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IRVINE A. LOVITT AND OTHERS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE H. LOVITT, DECEASED (DEFENDANTS) APPELLANTS;

AND

HIS MAJESTY THE KING, REPRESENTED BY THE RECEIVER-GENERAL OF NEW BRUNSWICK (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Succession duties—New Brunswick statute—Foreign bank—Special deposit in local branch—Depositor domiciled in Nova Scotia—Debt due by bank—Notice of withdrawal—Enforcement of payment.

L., whose domicile was in Nova Scotia, had, when he died, $90,000 on deposit in the branch of the Bank of British North America, at St. John, N.B. The receipt given him when the deposit was made provided that the amount would be accounted for by the Bank of British North America on surrender of the receipt and would bear interest at the rate of 3 per cent. per annum. Fifteen days' notice was to be given of its withdrawal. L.'s executors, on demand of the manager at St. John, took out ancillary probate of his will in that city, and were paid the money. The Government of New Brunswick claimed succession duty on the amount.

Held, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 558), Idington and Duff JJ. dissenting, that the Government was not entitled to such duty.

Held, per Davies and Anglin JJ., that notice of withdrawal could be given and payment enforced at the head office of the bank in London, England, and perhaps at the branch in Montreal, the chief office of the bank in Canada.

Attorney-General of Ontario v. *Newman* (31 O.R. 340, 1 Ont. L.R. 511), questioned.

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

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APPEAL from the judgment of the Supreme Court of New Brunswick(1), in favour of the respondent on a stated case.

The case stated and agreed upon for submission to the Supreme Court of New Brunswick was in the following terms:

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

"2. That the said George H. Lovitt was, immediately before his death, a resident of Yarmouth aforesaid and was domiciled in the Province of Nova Scotia.

"3. Probate of the said will was duly granted by the judge of the Court of Probate, in and for the County of Yarmouth on the 19th day of November, A.D. 1900.

"4. That the following are the several persons to whom the estate of the said George H. Lovitt will pass under his last will and testament, and the degree of relationship in which they stand to the testator.

"Margaret Jane Lovitt, widow of testator; Frank Lovitt, Irvine Ashby Lovitt, Erastus Hurd Lovitt, sons of testator; and Jane J. Burrill, daughter of testator, all of Yarmouth, in the Province of Nova Scotia; and Abbie Thomas and Blanche Thomas, of St. John, in the Province of New Brunswick, no relation to testator, and "The Old Ladies' Home" of Yarmouth, in the Province of Nova Scotia.

"5. That the said George H. Lovitt died seized and

(1) 37 N.B. Rep. 558.

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possessed of real and personal property of the value of $557,982.88.

"6. That a portion of the estate of the said George H. Lovitt consisted of the sum of $90,351.75, which in his lifetime he had placed on special deposit in the Bank of British North America in the City of St. John, taking from the said bank two deposit receipts in the following form:

"No. 2111. Deposit Receipt.
"Incorporated. Royal Charter.
Bank of British North America.
St. John, N.B., 30th December, 1898.

"Received from George H. Lovitt the sum of eighty-six thousand, seven hundred and seventy-five dollars, and 92-100 dollars, which amount will be accounted for by the Bank of British North America on the surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal and no interest to be paid unless the money remains in the bank three months.

"For the Bank of British North America,
H. A. HARVEY,
Manager.

"$86,775.92, Entd. O. H. SHARP,
Accountant.

"Not transferable.

"No. 2112. Deposit Receipt.
"Incorporated. Royal Charter.
Bank of British North America.
St. John, N.B., 30th December, 1898.

"Received from George H. Lovitt the sum of three thousand, five hundred and seventy-five dollars, and

83-100 dollars, which amount will be accounted for by the Bank of British North America on the surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal and no interest to be paid unless the money remains in the bank three months.

"For the Bank of British North America,

H. A. HARVEY,
Manager.

"$3,575.83, Entd. O. H. SHARP,
Accountant.

"Not transferable.

"7. That the head office of the said Bank of British North America is in the City of London, in that part of the United Kingdom of Great Britain and Ireland called England.

"8. That at the time of the death of the said George H. Lovitt, the said deposit receipt was in his possession at Yarmouth aforesaid, in the Province of Nova Scotia aforesaid.

"9. That a portion of the real property of the said George H. Lovitt consists of a lot of land and premises at Carleton, in the Province of New Brunswick. The said lot of land was appraised at the sum of $2,000, and was devised specifically to Frank Lovitt, the son of testator.

"10. That the manager of the said bank at St. John aforesaid, refused to pay to the said executors the said amount, unless and until they took out ancillary probate as hereinafter mentioned, whereupon the defendants took out ancillary probate of the said last will and testament of George H. Lovitt in New Brunswick. Said ancillary probate was granted to the said defend-

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ants by the judge of probate for the City and County of St. John, in the Province of New Brunswick, whereupon the said executors were paid by the said manager of the Bank of British North America at St. John, the amount of the aforesaid deposit receipts.

"The plaintiff claims and the defendants deny that the defendants should pay succession duty in respect to the said sum of $90,351.75, so deposited in the branch of the Bank of British North America at Saint John aforesaid.

"The question for the decision of the court is, whether the said defendants or said estate, or the devisees, or any and which of them, are liable to pay succession duty in respect to the said sum of $90,351.75, the amount of the said deposit receipts issued by the said Bank of British North America, and if so, what amount to the Province of New Brunswick, and in determining the question the court may refer to and construe the statutes of Nova Scotia the same as if they had been proved before the court.

"If the judgment of the court upon the question raised herein is that the same be answered in the affirmative, judgment of the court may be entered for the plaintiff for the amount found by the court to be due, without costs, and if the said questions be answered in the negative, judgment may be entered for the defendants without costs.

"Dated this 16th day of February, A.D. 1905.

"(Signed) J. W. LONGLEY,
Attorney-General,
Nova Scotia.

WILLIAM PUGSLEY,
Attorney-General,
New Brunswick."

The above specifies all the provisions of the will annexed thereto as stated in the first paragraph which are material to the present appeal.

The executors appeal from the decision of the Supreme Court of New Brunswick, holding the estate liable for succession duties on the sum deposited in the Bank of British North America.

