CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ULRIC BARTHE, ES-QUAL, (PLAINTIFF)..... } APPELLANT;

AND

DAME M. ALLEYN-SHARPLES AND OTHERS, (DEFENDANTS)..... } RESPONDENTS;

1919
*Nov. 14.
1920
*Feb. 3.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Constitutional law—Succession duty—Situs of property—"Direct taxation within the province"—B.N.A. Act, 1867, *s.* 92, *s.s.* 2—4 *Geo. V., c.* 10 (Que.)—*Art.* 6 C.C.

The Quebec Succession Duty Act (4 Geo. V., c. 10) imposes succession duties upon "all transmissions within the province, owing to the "death of a person domiciled therein, of movable property locally "situate outside the province at the time of such death."

Held that the statute is *intra vires* of the legislative authority of the province over taxation, conferred by subsection 2 of section 92 of the B.N.A. Act, the succession duty imposed being "direct taxation within the province."

Judgment of the Court of King's Bench reversed.

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*PRESENT:—Sir Louis Davies C.J., and Idington, Duff, Anglin and Mignault JJ.—

1919

BARTHE v. ALLEYN-SHARPLES.

The Chief Justice.

APPEAL From a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of Lemieux C. J. at the trial (1) and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lanctot K.C., *Geoffrion K.C.*, and *St. Laurent K.C.*, for the appellant.

Lafleur K.C., and *Gravel K.C.* for the respondent.

THE CHIEF JUSTICE.—The questions raised in this appeal are no doubt most important ones relating, as they do, to the power of the several provinces of Canada to levy succession and legacy duties on personal or movable property locally or actually situate outside of the province but owned at the time of his death by one domiciled in the province.

In the present case the property on which or the transmission of which it was sought to recover the duties consisted of intangible property, namely shares in companies whose head offices were outside of the province of Quebec.

The Superior Court, acting upon and applying the well known rule *mobilia sequuntur personam*, gave judgment for the plaintiff es-qualité for the amount of the duties levied and payable under the statute.

This judgment was reversed on appeal by the Court of King's Bench in a majority judgment of that court which held that

the powers of the provincial legislature are not plenary but limited to "direct taxation within the province"; (British North America Act,

(1) Q.R. 55 S.C. 301.

section 92, s.s. 2); and that any attempt to levy a tax on property locally situate outside the province is not taxation within the province and is beyond the competence of the provincial legislature; that the taxation of transmissions within the province of property locally situate outside the province is an attempt to do indirectly that which the Legislature is forbidden to do directly and is in effect taxation of property within the province; and that the property and shares in question in this case are locally situate and have a situs outside the province.

I agree with that part of this judgment which declares the powers of the provincial legislature not to be plenary but to be limited to "direct taxation within the province." And I further agree that the taxation of "transmissions within the province" of property locally situate outside is an attempt to do indirectly that which the legislature cannot do directly, but I differ from the conclusion reached by the court that the property and shares in question in this case are locally situate and have a situs outside of the province and so beyond the jurisdiction of the provincial legislature in levying succession duties. The judgment now in appeal ignores the application of the rule making the domicile of the deceased owner, in questions arising out of succession and legacy duties, the test of the situs of the property and shares in question and adopts that which allots the situs to the location of the head office of the respective companies and so carries this intangible property outside of the province of Quebec.

In an appeal case from the province of Nova Scotia, recently decided in this court, *Smith* v. *The Provincial Treasurer of Nova Scotia*, (1) this court held that to determine the situs of personal property liable to succession duties on the death of the owner the rule

(1) 58 Can. S.C.R. 570.

1920

BARTHE v. ALLEYN-SHARPLES.

The Chief Justice.

to be applied is that expressed in the maxim *nobilia sequuntur personam.*

That judgment was the subject of much consideration and all the authorities bearing upon the question there in issue were carefully studied.

I may say that owing to the grave and great importance of the question I have deemed it right in this appeal again to re-read all these authorities with the result that I am more firmly convinced than ever that, in construing the powers of "direct taxation within the Province" granted to provincial legislatures by our Constitutional Act, so far as the levying of succession and legacy duties are concerned, the true rule is that which existed alike in Great Britain as in the province of Quebec at the time such Act was passed, namely, that the domicile of the deceased owner of the property, and not its actual location at his death, determined which province could impose succession and legacy duties upon it. That rule is not applicable in the construction of statutes levying probate, and estate duties or other taxes, but is confined to succession and legacy duties. The whole question was thoroughly thrashed out and determined in the House of Lords, in the appeal case of *Winans* v. *Attorney General,* (1) where the rules respecting succession and legacy duties and estate and probate duties are clearly laid down and the reasons for the application of the *mobilia* rule to the two classes of duties, succession and legacy, are given and for its non-application to estate and probate duties. I was greatly tempted to embody in these reasons of mine some extracts from the judgments of the noble lords

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

who decided that case. They were unanimous in their reasons for the judgment they delivered in determining that so far as succession and legacy duties were concerned the domicile of the deceased owner, and not the local situation of the property, must be taken as the controlling factor. As Lord Atkinson said at page 32:

> In each case (namely legacy or succession duty) the same principle brings constructively the property within or carries it without the reach of the taxing statutes of this realm according as the domicile of its deceased owner is without or within the realm,

and, as he says on the same page,

> wide as is the language of the statute imposing them.

If that was the true rule applicable to ordinary imperial legislation, why should it not be applied to our constitutional Act? To my mind there is greater reason in so applying it to such a statute as ours creating a confederation of then existing and of future provinces in one dominion and delimiting their powers of legislation, than to ordinary statutes. The grounds upon which the rule of the domicile was first introduced are stated to be based upon convenience and international law. To my mind, such grounds afford the strongest reasons for construing our constitutional Act in accordance with the rule of the domicile so long and universally adopted.

I venture in conclusion to reproduce a paragraph from my reasons for judgment in the case of *Smith* v. *The Provincial Treasurer of Nova Scotia* (1), above cited.

