminium Limited were deemed to be situated in Canada. No objection to the assessment has been filed pursuant to s. 22 of the *Estate Tax Act.*

On May 14, 1963, the Deputy Minister of National Revenue issued a certificate, alleging that estate tax in the sum of $156,620.73 was due, owing and unpaid by the Mellon National Bank and Trust Company, Executor of the Estate of Rachel McM. M. Hunt. This certificate was registered in the Exchequer Court. No objection is taken in this appeal to the issuance or registration of the said certificate which, under s. 41 of the *Estate Tax Act,* has the same force and effect as a judgment obtained in the Exchequer Court.

On May 14, 1963, a writ of *fieri facias* was issued out of the Exchequer Court and directed to the Sheriff of the Judicial District of Montreal who is, by virtue of s. 74 of the *Exchequer Court Act, ex officio* an officer of the said Court. The Sheriff took the steps appropriate to the seizure of the Hunt shares in accordance with the requirements of the writ.

By petition of right filed on June 6, 1963, and amended on June 21, 1963, the appellants claimed, *inter alia,* that the seizure of the said shares was invalid, and it is from the judgment of the Exchequer Court of Canada, dismissing the appellants' action, that this appeal is brought.

Before the Exchequer Court, the sole issue was whether the shares of Aluminium Limited were situated in Canada for the purposes of judicial execution under the processes of the Exchequer Court.

Following the judgment of the Exchequer Court, counsel for appellants advised counsel for respondent of his intention to contend before this Court that, whatever might have

been the situs of the shares, the writ of execution issued out of the Exchequer Court was not in the appropriate form and that it was therefore ineffective to seize the shares. At the argument before us, counsel for appellants was informed that, in the circumstances of this case, and applying the principles enunciated by Duff C.J. in *Dominion Royalty Corporation Ltd. v. Goffatt*[2], this point, as to procedure, cannot be entertained in this Court.

The sole question in issue before this Court is, therefore, whether the shares in question were property in Canada for the purposes of judicial execution. Three possible conclusions are open for consideration; either for purposes of execution (1) the shares were situate only in Canada or (2) they were situate in both Canada and Pennsylvania or (3) they were situate only in Pennsylvania.

The appellants can succeed only if they establish that the learned trial judge ought to have rejected the first two alternatives and adopted the third.

Counsel for appellants put his case squarely on the familiar line of cases which established the rule that, for provincial succession duty purposes, shares have a situs where they can be effectively dealt with: *Brassard v. Smith*[3], *Rex v. Williams*[4] and *Treasurer of Ontario v. Aberdein*[5].

Appellants' contention was that the situs of Mrs. Hunt's shares, for present purposes, was in the United States and particularly in Pittsburg, either because of the rule of situs laid down in *Rex v. Williams* and *Ontario v. Aberdein* or simply by reason of the physical location there of her share certificates.

In *Brassard v. Smith,* the shares in question there could be effectively dealt with only in Quebec. In the *Williams* case, as in the present case, the Court was faced with a situation where the shares could be validly transferred in more than one place. In *Williams,* the shares were validly transferable on registries in Ontario and in Buffalo, New York, so the problem arose that, for the purposes of provincial succession duty, one, and only one, local situs had

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[2] [1935] S.C.R. 565, 4 D.L.R. 736.

[3] [1925] A.C. 371, 38 Que. K.B. 208, 1 W.W.R. 311, 1 D.L.R. 528.

[4] [1942] A.C. 541, 2 All E.R. 95, 2 W.W.R. 321, 3 D.L.R. 1.

[5] [1947] A.C. 24, [1946] 3 W.W.R. 683, 4 D.L.R. 785.

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to be chosen. At page 558, Viscount Maugham, referring to the decision of this Court in *R. v. National Trust*,[6] said:

> In what their Lordships take leave to describe as a very luminous judgment of the Supreme Court Chief Justice Duff formulated as the result of the authorities certain propositions pertinent to the question of situs of property with which their Lordships agree. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. Secondly, situs in respect of intangible property must be determined by reference to some principle or coherent system of principles, and the courts appear to have acted on the assumption that the legislature in defining in part at all events by reference to the local situation of such property the authority of the province in relation to taxation, must be supposed to have had in view the principles deducible from the common law. Thirdly, a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under s. 92, sub-s. 2, of the British North America Act may be put into effect.

and at page 559,

> One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground.

The factor which impelled the Court to decide in favour of New York, rather than Ontario, was the existence in Buffalo, at the date of death, of certificates in the name of the testator endorsed in blank.

The passage which I have quoted makes it clear however that the rule followed to determine the situs of shares in issue in the *Williams* case does not necessarily apply to the situs of shares for the purposes of judicial execution. The Parliament of Canada can prescribe the situs of shares in federally incorporated companies. It has done so for estate tax purposes by the combined effect of s. 38(*e*), s. 47(1) and s. 47(4) of the *Estate Tax Act*.

In my opinion, the true principles to be applied in a case of the kind we are concerned with here are those set out in *Braun v. The Custodian*[7]. The question there was the situs of shares in the Canadian Pacific Railway Company, for the purpose of determining a dispute as to their ownership as between a purchaser from an alien enemy, and the Custodian of Enemy Property. The share certificates stood in the names of alien enemies, and were bought by Braun on the Berlin Exchange in October 1919. The shares were on the

[6] [1933] S.C.R. 670, 4 D.L.R. 465.

[7] [1944] Ex. C.R. 30, 3 D.L.R. 412; [1944] S.C.R. 339, 4 D.L.R. 209.

New York register of the company and transfers were registrable only in New York. The certificates had transfers on the back endorsed in blank by the registered owners. In April 1919, the shares had been made the subject of a vesting order under the Consolidated Orders Respecting Trading with the Enemy. In November 1919, Braun presented the certificates for registration in his name at the New York office. Registration was refused on the ground that the vesting order of April 1919 vested them in the Canadian Custodian. It was contended that the vesting order was a nullity on the ground that the situs of the shares was New York and that therefore no Canadian court could validly deal with them.

The Exchequer Court and this Court rejected this contention and held the shares to be situate in Canada.

In this Court, Kerwin J., as he then was, speaking for the Court said at p. 345:

> While ordinarily (in the present instance) the law of Germany would determine the effect of the contract to transfer the certificates, "the distinction", as Professor Beale points out in volume 1 of his Conflict of Laws, page 446, "between the certificate of stock and the stock itself is an important one. The latter has its situs at the domicile of the corporation and there only".
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> Here the situs of the shares, as distinguished from that of the certificates, was in Canada and the New York Uniform Stock Transfer Law, relied upon by the appellant, has no bearing upon the question. The fact that the Railway Company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, cannot make any difference. This was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company.
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> The appellant also relied on the decision of the Privy Council in *Rex v. Williams* (2). There the Province of Ontario attempted to collect succession duty upon shares of a mining company incorporated by letters patent under the Ontario *Companies Act* and which had two transfer offices, one in Toronto and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in New York and the share certificates themselves were physically located there. Viscount Maugham pointed out that "One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground" (p. 559); and further: "In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario" (p. 560). The considerations which apply to a discussion as to the situs of shares for provincial succession duty purposes where a provincial legislature is restricted to direct taxation within the province cannot affect the matter at present under review.

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I can see no valid reason why the same considerations should not apply, to determine the situs of shares for the purpose of judicial execution, as for the purpose of a dispute as to ownership. In both cases, the dominant consideration is the jurisdiction of the court to which the company is ultimately subject.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellants: Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.*

*Solicitor for the respondent: D. S. Maxwell, Ottawa.*