Newcombe K.C. for the appellants. A bank and its branches are one concern: *Bain* v. *Torrance*(1); and this debt was payable by the Bank of British North America, not by its branch in St. John, which is not an entity.

The imposition of this duty would be indirect taxation; *Bank of Toronto* v. *Lambe*(2); *Attorney-General of Quebec* v. *Queen Ins. Co.*(3); *Attorney-General of Quebec* v. *Reed*(4); *Brewers and Maltsters Assoc.* v. *Attorney-General of Ontario*(5).

In case of a devise or legacy to be acquired in the future the imposition of the duty must be postponed. *Attorney-General of Ontario* v. *Toronto General Trusts Corp.*(6), and this proceeding is, therefore, premature.

And it cannot be imposed on the residuary estate without express provision therefor in the will. *In re Botsford*(7).

Hazen K.C., Attorney-General of New Brunswick, for the respondent. For purposes such as those in question here the branch of a bank is a distinct entity.

(1) 1 Man. R. 32.
(2) 12 App. Cas. 575.
(3) 3 App. Cas. 1090.
(4) 10 App. Cas. 141.
(5) [1897] A.C. 231.
(6) 5 Ont. L.R. 216, at p. 223.
(7) 33 N.B. Rep. 55.

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Woodland v. *Fear*(1); *County of Wentworth* v. *Smith* (2); *Prince* v. *Oriental Bank Corp.*(3).

Succession duty is based upon administration: *Attorney-General of Ontario* v. *Newman*(4), and the appellants in taking out probate of the will in New Brunswick alleged that this money was "property within the province," and are now estopped from denying it.

If it is "property within the province" the fact that the testator had his domicile in Nova Scotia does not prevent the duty from attaching. *Harding* v. *Commissioners of Stamps for Queensland*(5).

THE CHIEF JUSTICE.—The facts out of which this appeal arises are fully stated in the opinion of Mr. Justice Anglin.

That portion of the testator's movable wealth upon which the respondent seeks to levy succession duty was not property which passed either by will or intestacy within the Province of New Brunswick. The debts evidenced by the two deposit receipts were due by the Bank of British North America, an English corporation having its head office at London, England, and the situs of these debts was at the domicile of the testator in Nova Scotia. The amount of the bank's indebtedness passed by Lovitt's will to his executors in the province where the will was admitted to probate and the succession devolved. Subsequently, however, to the devolution of the succession in Nova Scotia and in the course of the liquidation of the assets of the estate, the bank at the request of the executors paid the

(1) 7 E. & B. 519.
(2) 15 Ont. P.R. 372
(3) 3 App. Cas. 325.
(4) 31 O.R. 340; 1 Ont. L.R. 511.
(5) [1898] A.C. 769.

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amount of its liability to them in the Province of New Brunswick after they had obtained ancillary letters of probate. Such payment by the bank cannot be said to be a devise or a transfer of property to a person or persons residing within the province within the meaning of the New Brunswick statute. I am of opinion that the amount of the bank's indebtedness to Lovitt was, in the terms of the proviso to the fifth section of the "Succession Duties Act of New Brunswick," property outside of the Province of New Brunswick owned at the time of his death by a person not then domiciled within that province, and that the New Brunswick Act cannot constitutionally have effect to impose a tax upon persons domiciled and resident in Nova Scotia in respect of a succession coming to them under the laws of Nova Scotia.

I would allow the appeal with costs.

GIROUARD J.—I am inclined to apply to this case the principle of international law recognized in nearly all the systems of law of the different civilized nations and laid down in article 6 of the Civil Code of Lower Canada, viz., that moveable or personal property is governed by the law of the domicile of the owner, and if I understand correctly the recent decision of the House of Lords in *Winans* v. *The Attorney-General* (1) the law is the same in England. The laws of New Brunswick have not imposed a succession duty upon the specific property claimed by the estate Lovitt, and consequently being personal it is governed by the law of the domicile of the late Mr. Lovitt, which was in Yarmouth, N.S., and not by the laws of New Brunswick. Being a mere contract debt, it cannot be contended

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

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that it is situated in New Brunswick; but even if it was it cannot be denied that it was personal property. I have therefore no hesitation in coming to the conclusion that the appeal must be allowed with costs.

DAVIES J.—The question we have to decide in this appeal is whether or not a simple contract debt due by the Bank of British North America to the testator, Lovitt, at the time of his death, was subject and liable in the hands of the executors of the estate to the succession duties imposed and made payable by the statute of the Province of New Brunswick (R.S. vol. 1, ch. 17, sec. 5).

There is no dispute about the facts which are submitted to us in the form of a stated case.

Stated briefly, and so far as they are necessary for the conclusion I have reached, these facts are that the testator Lovitt was domiciled in Yarmouth, Nova Scotia, and died there, having first made his will and appointed the appellants his executors. That some time before his death testator deposited with the Bank of British North America at its branch in St. John, N.B., the sum of $90,351.75, which monies remained with the bank until withdrawn by the executors. That when making the deposit testator received a receipt for the same which specified that "the amount would be accounted for by the Bank of British North America on surrender of this receipt"; that it would bear interest at 3%; that fifteen days' notice was to be given of its withdrawal, and that no interest would be paid unless the money remained in the bank for three months.

The executors took out probate of the will in Yarmouth, Nova Scotia, on the testator's death, and after-

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wards demanded payment of the debt and interest from the bank at its St. John agency, but the manager there required the executors to take out ancillary letters of probate in New Brunswick before paying them the money, which letters were taken out.

The deposit receipt, the evidence of the debt owing by the bank to Lovitt was with him at his domicile, Yarmouth, when he died.

The then Chief Justice, Tuck, with whom Landry J. concurred, reached the conclusion, as he says, "with much doubt," that the debt was liable to pay succession duty in New Brunswick relying upon the authority of *Attorney-General* v. *Newman*(1).