> The broad ground on which that judgment rests is that the maxim *mobilia sequuntur personam* embodies the principle applicable to the succession of property of a domiciled decedent of any province of Canada for succession and legacy duties, as distinct from probate or estate

(1) 58 Can. S.C.R. 570, at p. 575.

1920

BARTHE v. ALLEYN-SHARPLES.

The Chief Justice.

duties; that in regard to those special succession and legacy duties the domicile of the decedent and not the physical or actual suits of the property must prevail; that this was the law in England decided in a series of cases before the "British North America Act" was passed and that the power of taxation within the province granted to the provinces in subsec. 2 of sec. 92 of that Act must be construed in accordance with the English law as it then was decided to be; that accordingly each province has the power of levying succession and legacy duties only upon the personal property passed by a domiciled decedent of the province, which either is locally situate therein physically or by virtue of the maxim "mobilia sequuntur personam" is drawn into such province by reason of the domicile; that while the Imperial Legislature itself or a colony possessing plenary powers of taxation could at any time overrule the principle embodied in the maxim (see *Harding* v. *Commissioner of Stamps for Queensland*), (1) the several provinces of Canada being limited in their powers cannot do so or by any enactment of their own enlarge or extend the powers of taxation granted to them by section 92 of the "British North America Act;" that any other construction of these powers of taxation would create endless, if not insuperable difficulties and would subject the same property to possible double liability to succession duty taxation, one in the province where the domiciled decedent owned the property and the other in which it was locally situated at his death. The result of my holding would be that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situate and that such taxation could only be levied by the province of the domicile.

For the foregoing reasons I would allow this appeal with costs and restore the judgment of the Superior Court.

IDINGTON J.—The question raised by this appeal is whether or not 4 Geo. V., ch. 10, is, as regards the taxation imposed thereby, *ultra vires* of the Quebec legislature.

The first part of the section in question reads as follows:

All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, shall be liable to the following

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

taxes calculated upon the value of the property so transmitted, after deducting debts and charges hereinafter mentioned.

This, contrary to the express language used, it is urged must be read as a taxation of property outside the province. I cannot so read it by any of the ordinary rules of interpretation and construction.

It is the transmission "within the province" by force of the laws enacted by the legislature of the province, in virtue of its exclusive jurisdiction under the British North America Act, sec. 92, over (item 13), "Property and Civil Rights in the Province," which clearly is dealt with, and not something else constituted by the theories of interpreters as a basis for their interpretation of this section.

The legislature, which is given thus the power to destroy, if it see fit, can surely take a toll upon that which its creative power confers.

It has not gone so far as to attempt to destroy the supposed right of successions but has, on the contrary, conferred that right by virtue of its laws and imposes as a condition of the assertion of such right the tax measured by a scale set forth.

We are so accustomed to assuming, which is not the legal fact, that the property left by a deceased person becomes, as a matter of course, that of some survivor named in a will, or statute of distributions, or other law of succession, that we forget that both will and succession of another sort are but the creation of the legislative powers over property and civil rights.

The right to tax the transmission is, in the last analysis, but the right to define to whom the property of a person domiciled in a country shall pass at the death of him so domiciled.

Such an exercise of the power of taxation is as direct

1920

BARTHE v. ALLEYN-SHARPLES.

Idington, J.

as anything can well be, and is certainly as direct as that imposed by the licensing of a brewer in Ontario to carry on his business, which was upheld by the Judicial Committee of the Privy Council in the case of *Brewers & Malsters Association for Ontario* v. *The Attorney General for Ontario.* (1)

It was argued therein that the licensing power was indirect and therefore *ultra vires.*

It has never been argued since, until recently, that the taxation of the exercise of any supposed right within a province was something so impalpable, indeed such a mere "abstract concept", that such taxation was unthinkable and hence impossible.

If that is a complete answer then I submit the imposition of a licensing tax as a preliminary condition to the carrying on of a business, or use of an automobile, for example, would seem to be thus left without any basis to rest upon.

If that sort of argument must prevail and be given effect to, then, of course, there can be nothing in the basis which I have suggested above for taxing transmission.

I hope it will not be necessary in order to demonstrate the existence of the fundamental basis of such a tax to repeal all laws of succession and begin anew.

We are asked to follow what has been properly designated by Mr. Justice Pelletier in the Court of King's Bench as only an *obiter dictum* in the case of *Cotton* v. *The King.*(2)

The judgment in that case proceeded upon the construction of the Act there in question, being by its terms confined to property within the province, and

(1) [1897] A.C. 231 (2) [1914] A.C. 176.

upon that ground alone it was held that the appeal must be allowed.

Then their Lordships proceeded to deal with another ground which, with great deference I submit, was not necessary or necessarily relevant to the decision of the case.

The fact that at least the members of the majority in this court had each written judgments resting partly or wholly on the right and power to tax a transmission of property by force of the laws of the province, apparently received no consideration.

For my part, I had with tiresome, probably too tiresome, reiteration presented that view of the case in many ways in *The King* v. *Cotton.*(1)

I, therefore, must refrain from enlarging upon it here, and refer the curious, (if any, in that regard), thereto and to the case of the *Standard Trust Company* v. *The Treasurer of Manitoba,* (2) wherein I presented the same views; I therein pointed out that if people could get property situated outside the province which had been that of a deceased person who had been domiciled at death in the province, without asking recognition of some provincial authority, or relying upon provincial law, then they might escape the tax. The case of *Woodruff* v. *The Attorney General of Ontario* (3) illustrates how it may be done by transactions *inter vivos.*

The judgment of the Judicial Committee of the Privy Council in the *Cotton case,* (4), above referred to, at page 195, contains the following paragraph.

> To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by exam-

(1) 45 Can. S.C.R. 469
(2) 51 Can. S.C.R. 428.
(3) [1908] A.C. 508.
(4) [1914] A.C. 176.

1920

BARTHE v. ALLEYN-SHARPLES.

Idington J.

ining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from someone who was not intended himself to bear the burden but to be recouped by someone else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

This seems to suggest the possibility of the production of the will and proof of its execution before the court in New York entitling the legatee to get possession and ownership of the securities there.