Barker J., now Chief Justice, with whom the other members of the court concurred, reached the same conclusion, resting his judgment upon the construction of the New Brunswick statute respecting succession duties, which he held was substantially the same as that upon which *Attorney-General* v. *Newman*(1) was decided, and upon the statement of Lord Hobhouse in the case of *Harding* v. *Commissioners of Stamps for Queensland*(2), who, speaking for the Judicial Committee at page 775, says, that if the amendment to the "Queensland Succession Duty Act" declaring

> that upon the issue of any grant of probate or administration in Queensland succession duty is chargeable in respect of all property within Queensland, although the testator may not have had his domicile in Queensland,

was retrospective and applicable to the case before the Committee, it would be conclusive in favour of the liability of the property there in question to pay the tax.

(1) 1 Ont. L.R. 511, at p. 519. (2) [1898] A.C. 769.

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It may be possible that this Ontario case of Newman's on which the learned judge in the court below so much relied can be distinguished at least in part from this appeal, and I think it very clear that Lord Hobhouse's dictum does not support the judgment here appealed against. The decision in *Newman's Case*(1) appears, from the official report of the decision in the appeal court, to have been based upon the propositions that succession duty is payable upon any property in Ontario which can properly be administered *only* there, and that as the payment of the debts there in question could *only* be enforced in Ontario *and only properly administered there*, that settled the question.

The opinions of the learned judges who decided that case in the appeal court of Ontario leave no doubt as to those propositions being the reasons for their judgment, and the decision is not authority for anything beyond that. But if, as I gather from the appeal case, the facts were that some of the deposit receipts in that case were in the same words substantially as those in this appeal, and were given by branches of banks having their head offices outside of Ontario, then, construing those receipts as I do, I would feel myself obliged to dissent from that case so far as it related to those receipts. That decision is, of course, not binding on us, but I desire not to be understood as expressing any opinion upon it beyond what is necessary for the decision of this appeal.

The debt in this appeal was a simple contract debt payable by the bank, a British corporation, with its head office in London, to Lovitt, a person domiciled in Nova Scotia.

(1) 1 Ont. L.R. 511.

In my opinion payment of the amount could be enforced against the bank by Lovitt, or his executors after his death, either in London, Eng., where the head office was, or in Montreal, where, so far as Canada was concerned, our "Bank Act" declared it to be, or in Nova Scotia, where the creditor was domiciled at his death, and where probate of his will was taken out. Whether the money could be recovered without first giving fifteen days' notice or whether failure to give this notice operated simply to put an end to interest for that time is not necessary to decide and does not in my opinion affect this case.

By no reasonable construction of the deposit receipt can the liability of the bank to pay be limited to St. John only. The St. John agency might be closed at any time. It was the Bank of British North America, the corporate body, not the St. John agency, which had no corporate existence or entity, that accepted the deposit, created the debt by so doing and became liable for the amount. The bank declared in the receipt given by its agent that the "amount would be accounted for by the Bank of British North America," not by the agency in St. John of the bank, nor by the bank at that agency. No words of any kind are in this receipt evidencing a contract only to pay in St. John or in New Brunswick, nor is there any statement in the case respecting any bank usage or custom which could justify any such finding or conclusion; on the contrary, the liability of the bank is expressed in the broadest terms and without any limiting words beyond possibly those requiring fifteen days' notice to be given of its withdrawal. That notice could surely be given, and properly given, at the head office of the bank either in London or Montreal, and when so given the bank was liable to be sued for

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payment as well in Great Britain or in Nova Scotia, where the creditor resided, as in New Brunswick.

If that statement of the law and construction of the contract is correct the case of Newman on my understanding of its facts has no application.

Then with respect to the dictum of Lord Hobhouse when speaking for the Judicial Committee in the above cited case of *Harding* v. *Commissioners of Stamps for Queensland*(1), it should be remembered that he was speaking with reference to the facts of the case before him. Two of the debts there in question " were secured by mortgages in land, stock and goods in Queensland," while the third debt consisted of "3,000 shares in the Royal Bank of Queensland." And as Lord Hobhouse said: "As regards locality it is clear that the assets now in question have locality in Queensland; but that does not affect the beneficial interest to which succession duty is attached and which devolves according to the law of the owner's domicile." He followed that statement up with the dictum relied on which I am discussing, namely, that if the amendment there in question had retrospective action "it was calculated to meet such cases as the present one, and would be conclusive" on the there respondents, that is, speaking with regard to debts and property such as those in question in that case secured by mortgage on lands and goods in Queensland and shares in the Queensland bank.

But their Lordships held that, in the absence of the specific words of the amendment declaring "succession duty chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicile in Queensland," the statute imposing the succession duty, broad and comprehensive

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

as its language was, must be held to include only persons *who became entitled by the laws of Queensland,* and must be confined to such persons. In other words, that in construing succession duty Acts, unless the language was specific to the contrary the principle of the maxim *mobilia sequuntur personam* should apply and the law of the domicile prevail over that of situation. The words of the section above quoted to which such a ruling was applied, were as broad and as general as one could suppose language could be made to be.

Now turning to the New Brunswick Act it cannot but be admitted that the words of the main section are as broad as they possibly could be made. They are, however, restricted by a proviso subsequently added declaring:

> The provisions of this section are not intended to apply, and shall not apply to property outside this province, owned at the time of his death by a person not then domiciled within the province, except so much thereof as may be devised or transferred to a person or persons residing within the province.

In construing this section and sub-section it is manifest that some limitations must be introduced because of the fundamental limitation contained in the "British North America Act, 1867," sec. 92, limiting the power of the provinces as regards taxation to "direct taxation within the province," etc. If the money, $90,325.75, here in dispute, was "property outside of the province" owned at the time of his death by the testator whose domicile was in Nova Scotia and had not been devised "to any person residing in the province," then it would come within the express proviso of the sub-section. It had not been so devised, and the single question remained, whether it was or was not property within the province.

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Construing this sub-section in the light of the rules laid down by Mr. Dicey in his book on the Conflict of Laws (2 ed.), pages 754 to 760, which rules I find fully supported by the authorities, and which govern in the construction of succession duty statutes, I should have no hesitation whatever on my construction of the deposit receipt in holding this debt to be property "outside the Province" of New Brunswick at the time of the testator's death, and not, therefore, subject to the succession duty. It certainly being a simple contract debt was not physically within that province whether the situs of the debt was the domicile of the testator or that of the bank, the debtor, it was alike outside of New Brunswick and the forum to administer the property was clearly that of the domicile of the testator. *Attorney-General* v. *Campbell*(1).

To my mind the proceedings subsequent to the testator's death, namely, the demand by the executors for the money at the branch of the bank in St. John; the refusal to pay until ancillary probate was taken out; the taking of such probate with the accompanying proceedings, in no wise affects the construction of the statute in question here.

The liability of the debt to pay succession duties in New Brunswick depends upon the conditions existing on the day of testator's death. No subsequent proceedings or acts of the executors could operate either to impose or impair such liability.

The whole subject of succession duties, the distinction which exists between them and estate and probate duties, and the rules which the courts in a long succession of judgments have found it necessary to lay down respecting the construction of statutes im-

(1) L.R. 5 H.L. 524, at p. 529.

posing them are authoritatively reviewed in a late case in the House of Lords, *Winans* v. *Attorney-General* (1), at page 29. These rules are to be found restated with great clearness in the speeches of the law lords who decided that case, and foremost among the rules or principles is one that unless the statute being construed forbids such a construction the maxim *mobilia sequuntur personam* will be applied and its application will

> bring constructively the property within or carry it without the reach of the taxing statutes according as the domicile of its deceased owner is within or without the realm, colony or dominion as the case may be.

Of course all such rules based as Lord Atkinson in his speech in the case just quoted, page 34, says they are on convenience and springing "from the necessity of avoiding the difficulties almost insuperable," which would arise from their being ignored, must yield to the clearly expressed language overruling them, of a statute passed by a legislature competent to enact it.

The questions before us are whether or not with respect to this simple contract debt the legislature of New Brunswick was so competent, and secondly, if competent, has it so clearly expressed itself as to make this debt liable to the succession duties. In the view I take of the facts and of the meaning and effect of the deposit receipt I have concluded that this debt was, to use the language of the sub-section, "outside of the province" and not within it at the time of the testator's death; that the subsequent action of the executors in taking out ancillary probate in New Brunswick and withdrawing the money from the agency of the testator's debtor in St. John did not and could not have the

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

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effect of bringing within the scope of the succession duties property which at the time of testator's death was not subject to them, and that consequently the appeal must be allowed and the judgment below reversed.

It is not necessary for me to say anything beyond what is necessary to reach this conclusion, and I desire on this difficult question of succession duties and the constitutional problems which in Canada surround it, to be understood as not expressing any opinion beyond the concrete case we have before us in this appeal. The extent to which the "British North America Act" imposes restrictions upon the taxing powers of the provincial legislatures; the liability to the tax in dispute which might have followed had this been a specialty debt charged upon lands and goods within the province or consisted of shares in a provincial company as was the case in the Queensland appeal before the Privy Council; or had even the debt been a debt recoverable only in New Brunswick and not elsewhere, are none of them questions which in my view of the facts necessarily arise for decision here, and I purposely refrain from expressing any opinion upon them.

The debt in question being a simple contract debt recoverable against the bank debtor elsewhere than in New Brunswick, and owing to a testator domiciled in Nova Scotia when it was created and when he died was outside the Province of New Brunswick, and the forum to administer it was that of the domicile.

Appeal should be allowed with costs.

IDINGTON J. (dissenting).—The late George H. Lovitt deposited in the Bank of British North America two sums of money aggregating $90,351.75, and received for one sum a deposit receipt in the following form:

Deposit Receipt.
Incorporated. Royal Charter.

BANK OF BRITISH NORTH AMERICA.

St. John, N.B., 30th December, 1898.

Received from George H. Lovitt the sum of eighty-six thousand, seven hundred and seventy-five dollars and 92-100 dollars, which amount will be accounted for by the Bank of British North America on surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal, and no interest to be paid unless the money remains in the bank three months.

For the Bank of British North America,

$86,775.92. (Sgd.) H. A. HARVEY, Manager.

Entd. O. H. Sharp,
Accountant.

He received for the other sum a similar deposit receipt. After Mr. Lovitt's death in Nova Scotia, where he resided, the bank refused to pay his executors these moneys unless and until they had obtained ancillary letters of probate from the Probate Court of New Brunswick.

Thereupon the executors applied for and obtained such ancillary letters of probate and by virtue thereof obtained payment of the moneys secured by said receipts.

The respondent thereupon claimed succession duties had become payable by virtue of the New Brunswick Act known as the "Succession Duty Act."

The executors resisted this claim on the grounds that their testator having been domiciled in Nova Scotia, the right to such succession duties was not within the purview of the said Act, and even if so the Act in such regard was *ultra vires*.

The question raised by the latter ground must be resolved by the construction we put upon the "British

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North America Act," and the former by the construction put upon the above mentioned provincial Act.

The "British North America Act" assigns by section 92, sub-section 2, as one of the exclusive powers of the Provincial Legislature that of

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

It is not disputed that the said Act imposing the succession duties it does is intended to be, and speaking generally is, a rightful exercise of this power of taxation.

It is claimed, however, that these debts due by the bank were within the maxim *mobilia sequunter personam,* and must in law be taken to have been at the death of the testator in Nova Scotia, and therefore beyond the legislative jurisdiction of the Province of New Brunswick.

What was the nature of the contract the testator made? What was the nature of the property evidenced or created thereby? Was it taxable and where?

On the face of it the contract was entirely made in New Brunswick. And the fair construction of it having regard to what is common knowledge must be that the notice it provides to be given should be given at St. John in that province and payment be made there.

It is quite irrelevant to consider what might have happened and what the legal rights of the parties might have become had things happened which have not; just as much so as if a horse or carriage held under bailment and liable to taxation in the province had been, after levy, wrongfully removed beyond it, and so remained and questions raised then as to original validity of the imposition being affected thereby.

In the latter case the rights and remedies of the

bailor might have changed their character and incidentally the possibility of actual power to enforce the tax might have vanished.

I submit we obscure the issue by complicating it with possibilities that have not arrived.

The simple question is whether or not such a contract as this which was entirely created within the province had become taxable. Can there be any question now that income is held taxable by a province? And if all the varieties of sources of income we have become accustomed to see so taxed are rightly so taxed can it be that the income derivable from such a contract as this is not? If that derivable therefrom can be taxed, how can the thing itself escape taxation if that more obviously direct method were adopted?