But, with great respect, I submit that neither was there in that case, nor is there in the present case, any evidence demonstrating as a practical possibility, such a course as outlined.

I am not prepared to say that, if it were proven that there was no other property than in the foreign state and that the laws of that state were of the unusual character which would permit such a proceeding in respect of the will of a testator domiciled in Canada, or other country outside of that state, such a mode of proceeding would be impossible.

If, however, as happens almost universally, the executor, in order to enable him to get possession of the goods, which were the property of his testator (and he can only get possession thereof by means of the law of that testator's domicile at death) is thereby under the necessity of applying to some authority created by a provincial legislature to give the necessary recognition of the right as defined by that law; or that law giving the right is so conditionally framed as to give rise to,

any right only upon due compliance with the taxing terms imposed; then he is surely bound to submit to the terms thereby imposed, and pay such tax as required as the price of such recognition. I hold that is very direct taxation.

The scale of its distribution is but another term of the conditions which the state conferring the right or assenting to the necessary recognition of it sees fit to impose, and, like many other subsidiary things such as involved in the due and convenient means of the execution of the business in hand, has nothing to do with determining the question of the constitutional right to impose such a tax. There is nothing save the question of that right involved herein

I may say that probably the fair construction to be put upon that above quoted is that it was not intended to assert, as matter of law, all that it seems at first blush to imply, but merely as an illustration of what is to be understood as direct taxation within the Act.

Assuming that to be all intended then, for the reasons I have already assigned, it does not fit this case or meet the argument I present which induces me to hold that the tax in question is most direct taxation, and much more clearly so than was the tax imposed in question in the case of the *Bank of Toronto* v. *Lambe*, (1)

I do not understand that the judgment in the latter case, or in any other (unless in the above-mentioned *Cotton Case*) (2) in which reference has been made to the definitions by John Stuart Mill of direct and indirect taxation, maintains them as a final determination of what must imperatively guide us in relation to any question arising from the taxing power conferred by the British North America Act upon the provincial

(1) 12 App. Cas. 575. (2) (1914) A.C. 176.

1920

BARTHE v. ALLEYN-SHARPLES.

Idington J.

legislatures. To impose such a test as obligatory and conclusive in all cases would, I submit, be productive of much mischief. Indeed the judgment in the said case of *Bank of Toronto* v. *Lambe* (1) expressly renounces at pages 581 and 582 any such test as obligatory.

The very able group of men who framed the British North America Act certainly had presented to their minds the actual case of customs dues, most frequently spoken of in those days as indirect taxation which then, apart from the others, such as revenues from wild lands, was the chief source of revenue on which the government of old Canada depended for carrying on.

In the scheme of government which they were concerned in framing, it was intended that all (except that in the special provisions of a temporary nature provided for in sections in ch. 8, under caption of Revenues, etc.) derivable from customs, should go to the dominion and be incidental to the regulation of trade and commerce, and that none of the provinces should be permitted to interfere therewith.

To render the chief indirect mode of taxation of the day an impossible source of revenue by way of taxation by any province, section 121 of the Act was enacted.

In contradistinction to that chief revenue derived from the customs dues, universally recognized as indirect taxation, the term "direct taxation" no doubt seemed appropriate for use in the section of the British North America Act in question herein, especially to designate other available taxation which, when thus confined within the province must of necessity be what in popular language would be presumed to be direct taxation.

(1) 12 App. Cas. 575.

That the framers of the Act designed, except in that sense, to impose therein upon the provinces an obligatory observance of the doctrine enunciated by any philosophic writer on economic questions, however eminent, I most respectfully deny.

To hold otherwise would be to assume, for example, that a tax upon land which on close examination is generally an indirect tax according to the definition quoted, though in the popular sense it is taken to be a most direct tax, and is imposed in some of our provinces.

Yet, according to Mill's definition, it would, I submit, if imposed here by clear headed men, be one of an indirect character, for assuredly in this country, under the conditions existent therein, such a tax would fall within the meaning of the definition of indirect taxation which he gives as follows:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs.

Despite my high regard for the author's work I doubt if the definition, resting upon intention and desire, is a very happy one. Some of the masters imposing a land tax might deem it direct and the clear headed see its beauty in its indirect character, though not always so.

I need not elaborate, or show how (whether expected or not) the possessor of land so taxed would inevitably succeed in reaping a return of taxes so imposed from those renting from him, or how in the case of business properties the tax would become further distributable.

Social conditions in countries where the possession of land adds so much to the importance of the possessor

1920

BARTHE v. ALLEYN-SHARPLES.

Idington, J.

that he may be averse to refrain from exacting the indemnity against such a tax and hence the definition, so far as relates to direct taxation, may be applicable to some lands; but here where land is held chiefly for what there is or is supposed to be in it, as a monetary investment, the result of imposing such a tax is certainly expected, by those possessing clear heads, to become so operative as to make a tax on land felt by him who as tenant occupies it for business purposes and thus impel him to distribute the burden over those buying his merchandise or manufactured goods.

I am not to be taken as assuming that, instantly such a mode of taxation may be adopted, the then possessor of land could in every instance be able to collect reimbursement of the tax from someone else, but ultimately such would be the manifest result in almost every case.

In those cases where the terms of the lease, as not infrequently happens, provide that the tenant pay all taxes the tax in the case of business properties would be almost instantly distributable in the way I suggest.

Even in the imposition of such an indirect tax as customs dues there are many instances as in its operation in the case of him importing for his own use where it becomes as direct as any tax can be and is not invariably distributable.

Again the taxation of land by municipalities had been and still is their chief source of revenue.

Another source of their revenue, especially in Ontario, then Upper Canada, was the taxation of commodities which is classed by political economists as indirect taxation. And so it continued for thirty-four years after the British North America Act had

been enacted and then was changed as to form into the business tax.

As illustrative of the mode of thought, on the subject of taxation, prevalent in old Canada, at the time when the constitution of a joint authority for the general purposes of its government, coupled with a separate legislature for each of the provinces of Upper and Lower Canada, was first mooted, and there arose an agitation therefor which culminated some eight years later in the wider scheme presented by the British North America Act we may profitably turn to Upper Canada's Assessment Acts.