The incomes from somewhat similar sources of investment were declared assessable by the Ontario Legislature and the claim upheld in the case of *Re North of Scotland Canadian Mortgage Company*(1)—so long ago as 1881.

The company's head office and home was in Scotland. Its business was to lend money on real estate or public securities and act as financial agents.

The assessment was for interest on its investments payable to its agents at Toronto or "at the credit of the company at a bank or being moneys lying at the credit of the company in a bank for investment." The shareholders receiving dividends were subject to income tax in Great Britain. Of course this decision is not binding upon us, but is of long standing and illustrative of what, I submit, may be legally done, whether wisely or not.

No one would dispute the liability to assessment

(1) 31 U.C.C.P. 552.

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of a bag of gold received from a non-resident for which a receipt had been given by any one entrusted with it. Can the accompaniment of such deposit of gold by terms and conditions varying the legal liability to account therefor make it less assessable?

The case of *The Attorney-General of Quebec* v. *Queen Ins. Co.*(1), shews that the business transaction itself, that is, the mere lending or act of acquisition cannot be taxed, as doing so would be indirect and not direct taxation.

The case of *Bank of Toronto* v. *Lambe*(2) seems to go further by reason of its comprehensiveness than needed to maintain the right to tax the thing itself in question here, that is, the property in the debt of which the receipt is merely the evidence.

Perhaps this mode of presentation and analysis of the right may, the more one elaborates it, obscure the consideration of the real question to be solved here.

That has been well considered and presented in the case of *The Attorney-General* v. *Newman*(3), where the statute under consideration was in effect identical with and apparently that from which the New Brunswick statute before us was taken.

I agree generally in the reasoning of the opinion judgments in that case supporting the right to maintain the tax upon substantially the same element of fact as herein.

I need not repeat or refer to the authorities therein and on the argument herein dealt with.

There is, as result of argument here, another view presented to my mind, and I proceed to state it.

(1) 3 App. Cas. 1090. (2) 12 App. Cas. 575.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

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Section 25 of the New Brunswick "Succession Duty Act" enacts as follows:

> Any administrator, executor, or trustee having in charge or trust, any estate, legacy or property subject to the said duty, shall deduct therefrom, or collect the duty thereon, upon the appraised value thereof, from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon. 59 Vict. ch. 42, sec. 16.

Having regard to the terms of this statute which the executors solemnly undertook to obey upon obtaining the ancillary letters granted them by the probate court of New Brunswick, preceded by all that that grant implies it seems to me that there is an obligation resting upon them by force of the statute and the proceedings upon which the ancillary letters were got which can only be discharged by the payment of the duties claimed.

The Act provides, among other things, the giving of the bond for the express purpose of procuring the payment of these very duties.

It is to be presumed that was done. It does not appear as part of the stated case. It does not appear either whether we are at liberty to draw inferences in that regard or not.

The parties desire a decision upon the point of the liability to taxation, and if I am at liberty on this stated case to presume these things to have been done that should have been done by virtue of the "Probate Courts Act" and the "Succession Duty Act," then it seems to me it would be a travesty upon justice to permit any one to obtain possession of the proceeds of a debt receivable by them only by virtue of ancillary letters granted upon the faith of their engagement, such as must have been entered into herein, and upon the faith of their representations including, it is pos-

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sible, an oath implying that this property now in question was within the Province of New Brunswick.

I assume that the parties to this litigation desire to have the opinion of the court upon no narrow construction of the case submitted, but upon one which would take account of the circumstances and presumptions no doubt existing and which must exist in every such case when the question to be solved herein arises.

I have no doubt that the executors assuming duties such as I have assumed the executors in this case assumed in the statute just quoted, are answerable upon that statute as well as upon any undertaking they may have given pursuant to its other provisions.

I have just one word to add as to the view ingeniously presented that the ultimate beneficiaries under the will in question upon whom must ultimately fall the burthen of paying duties such as that in question lived beyond the province and that it is upon them and their receipt of their legacies that the tax is in effect imposed and hence *ultra vires* as an indirect tax as well as of property beyond the province.

If I understand the argument aright it is sought to be inferred from this that the proper construction of the "Succession Duty Act" was that the tax in such cases was not intended and should only be imposed upon legatees if within the Province of New Brunswick, and that others should escape therefrom. I can not think that any of such constructions was within the contemplation of the framers of the Act. The provisions above referred to seem conclusively to shew the intention at least to collect such a tax.

I think the appeal should be dismissed with costs.

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DUFF J. (dissenting).—The question raised by this appeal is whether the executors of the deceased George H. Lovitt are accountable for succession duties under the "Succession Duties Act" of New Brunswick, ch. 17, C.S.N.B., in respect of certain sums deposited by the deceased with the Bank of British North America at its branch at St. John. These deposits were acknowledged by deposit receipts in the ordinary form and under the authority of ancillary letters of probate granted by the probate court of New Brunswick were paid out at St. John to the executors of the deceased, who at the time of his death was domiciled and resident in Nova Scotia. The points in controversy are: First, were these deposits chargeable with succession duties by the terms of the statute; and secondly, if so, was the enactment in so far as it imposed a duty upon such deposits within the competence of the legislature?

The statute after exempting certain property and estates from the operation of it declares in broad terms (section 5) that all property ("whether situated in New Brunswick or elsewhere other than property being in the United Kingdom of Great Britain and Ireland and subject to duty whether the deceased person owning or entitled thereto had a fixed place of abode in or without New Brunswick at the time of his death") passing either by will or intestacy shall be subject to a succession duty to be levied, where the aggregate value of property exceeds $200,000, on the whole property, and in other cases upon the share in the distributable surplus passing to the respective beneficiaries according to a scale varying with the degree of relationship borne by the beneficiaries to the deceased.

This broad declaration is, however, qualified in an

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important way by sub-section 2 of the same section, which is in the following terms:

(2) The provisions of this section are not intended to apply, and shall not apply to property outside this province, owned at the time of his death by a person not then domiciled within the province, except so much thereof as may be devised or transferred to a person or persons residing within the province.

The effect of the section read as a whole seems to be that as regards persons domiciled at the time of their death in New Brunswick, the duty is leviable in respect of the whole of their property; and as regards persons not domiciled at the time of their death in that province, the duties provided for by the Act are payable in respect of all property not "outside the province" within the terms of sub-section 2. But there is a further and necessary limitation, that, namely, which is imposed by section 92, sub-section 2, of the "British North America Act," by which the provincial power of taxation is limited to "direct taxation within the province." We need not consider whether in its application to the property of persons domiciled in New Brunswick, the first sub-section can be given a construction which does not offend against the constitutional limitation. At all events in its application the property of persons dying domiciled outside the province the Act is not open to impeachment as beyond the powers of the legislature. In confining the operation of the Act in such cases to property which is not outside the province, the legislature must be taken not to have intended to impose any form of taxation which does not fall within the description "direct taxation within the province"; and there can be no difficulty in so reading the language used. The question for determination then comes to this:—Is an at-

tempt to levy duties under the provisions of the Act in respect of the deposits in question an attempt to apply the provisions of the Act to property outside the Province of New Brunswick within the meaning of subsection 2 or an attempt to impose taxation which is not "direct taxation within the province" within the meaning of the "British North America Act?"

Choses in action such as those in question here can, of course, have no actual local situation. They can have only a constructive situs—a situs in contemplation of law. The general rule, I think, is that stated by Mr. Dicey, at page 310, Conflict of Laws, (ed. 1908)—debts or choses in action are (with certain exceptions that need not be noticed) to be looked upon as situated in the country where they are "properly recoverable or can be enforced." In the case of a natural person this forum is taken to be in the absence of some special stipulation affecting the debt or chose in action, the local jurisdiction within which the debtor for the time being resides. The origin of the rule and the ground upon which it rests are stated by Lord Field in *Commissioner of Stamps* v. *Hope*(1), at p. 481, in the following passage:

> Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the courts of this country, and is a well-settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. *In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be,* and it was held therefore to be *bonâ notabilia* within the area of the local jurisdiction within which he

(1) [1891] A.C. 476.

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resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bonâ notabilia* where it was "conspicuous," *i.e.*, within the jurisdiction within which the specialty was found at the time of death: see Wentworth on the Office of Executors, ed. 1763, pp. 45, 47, 60(1).

From this rule the English courts have derived the criterion for ascertaining the local situation of debts and choses in action for the purpose of determining the jurisdiction of courts of probate, and where such liability depended upon the situation of the property for the purpose of determining the liability to duties payable upon property passing in consequence of death.

The application of the rule, however, where the debtor is a corporation having a principal place of business and branch offices where it also carries on its business, presents difficulties which do not arise where the debtor is a natural person. Such a corporation, while for some purposes resident at the place where "the central management and control actually abides" (*De Beers* v. *Howe*(1)), is for other purposes (of founding jurisdiction, for example) resident at each of the places where it has a fixed place at which it carries on its business(2). "The better opinion," Mr. Dicey, p. 163, says,

seems to be that a corporation has, following the analogy of an individual, one principal domicile, the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices correspond as far as analogy can be carried out at all to the residence of an individual.

(1) [1906] A.C. 455, at p. 458. (2) *La Bourgogne*, [1899] A.C. 431.

I have come to the conclusion that the moneys in question were properly demandable only at the branch at St. John; and in that view there can be no doubt that so long as the branch should continue to carry on business there in such a way as to be subject to the jurisdiction of the courts of New Brunswick, that province was the proper forum for the recovery, and consequently, upon the principles above stated, the situs of the moneys deposited within the meaning of the "Succession Duty Act." There, to use the words of Lord Field just quoted,

> the assets would probably be to meet them and for the purposes of administration they must be taken to be situated there.

The principle which I think is applicable for the purpose of ascertaining the true effect of the transaction evidenced by the deposit receipts is that stated by Lord Bowen, then Bowen L.J., in *The Moorcock* (1), at page 68, in this passage:

> In business transactions * * * what the law desires to effect by implication is to give such efficacy to the transaction as must have been intended by at all events both parties who are business men;

and by Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (2):

> I have always understood that when the parties to a mercantile contract have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the

(1) 14 P.D. 64. (2) 6 App. Cas. 38, at p. 59.

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parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

Applying these principles, can any stipulation be implied from these documents and such of the surrounding circumstances as we are entitled to consider as to the place where the moneys referred to in them should be demandable?

A similar question was raised and decided in *Attorney-General* v. *Newman* (1). In that case there were six such receipts given by six different banks, one of which was the Bank of British North America, all in the same form as those before us. The Ontario Court of Appeal, affirming the Chancellor, unanimously held that the moneys represented by them were only properly demandable at the several branches of the banks where the deposits had been made. Two years afterwards the question was raised in British Columbia, in *Re Scott McDonald* (2), concerning a deposit in the Bank of Montreal evidenced by a receipt in the same form. The full court of that province unanimously concurred in the view of the Chancellor and the Court of Appeal for Ontario. In both these cases the occasion of the litigation was an attempt by the province to exact duties under a statute similar to the new Brunswick Act. In this case the full court of New Brunswick unanimously adopted the same view. These cases appear to me to be well decided.

It is stated in the case submitted to us that the Bank of British North America had a branch office at St. John, N.B., and its head office in London. We

(1) 31 O.R. 340; 1 Ont. L.R. 511.

(2) 9 B.C. Rep. 174.

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must, I think, put aside for the purposes of this appeal any suggestion that the centre of the bank's affairs within the meaning of the principle stated by Mr. Dicey is at Montreal. For the purposes of applying certain sections of the "Bank Act" the bank is required by the Act to have a chief place of business there; but those sections have no relevancy to any question on this appeal, and we must, I think, take the principal place of business to be in fact where it is stated to be—in London.