The Consolidated Assessment Act of Upper Canada (passed in A.D. 1859) in section 8 reads as follows:

> 8.—All municipal, local or direct taxes or rates, shall, when no other express provision has been made in this respect, be levied equally upon the whole ratable property, real and personal, of the Municipality or other locality according to the assessed value of such property, and not upon any one or more kinds of property in particular or in different proportions.

The substance thereof was taken from an Act passed six years earlier and the exact language used was adopted in section 8 of another new assessment Act passed in the year 1866.

The phrase "local or *direct* taxes or rates" evidently had no relation to theories of writers such as Mill on political economy, for each of these several Acts provided for the imposition of taxes on commodities which according to such theories would be indirect taxation.

I present its use as a fair sample of the Canadian mode of thought in relation to the question of what must have been intended by the words "direct taxation within the province" as used in the item No. 2 of

1920

BARTHE v. ALLEYN-SHARPLES.

Idington J.

section 92 of the British North America Act, now to be applied herein.

Quite true that basis of taxation to which I refer was only used for purposes of municipal revenue and not for those provincial revenues now in question. Yet its adoption when expressly designated as "direct tax" suggests how little the framers of this Act, knowing of and having regard to the possibilities of the future possible variation in such municipal assessment Acts by the legislatures they were calling into being, had regard to mere economic theories in using the term "direct taxation within the province," for the master spirits among them had taken part in enacting these municipal assessment Acts.

Is it conceivable that it was intended to give to the creations, prospectively in the power of provincial legislatures, as all municipal institutions were to be and to become liable to be in fact increased by them in importance, and taxing power, and assigned wider powers of taxation than each of such legislatures was being assigned for its own purposes? Or, is there to be applied the still more absurd alternative, that thenceforward all taxation, which political economists of the time deemed to be indirect, were to be eliminated from municipal taxation?

I hold neither of these alternatives should be adopted as expressive of the intention of those using in the British North America Act the term "direct taxation" to limit the operation of the power so conferred, to the meaning of the word "direct" within the lines laid down by any political economist.

This is not the place for an essay on the subject.

I merely desire to point out how dangerous it is to question the authority to tax land as a source of

provincial revenue, and how thoroughly illusory must be the dependance, solely upon some of the best of philosophic theories in political economy, as the only or even chief means of interpreting the language used by very able and practical statesmen in framing this division of the powers of government.

And let us never forget that the home parliament in that enactment was but trying to correctly appreciate and execute the purposes dictated by the then mode of Canadian thought, and that the expressions therein ought to be interpreted as far as possible in accord therewith.

No Canadian who lived through those strenuous times is likely ever to discard that point of view unless and until by due constitutional methods another has been substituted therefor.

I admit that whilst rejecting such guiding lines in the sense of their being obligatory and finally determinative of any such question as raised herein, they may well be casually as it were, considered as an element proper for consideration along with other possible features, in the way which has been done in some of the cases in which they have been used or incidentally referred to.

To sum up: The purpose of the provision now in question was to assign to each province the direct use "within the province" of the taxing power, just as fully as possessed by any other autonomous state, in relation to all those subjects or subject matters assigned exclusively to the several provincial legislatures; saving the use of those taxing powers which were being assigned either expressly or by clear implication, exclusively to the Dominion Parliament. That parliament had, subject thereto, for any of its purposes,

1920

BARTHE v. ALLEYN-SHARPLES.

Idington J.

specifically assigned to it any mode or system of taxation.

The legislature of the province of Quebec is exercising or asserting the right to exercise just such powers as other states have, so far as relevant to the particular subject matters in question, assigned to its exclusive jurisdiction.

Whether or not the power is justly asserted in some cases is not for us herein to determine or perhaps even to pass upon, for we cannot remedy the possible evil of double, or possibly double, taxation. Yet I may be permitted to suggest that an examination of the doctrine of private international law, by which the domicile of the deceased has been made the basis of so much, as grouped in the judgment of Lord Chancellor Westbury in *Enohin* v. *Wylie*, (1) it might and possibly may for the purpose of avoiding such an undesirable result, determine the line to be observed.

Sovereign states may be doing the very same thing. If this assertion of power on their part is unjust, the remedy is to be sought by other means than a denial of jurisdiction to our provinces, which would only help to perpetuate the evil by handing over to foreign states alone the determination of a just or unjust basis for settling such questions.

I feel that I may profitably add a few words relative to *Smith* v. *The Provincial Treasurer of Nova Scotia*, (2) which seems, I respectfully submit, to have led to some confusion of thought herein.

I may be permitted to point out that in some of the provincial legislation which has come before this court in the attempts to deal with the problem of succession duties, the legislature has failed to use such approp-

(1) 10 H.L. Cas. 13. (2) 58 Can. S.C.R. 570.

riate and comprehensive language as lies in the meaning of the words "transmission within the province."

Hence in trying to get at their meaning resort has had to be had to the appropriate legal maxims and decisions and other statutes to see if when applied to the words used they can be held to comprehend such transmission as taxable by another name.

In like manner, by reason of probate not being always needed in Quebec, the illustrations drawn from decisions relative to the imposition of a probate duty, may not be so apt when applied to a Quebec case as in those arising elsewhere. Yet as perhaps the earliest and most apt illustration of what might be meant by taxation within a country and made the basis of a direct tax, decisions resting upon a probate duty are serviceable. The relative amount of the tax imposed does not affect the principles upon which it rests or the right to impose it.

The mere name seems to some persons to signify everything and hence whilst recognizing a probate tax as valid, they refuse to so recognize a tax resting upon same basis when called a succession or death duty tax.

As an instrument of government the British North America Act requires not only attention to the genesis of the frame thereof, and the growth of the law which it recognizes as existent, but also the application of a wider vision and more comprehensive and accurate grasp of what is thereby dealt with than is evident in such distinctions.

Is it necessary to call this tax on transmission a probate duty in order to render it effective? And, to make it clear that it is a direct tax, for provincial revenue purposes, is it necessary to take all that which probate or other like courts deal with under the direct

1920

BARTHE v. ALLEYN-SHARPLES.

Idington J.

supervision of provincial government? I think not. Let us grasp the realities even though presented in the garb of what seem to the court below to be a mere "abstract concept" for the authority endowed with the taxing power is apt and entitled to be fertile in resources for the mode of its exercise.

I think the appeal should be allowed with costs.

DUFF J. —This appeal raises a question which in this court was supposed to be represented by the appeal in *Cotton's Case* (1). The discussion was, in that case, without practical effect because it was held in the Privy Council that it all proceeded upon an erroneous hypothesis respecting the scope and meaning of the statute under consideration.

The question concerns the authority of the province when professing to exercise the legislative power conferred by section 92, paragraph 2, of the British North America Act, the power, that is to say, to

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

and is whether by virtue of this authority the province can exact death duties payable in respect of the transmission of personal property upon the death of a person domiciled in the province, notwithstanding the fact that such personal property has a situs outside the boundaries of the province.

In *Cotton's Case* (1) I gave my reasons for thinking that this question ought to be answered in the affirmative. I still think that those reasons afford adequate ground for that conclusion and I shall, of course, not repeat them now. But there are one or two points I should like to emphasize.

(1) 1914 A.C. 176.

One of these is the fact that by a practice almost uniform in common law jurisdictions—a practice embodied in the law of Quebec by statute in 1866—the law of the situs takes (as regards movables) its rules of succession from the law of the domicile; that this practice had for a long time been in force at the time of the passing of the British North America Act, and further that the existence of this practice is and has been generally held to be a sufficient ground for considering that the legislative authority of the domicile is acting within its proper sphere in levying duties upon the beneficial surplus of all movables, wherever situate, comprised in the succession.

Strictly, of course, where the situs is outside the territory of the domicile, the law of the domicile has no operation within the territory of the situs and the beneficiary who acquires an interest in, e.g., a tangible chattel having such a situs acquires nothing directly through the law of the domicile; but it would not be difficult to furnish a list of authorities to show that lawyers as well as legislators have persistently refused to treat these matters from this point of view exclusively.

Emphasis is sometimes laid upon the fact that the benefit is a benefit derived from the law of the domicile, see, e.g., *Wallace* v. *Attorney General*, (1) per Lord Cranworth. In other cases *mobilia sequuntur personam* and the ascription of a notional situs to the movable succession at the place of the domicile is treated as the ground of jurisdiction, as by Lord Herschell in *Colquhoun* v. *Brooks* (2).

And the sum of the matter is admirably stated by Mr. Justice Homes in *Bullen* v. *Wisconsin* (3).

(1) 1 Ch. App. 1. (2) 14 App. Cas. 493 at p. 503.
(3) 240 U.S.R. 625, at p. 631.

1920

BARTHE v. ALLEYN-SHARPLES.

Duff J.

The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession it would be recognized that by the traditions of our law the property is regarded as a universitas the succession to which is incident to the succession to the persona of the deceased. As the States where the property is situated if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile.

These principles have been considered to be validly applied in the fiscal legislation of a colony. *Harding* v. *Queensland* (1); *Re Tyson* (2); and there can be no doubt, I take it, that prior to confederation the old province of Canada or the province of Nova Scotia could have enacted such legislation validly.

In *In re Tyson* (2) Griffith C.J., said at p. 37:

It was contended that such legislation was beyond the province of a colonial legislature. The powers of the legislature of this colony, at any rate, have only one fetter. That is to say, their legislation only extends within their boundaries; but as international law treats the personal property of persons who die domiciled in Queensland as being in Queensland, it is no transgression of that rule to pass an Act providing that duty shall be payable upon it. In another sense there is, of course, another fetter on the legislative powers of the colony, and that is that the colony may not make a law which is directly contrary to a law of the United Kingdom extending to Queensland. Beyond these two I do not know that there is any limit at all, and we have to enforce the laws as we find them.

When this practice is considered and the words "taxation within the province" are read in the light of it, they must, I think, be held to be comprehensive enough to authorize the enactment of such legislation.

There is a broader ground upon which it might be forcibly contended that such enactments when passed by a Canadian province can be sustained. I think the words "within the province" are capable of being

(1) [1898] A.C. 769. (2) 10 Queensland L.J. 34.

read as merely declaratory of the principle that legislation of a provincial legislature enacted under the power conferred is operative only within the territorial limits of the province. The words "within the province" it may be observed, are not to be found in the Quebec Resolutions; and these Resolutions may properly be looked at for the purpose of construing ambiguous expressions in the British North America Act; *Eastman Co.* v. *Comptroller General* (1).

The language of the paragraph in the Quebec Resolutions upon which the second paragraph of section 92 is founded assuredly affords no indication that the provinces who agreed to the resolutions had any intention of restricting the existing power of direct taxation or of accepting a grant of power of direct taxation more restricted than the existing power; the reservation of the right to levy certain export duties appears to have been a concession to one of the provinces which was eventually abandoned.

Some support for this interpretation might perhaps be found in the *Bonanza case.* (2). Their Lordships appear in that case to have held in effect that the office of the words "with provincial objects" in No. 11 of section 92 is not to delimit a class of companies (companies with provincial objects) for the incorporation of which the provinces are empowered to legislate; but that these words were inserted for the purpose of making it clear that companies incorporated in the execution of this power—while within the province they enjoy such powers and rights as they possess by virtue of provincial legislation—can acquire and enjoy powers and rights beyond the province only by force of extra-provincial recognition

(1) [1898] A.C. 571 at pp. 573-4. (2) [1916] 1 A.C. 566.

1920

BARTHE v. ALLEYN-SHARPLES.

Duff J.

or grant; in other words, the phrase "for provincial objects" merely denotes that in legislating upon the subject "incorporation of companies" the province legislates for the province alone. See pp. 578, 583-4.