Let us then apply the principle stated by Lord Bowen and Lord Watson. Is there any relevant inference or implication which upon that principle can properly be drawn from the circumstance that a customer of a Canadian bank deposits at one of its branches a sum of money upon the terms that the bank will account for the specific sum deposited with interest, upon the surrender of the receipt and upon receiving fifteen days' notice of the withdrawal of the money, and upon the terms that no interest is to be payable unless the money remain in the bank for three months ? In the first place it is clear that the parties regard the transaction as a deposit of money or a loan of money at interest. Is it possible also to treat the transaction as involving an undertaking on the part of the bank to pay at any other of its branches or at its head office across the continent or across the Atlantic, upon notice and demand by the depositor there of the precise sum of money deposited ? I do not think myself that looking at the question from the point of view indicated by the language of Lord Watson just quoted, it is possible to suppose that reasonable business men would, if such a point had been raised when the deposit was made,

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have regarded it as open for discussion. Consider for a moment what such a construction of these instruments involves. There is the very obvious inconvenience of making provision at the various branches and the head office for the verification of these documents when presented from all parts of the country. Then there is the question of time. To confine ourselves to the specific case before us, is it supposable that if the bank had contemplated binding itself to pay this money at its head office in London, some longer notice than fifteen days would not have been stipulated for in order to insure beyond failure sufficient time to make the necessary inquiries in the ordinary way? Then again there is the cost of transmission. Here is a sum of money which the depositor has at his credit at St. John. Is it to be supposed that the bank, without making some provision for the cost of transmission, and without regard to the balance of exchange, would have agreed to pay the precise sum deposited with the agreed interest in London at the option of the depositor ? Some suggestion was made that the undertaking of the bank was to "account" for the sum mentioned, and that in that word might be implied some provision for the deduction of such expenses. But surely that is to abandon the appellant's point. Upon what is the implication based? It can have no other foundation than the theory that the Bank is to account for the moneys deposited, not as moneys in London, but as moneys in St. John. In other words, you cannot imply such a stipulation, in my judgment, without going quite as far as it is necessary to go in order to imply the stipulation that the obligation of the bank is to make provision for payment and to pay at St. John, in other words, that St. John is the place of demand.

From the point of view of the honest and reasonable depositor, it is difficult to see what advantage would accrue to him from making money deposited in St. John, and intended to remain in the bank there as a deposit at interest (which is what these deposits profess to be), demandable in the ordinary course at the head office of the bank. If his purpose were under the guise of making a deposit to get money transmitted to London free of charge, one might understand it. But it is not by such assumptions that the intentions of parties to business contracts are to be arrived at. The discontinuance of the branch at St. John could not possibly affect the interests of the depositor because a condition which the bank by its own act had made it impossible for the depositor to perform would *ipso jure* cease to bind him. I come to the conclusion, therefore, that the construction placed upon these documents by the courts below is the only one which is calculated to give efficacy to them as business documents in accordance with what must be supposed to have been the intentions of reasonable men entering into the transactions evidenced by them.

This alone is sufficient to determine the appeal. But conceding the point just considered against the respondent still, I think, the appeal fails. The argument for the appellant is this. The deposit receipts embody a general and unconditional obligation to account for certain moneys. These moneys admittedly were demandable at the bank at St. John; but whether or not also demandable at other branches they certainly were also demandable at the head office. Now, it is said for the purpose of this statute the situs of a chose in action is the residence of the debtor; and for the purpose of determining the dutiability of such an

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asset under such statutes as this as between rival authorities the residence of a corporation is by construction of law deemed to be the place where its administrative business is carried on—in this case London. It follows—so it is argued—that at the date of the death of the testator the choses in action in question must, for the purpose in hand, be taken to have been situate outside New Brunswick.

Thus it is said to result from the application of Lord Field's reasoning that these choses in action (reducible into possession at the residence of the debtor because they would "probably be" there, or because they were "properly recoverable there"), are for the purpose of determining their situs regarded as properly recoverable and reducible into possession in London only, although it manifestly never entered the mind of anybody until this controversy arose that they should be demanded or recovered anywhere except at the branch office where the moneys were deposited. I am not, of course, returning to the question of implied terms. I am merely emphasizing the circumstance that this result arises purely from the application of a series of constructions of law, and is a result which imparts to the transactions in question a legal effect obviously at variance with any reasonably conceivable expectation of the parties.

I think the reasoning fails because it is based upon an assumption which I think cannot be sustained in principle, and has no countenance from authority. That assumption, underlying the argument, is that a corporation for the purpose of determining the situs of its obligations can never have more than one residence. A corporation—I have already mentioned—admittedly can have, for the purpose of founding jurisdiction,

many residences; and if a corporation be in that sense resident within a given local jurisdiction and performance of a given obligation of that corporation is properly (*i.e.*, lawfully) demandable within that jurisdiction, I do not see on what ground it can be said on the principles stated above that the obligation has its situs exclusively elsewhere. If the corporation is there so that its obligations can be enforced against it there, and if the given obligation is at the demand of the creditor enforceable there (in the sense that the creditor is legally entitled to have it performed there not merely that he may sue there for the debtor's breach of it), then for all these purposes the residence of the corporation (in the relevant sense) must be said to be there. That is really only another way of saying that if the situs of the obligation must be taken in contemplation of law to be determined by the residence of the debtor then the conditions upon which constructive residence of a corporation for this purpose depends are not necessarily to be found in one locality exclusively; and accords with the view expressed by Mr. Dicey in the passage quoted above.

Of course it is said at once that in this view a debt may be situated at one and the same time in several places; and that in practice great confusion would result. There is nothing in this last suggestion; because it must very rarely happen that an obligation is lawfully enforceable in the sense mentioned at the choice of the creditor at more than one place where the debtor can be said to be resident. It would only occur where an artificial person is the debtor, and in most cases there must be some circumstance indicating one place rather than another as the place where the obligation ought to be performed. It may be that in the con-

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ceivable case in which the sole fact should be an obligation, of which performance could at the will of the creditor be exacted from a corporation either at its head office or at another place where it should be held to be resident, it may be that (assuming it necessary to determine the question of situs on these bare facts taken by themselves), the preference ought to be given to the place where the principal business is carried on. But cases in which the question is thus baldly presented must be very rare, and this case is not one of them.

This appears to be the difficulty in which in this case the appellants are involved. The jurisdiction of the New Brunswick court having been in fact based upon the assumption that there was personal property — in other words that these choses in action were — within the province, can the executors who obtained the grant on that assumption now dispute the foundation of the court's jurisdiction to make the grant? There is a doctrine of the law that one may not approbate and reprobate, play fast and loose, gain an advantage by assuming one position and escape the correlative burden by assuming another and inconsistent position. *Gandy* v. *Gandy*(1), at p. 82; *Roe* v. *Mutual Loan Fund*(2); *Smith* v. *Baker*(3). I do not think the executors, having represented these choses in action to be New Brunswick assets and having obtained probate and authority to reduce the assets into possession on that footing and having got possession of them under that authority, could be heard to say, against that province, in order to escape this duty, that they were not assets in New Brunswick.