In this view subject to the condition implied in the words "direct taxation" and subject to any exemptions established by the Act the legislative power of the province in respect of taxation would only be limited by virtue of the principle that it is a power to make laws on that subject for the province and would not be less ample than the power possessed by the provinces before the Union.

The other question requiring from me a single observation concerns the topic of "direct" and "indirect" taxation. I think Lord Moulton's reasoning does not apply to the provisions of the statute as they now stand. The notary, executor, etc., is only responsible in his representative capacity and then only to the extent of the property of the defaulting beneficiary in his hands against which judgment can be executed. He is treated as custodian and compelled to deliver up the keys.

In *In re Muir Estate* (1) I stated too broadly as I now conceive it, the effect of the judgment in *Cotton's Case* (2) although the statute then discussed was within the principle of *Cotton's case* (2) since the executor or administrator was made personally responsible in the first instance for the payment of the duty to the extent of the assets of the estate coming into his hands.

The appeal should be allowed.

ANGLIN J.—Amongst other assets the estate of the late Honourable John Sharples, who died domiciled in

(1) 51 Can. S.C.R. 428. (2) [1914] A.C. 176.

the province of Quebec, in July, 1913, comprised shares in various companies (most of them foreign) whose head offices were not in that province, of which the aggregate value was $213,039.75. The defendant Margaret Alleyn-Sharples is the universal legatee in ownership. The plaintiff, as collector of provincial revenue, sues to recover succession duties in respect of this property.

Art. 1387 (b) of the R.S.Q., as enacted by 4 Geo. V., c. 10, reads as follows:

> 1387 (b). All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned.

In the French text for the phrase "locally situate" we find the single word "situés." The only possible question of construction arises on these words. If they do not exclude property having no physical situs, the intention to impose taxation on, or in respect of, the property in question is indisputable.

In *Cotton* v. *The King*, (1) the phrase "locally situate" is applied to such property (pp. 186 and 188). For convenience I refer to my discussion of it in the same case.(2) In the case of tangible property it no doubt means "physically situate;" in the case of intangible property I regard it as intended to denote the attribute of locality which such property possesses according to some recognized rule of law, such as those applied in *Lovitt's case* (3) and in *Smith* v. *Provincial Treasurer of Nova Scotia* (4) respectively.

Of the assets in question 14 shares of the capital stock of the Northern Crown Bank, valued at $1,190,

(1) 1914 A.C. 176.
(2) 45 Can. S.C.R., 469, at p. 521.
(3) [1912] A.C., 212, at p. 218.
(4) 58 Can. S.C.R., 570.

1920

BARTHE v. ALLEYN-SHARPLES.

Anglin J.

and 1,227 shares of the capital stock of the Union Bank of Canada, valued at $169,326, would, according to the opinion of the majority of this Court in the *Smith Case* (1) (Davies C.J., Idington and Brodeur JJ; the Chief Justice, however, acceding to this view only if "the domicile of the decedent is (not) the determining factor") have their situs at the place in the province of Quebec where the same were registered and transferable, which would render them subject to taxation under Art. 1375 of the R.S.Q., as enacted by 4 Geo. V., c. 9, unless excluded from its operation by the restrictive description "actually situate"—réellement situé"—of Art. 1376 of the R.S.Q.

The situs of the rest of the property in question, however, is admittedly foreign, unless the maxim *mobilia sequuntur personam* should be deemed to give it a situs in Quebec for purposes of succession duty taxation. Indeed the plaintiff makes no claim that any of the property in question falls within Art. 1375 R.S.Q. On the contrary, it is common ground that, if taxable at all, it is under Art. 1387 (b) R.S.Q., and as

movable property locally situate outside the province.

We are therefore once more confronted with the question whether the imposition of succession duties in respect of such property is within provincial legislative jurisdiction—is "direct taxation within the province."

In the present Quebec statutes some features found by the Judicial Committee in the former legislation and held in the *Cotton Case* (2) to render it obnoxious as imposing indirect taxation have been carefully eliminated, or, to speak perhaps with greater precision, their

(1) 58 Can. S.C.R. 570. (2) [1914] A.C. 176.

existence has been expressly negatived. (Arts. 1387 (g) and 1380 R.S.Q.) For the present the views enunciated by their Lordships as to the indirectness of the taxation imposed by the former legislation must be loyally accepted; but, may I say with deference, it will not occasion surprise in this country if, whenever it may again become necessary to delimit the federal and provincial legislative jurisdiction in this field, some of them, based on what, with respect, seems to have been a misconception of the provisions of the Quebec statutes, may be dealt with by their Lordships, somewhat in the same way as they dealt in *Cotton's Case* (1) with the reasoning of Lord Collins in *Woodruff* v. *Attorney General for Ontario*. (2) The taxation here in question is in my opinion direct. When not paid by the beneficiary intended ultimately to bear it, the tax is payable only out of property to which he is intitled in the hands of the executor, trustee or administrator. It falls within Mill's classic definition, the applicability of which to the phrase "direct taxation" in s. 92 of the British North America Act their Lordships have said "is no longer open to discussion." P. 193.

I adhere to the opinion that the words "within the province" in s. 92 (2) of the British North America Act were intended to be restrictive of the right of taxation of each provincial legislature so as to prevent its trenching on the like exclusive right of the legislature of any sister province or upon the domain of a foreign state, just as the word "direct" was designed to preserve intact for the Dominion Parliament the field of indirect taxation. One purpose of the restriction imposed by the words "within the province" was, in my opinion, to preclude

(1) [1914] A.C. 176 at p. 193. (2) [1908] A.C. 508.

1920

BARTHE v. ALLEYN-SHARPLES.

Anglin J.

identical taxation of the same subject in two or more provinces; and this limitation of legislative power cannot be frustrated by any attempt to change the situs of property by declaratory legislation, or to disguise the nature of the taxation really imposed by giving to it a name not properly descriptive of it, or by a disclaimer of an intention to exceed statutory powers.

Personally I remain of the opinion which prevailed in *Woodruff's Case*, (1) that imposing the tax on the transmission of movables "situate outside the province"—"on the devolution or succession," as Finlay A.G., there put it *arguendo*,

> involves the very thing which the legislature has forbidden to the province—taxation of property not within the province (p. 513),

that the real incidence of the tax rather than the form given it must be considered in determining whether it is or is not taxation within the province and that s. 92 (2) of the British North America Act should be taken to authorize taxation

> only where the real subject of the tax—whether person, business or property—is within the province.

—and I cannot add anything to the statement which I made in the *Cotton Case* (2) of the arguments that seem to me to warrant those views.

In the recent case of *Smith* v. *Provincial Treasurer of Nova Scotia* (3) without explicitly saying so I deferred to what I conceived to be the condemnation of them implied in the Judicial Committee's comment in *Cotton's Case* (4) on the *Woodruff Case* (1) and in the fact that the judgment of their Lordships proceeded on the ground of indirect taxation, rather than on the

(1) [1908] A.C. 508.
(2) 45 Can. S.C.R. 469.
(3) 58 Can. S.C.R., 570.
(4) [1914] A.C. 176 at p. 196.

foreign situs of the property which was most strongly pressed by the appellants. I had perhaps failed in the *Standard Trusts Co.* v. *Treasurer of Manitoba* (1) to give to this virtual overruling of *Woodruff's Case* (2) so far as it affected successions the full weight to which further consideration led me to think it entitled. Thus accepting what I conceived to be the opinion of the Judicial Committee that provincial legislation imposing succession duties on foreign movables of a domiciled decedent was not *ultra vires*, I endeavoured in *Smith's Case* (3) to state what, from my point of view, were the most plausible arguments in support of the applicability of the maxim *mobilia sequuntur personam* in justification of such legislation.

In the present case the transmission itself admittedly took place under and by virtue of Quebec law and in that sense "within the province." If the transmission may be regarded as the subject thereof, the taxation would clearly be within provincial legislative jurisdiction. There is no doubt a body of authority, much of it conveniently collected in a recent American publication cited by the appellant, Gleason & Otis on "Inheritance Taxation," in favour of that view. But, unless *Lambe* v. *Manuel*, (4) may be so considered (I think it cannot) no English authority has been cited for it.

But whether the tax now in question should be regarded as imposed on the transmission itself or on the property on the occasion of its transmission, it is unquestionably a succession duty in the strict sense of that term as understood in England. This Court has so recently held in *Smith* v. *Provincial Treasurer*

(1) 51 Can. S.C.R., 428.
(2)]1908] A.C. 508.
(3) 58 Can. S.C.R. 570.
(4) [1903] A.C. 68.

1920

BARTHE v. ALLEYN-SHARPLES.

Anglin J.

of Nova Scotia, (1) that it is competent for a provincial legislature to impose such duties on the movables of a domiciled decedent situate outside the province that further examination of that question here seems futile—if, indeed, it is not entirely precluded. Following that decision therefore, I would allow this appeal with costs here and in the Court of King's Bench and would restore the judgment of the learned Chief Justice of the Superior Court.

MIGNAULT J.—This is an appeal by the collector of provincial revenue for the district of Quebec, in the province of Quebec, from the judgment of the Court of King's Bench (appeal side), which reversed the judgment of the Superior Court (Lemieux C.J.) (2) and dismissed the action which the appellant had taken against the respondents in recovery of $14,828.46, for succession duties and interest alleged to be due on shares of the aggregate value of $213,039.75 in a large number of companies whose head offices are outside the province of Quebec. The respondent, Mrs. Sharples, is sued as well personally as in her quality of testamentary executrix of the late Honourable John Sharples, in his lifetime of the city of Quebec, and the other respondents are sued as executors of the said Honourable John Sharples, and the prayer is that Mrs. Sharples, personally, be condemned to pay the said sum, and that the judgment be declared executory against all the respondents, in their quality of executors, on the property or moneys in their possession belonging to the beneficiaries of the succession of the late Mr. Sharples.

(1) 58 Can. S.C.R. 570.

(2) Q.R. 55 S.C. 301.

The Superior Court, (1) applying the rule *mobilia sequuntur personam* gave judgment to the plaintiff, but this judgment was reversed by the Court of King's Bench for the following grounds, the Chief Justice and Carroll J. dissenting:

Considering that the powers of the provincial legislature are not plenary but limited to "direct taxation within the province" (British North America Act, section 92, s.s. 2), and that any attempt to levy a tax on property locally situate outside the province is not "taxation within the province" and is beyond the competence of the provincial legislature.

Considering that the taxation of transmissions within the province of property locally situate outside the province is an attempt to do indirectly that which the legislature is forbidden to do directly and is in effect taxation of property not within the province.

Considering that the property and shares in question in this case are locally situate and have a situs outside the province.

Considering that there is error in the judgment appealed from, to wit, the judgment of the Superior Court sitting in and for the District of Quebec herein rendered on the twenty-second day of November, 1918, maintaining the action of the Respondent es-qualité:

The Court doth maintain the appeal, doth reverse the said judgment appealed from, and now giving the judgment which the Superior Court ought to have pronounced, doth declare the statute 4 Geo. V., ch. 10, upon which the present action is founded, to have been and to be ultra vires of the Quebec legislature and doth dismiss the action of the respondent es-qualité with costs in the Superior Court and costs of the appeal against the respondent es-qualité in favour of the Appellants.

The legislation in question is contained in three statutes passed in 1914 by the Quebec legislature, being chapters 9, 10 and 11 of 4 Geo. V.

Chapter 9 imposes succession duty on property movable and immovable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, and it defines "property" as including

all property, movable or immovable actually situate (in the French version, "réellement situé") within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased

(1) Q.R. 55 S.C. 301.

1920

BARTHE v. ALLEYN-SHARLES.

Mignault J.

at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

Chapter 10 imposes succession duty upon

all transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province (in the French version "biens meubles situés en dehors de la province") at the time of such death.

It also states that

all debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province, are included in the movable property taxable in virtue of this section.

Chapter 11 is a declaratory statute, the object of which is to declare that these taxes are direct taxes within the meaning of section 92 of the British North America Act. I do not think that this statute need be further considered, for if these taxes are really indirect taxes, the express declaration that they are direct would not change their nature.

Taking now the scheme of taxation adopted by the Quebec legislature as a whole, it taxes:—

1. All property, movable and immovable actually situate ("tout bien mobilier ou immobilier réellement situé") within the province, the ownership, usufruct or enjoyment whereof is transmitted owing to death, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein, the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province (chapter 9);

2. All transmissions within the province, owing to the death of a person domiciled therein, of movable

property locally situate outside the province at the time of such death, including all debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province (chapter 10).

It is of course obvious that the rule *mobilia sequuntur personam*—which is laid down as a general rule subject to certain exceptions by Article 6 of the Quebec Civil Code—may be excluded by the use of apt and clear words in a statute for the purpose (per Lord Robson in *Rex* v. *Lovitt* (1). I cannot help thinking that this has been done by these two statutes, the first of which taxes property, movable and immovable, *actually* situate within the province, and the second imposes the tax on the transmission within the province of movable property *locally* situate outside the province. In other words, the actual or local situation of movable property, rather than its situation by virtue of the rule *mobilia sequuntur personam*, is considered for the purpose of succession duties. This would suffice to distinguish this case from *Smith* v. *The Provincial Treasurer for Nova Scotia.*(2)

The Court of King's Bench holds that the province cannot tax property situate outside the province, and that to tax the transmission within the province of property locally situate outside is an attempt to do indirectly that which the legislature is forbidden to do directly and in effect is taxation of property not within the province.

This reasoning involves a major and a minor proposition. The major proposition, that the province cannot tax property outside the province, is in my opinion self evident. The minor proposition that the

(1) [1912] A.C. 212, at p. 221.
(2) 58 Can. S.C.R. 570.

1920

BARTHE v. ALLEYN-SHARPLES.

Mignault J.

province cannot tax the transmission within the province, by succession, of property locally situate outside, and that such taxation is equivalent to taxing the property itself, appears to me very questionable. The transmission is not something that cannot be distinguished from the property transmitted. It is a right, derived under the law of the province, to succeed to property left by a testator or an intestate, and the province which grants this right can require the payment of a tax as a condition of its grant, such tax being a tax imposed not on the property itself but on the right to succeed to it.

I may add that the taxing of the transmission, as distinguished from a tax imposed upon the property transmitted, has been the outstanding feature of all the Quebec Succession Duty statutes since 1902, chapter 9 of the statutes of 1914 being the first statute to tax the property transmitted, while in chapter 10 we find the familiar form of a tax imposed upon the transmission. The Quebec civil code moreover distinguishes between the transmission and the property transmitted, the term succession being supplied to either (Art. 596 C.C.) and there is no doubt in my mind that they are entirely distinguishable.

The only other observation I desire to make on this branch of the case is that the Quebec statutes differ essentially from the Manitoba Succession Duty law, considered by this court in *Standard Trust Co.* v. *Treasurer of the Province of Manitoba.* (1) This Manitoba statute (4 & 6 Ed. VII, ch. 45, sec. 4) expressly renders subject to succession duty movable property locally situate outside the province

(1) 51 Can. S.C.R. 428.

when the owner was domiciled in the province at the time of his death. Had the Quebec statute done the same, I would have had very grave doubts as to its validity.

The only other question discussed at the argument—but on this point the formal judgment of the Court of King's Bench expresses no opinion, although it is referred to in the opinions of the learned judges—is whether this tax is an indirect one and therefore beyond the powers of the legislature.

Their Lordships of the Privy Council in *Cotton* v. *the King*, (1) so held with regard to the Quebec Succession Duty Act in force before the enactment of the statutes of 1914, and if these statutes do not differ essentially from the former Act, the question of their validity must be answered in conformity with the judgment of the Judicial Committee. The test of an indirect tax, derived from the definition of John Stuart Mill, was also authoritatively adopted by their Lordships and is whether the tax in question

> is demanded from one person in the expectation that he shall indemnify himself at the expense of another; such as the excise or customs.

After a careful examination of the Quebec statutes enacted in 1914, my opinion is that the only person personally liable to pay the succession duty imposed upon a legacy is the person in whose favour such legacy is made. The executor when called on to pay such tax—and he can be required to pay it only when he is in possession of the property bequeathed, or, in other terms, a judgment rendered against the executor can be executed against such property only—is sued merely in his representative capacity, and in no case

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

1920

BARTHE v. ALLEYN-SHARPLES.

Mignault J.

can it be truly said that the succession duty is demanded from the executor in the expectation that he shall indemnify himself at the expense of another, that is to say at the expense of the legatee. As I construe these statutes, the executor can never be required, representatively or otherwise, to pay succession duty on the transmission of property or money which has never come into his possession. The tax is personally due by the beneficiaries, not collectively but distributively, that is to say each beneficiary is personally liable for the tax due in respect of the property bequeathed to him and for no more. It may well be, in the case of a special bequest of property locally situate outside the province, when made to a person not domiciled in Quebec, that the government may be unable to collect the tax, for the beneficiary possibly may obtain possession from the local courts, without reference to any Quebec authority, and no judgment can be enforced against the executor except on the property bequeathed. The other beneficiaries are liable for the tax imposed on their shares only, and the executor is never held except when in possession of the property. All this shows that the present law so differs from the former statute as to render it impossible to come to the conclusion that the tax is an indirect one, and therefore I am respectfully of the opinion that the decision in *Cotton* v. *The King* (1) is clearly distinguishable.

With the evil of double taxation a court of law has no powers of interference. It is a matter for the consideration of the legislatures themselves, which may so exercise their powers of concurrent taxation

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

as to render this country an unattractive one for foreign investors. But of course the remedy is in their hands and not in ours.

In my opinion, for the reasons I have stated, the appeals should be allowed, the judgment of the Court of King's Bench set aside and the judgment of the Superior Court restored, with costs here and in the Court of King's Bench.

Appeal allowed with costs.

Solicitor for the appellant: *Louis S. St. Laurent.*

Solicitors for the respondent: *Pentland, Gravel & Thompson.*