(1) 30 Ch. D. 57. (2) 19 Q.B.D. 347.
(3) L.R. 8 C.P. 350.

It may be argued that although the executors had a right to elect at which place the moneys should be demandable and reducible into possession — still until they had exercised their election the situs of the obligation was at the place where the head office of the bank was situated. I do not think that helps the respondent. The executors, it is conceded, had the right to determine whether they should treat these moneys as assets in New Brunswick or in the United Kingdom. Having elected to treat them as assets in New Brunswick and having acquired a full title to them as such under a New Brunswick probate (they could not otherwise acquire a right to reduce them into possession or deal with them there) their title to them must with the probate in contemplation of law have relation to the date of the testator's death; the assets must, in other words, be deemed to have been vested in them under the New Brunswick probate or, in other words, as New Brunswick assets from that date. *Ingle* v. *Richards* (1); *Whitehead* v. *Taylor* (2); Williams on Executors, p. 214. In a word, assuming that in the bald case above suggested the situs assigned by construction of law to these assets would be the place of the head office of the bank, that situs is assigned only in the absence of and subject to other controlling factors — in this case, in the absence of and subject to the election of the executors. That election once made has all its normal legal consequences and determines the situation of the assets as from the date of the testator's death.

There is some danger possibly of forgetting that we are to construe the language of an Act of the legislature with regard to the intention of which,

(1) 28 Beav. 366.

(2) 10 A. & E. 210.

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it has been said, that "the common understanding of men is one main clue." It is satisfactory to think, for the reasons I have given, that the constructions of law upon which the appellants' argument rests are not sufficiently inflexible to lead us to the startling conclusion that the New Brunswick Legislature in excluding property "outside the province" from the operation of the statute intended to exempt moneys on deposit in branch banks in that province which should be reduced into possession under a New Brunswick probate.

But it is said that the duty attached (if at all) at the date of the death and that unless it can be affirmed of these choses in action that they had a fixed situs within the province at that date, this is an attempt to exceed the provincial authority to impose direct taxation within the province.

Before dealing with that question it will be convenient to mention that it is a mistake to suppose that the payment of the duties imposed is in no way a condition affecting the right of the executors to collect and administer the estate. The Act requires the executors within thirty days after the grant to enter into an obligation for the payment of the duties, and in default there is a provision for the cancellation of the grant. The executors are made personally responsible for duties leviable upon property handed over by them without first collecting the duty. Then on certain estates (over $200,000) the duty is levied on the whole estate irrespective of the ultimate destination of the surplus.

It is observable that the imposition of such duties in respect of moneys reduced into possession under a New Brunswick probate under the protection and

authority of the provincial laws seems clearly to fall within the words "taxation within the province." As respects constitutional authority it can, it appears to me, make not the slightest difference, whether at the date of the death the property was in the province or out of the province. The power of the province to impose duties upon property coming under such authority into the hands of the legal personal representatives of a deceased person wherever domiciled has, I think, never been seriously questioned. It is, moreover, direct taxation because the tax is paid by (or out of the property of) the very persons upon whom its incidence is intended to and does fall, namely, those beneficially interested in the estate. The trustees' are the hands through which it is paid, it is true, but the trustees are not (in any sense germane to this question) the persons from whom it is primarily exacted; their personal liability only arises on failure to perform the duty to collect the tax out of the beneficiaries' share or retain the property until the tax is paid.

Nor do I think any difficulty arises from the circumstance that the tax is declared to be payable at or within twelve months of the death of the deceased. On this question of constitutional validity the inquiry is this: Looking at the scope and purpose of the Act as a whole (or rather in this case at the Act as it affects to impose duties in respect of persons dying domiciled outside the province) does the enactment transcend the power to impose "direct taxation within the province?" Then, if this power of taxation within the province is sufficient to justify the exaction of this kind of impost in respect of this kind of property in the hands of the executors within the province, is the enactment vitiated because of the circumstance that

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the duties are declared to be payable at the date of the death at which time it is said this property had not a fixed situs within the province? The answer to that, according to my view of the Act, is this. If the Act applies to such assets as these, it is because they were assets constructively within the province as being choses in action which, according to the agreement of the parties, were to be demanded of the debtor within the province or because they were assets which were in fact reduced into possession within the province, and which either the executors could not be permitted to say were not assets within the province at the death of the deceased, or which were, in contemplation of law, New Brunswick assets in their hands at that date. On any one of these hypotheses these choses in action were assets which indisputably came within the sweep of the power of taxation committed to the province. The declaration (section 13) that the duties should be payable at death or within one year thereafter appears to have been intended (see section 12(2)), to afford a basis for levying interest from the date of death in default of payment when due. Such incidents of the tax appear to me, once it is clear that the legislature is aiming alone at property within the province, to be unobjectionable; and in any view I can see no difficulty in giving to every part of the provision its full application as regards assets which by legal construction are considered New Brunswick assets in the hands of the executors at the date of the testator's death.

A word as to the general character of the Act. The express language of section 5 excludes the application of the principle upon which the operation of the statutes respecting succession duty and legacy duty

have been in England limited to the estates of persons domiciled within the kingdom. I cannot in view of that language see how the question here can be affected in the least degree by the domicile of the testator. The Act (which, notwithstanding its name, is thus radically different from the English Acts bearing similar titles) in its general features resembles the statutes which under the same name are in force in Ontario and some other provinces of Canada. In view of the composite character of the legislation I do not think the decisions upon the English statutes referred to, or the observations of distinguished judges upon the broad distinctions that have been observed in the Imperial legislation respecting the different classes of death duties, can afford us very much direct aid in the construction of it.

It may, however, be proper to add that in the view of Mr. Westlake, at pages 122 and 123, Private International Law (3 ed.), there could seem to be no question that under the statutes regulating the imposition of probate duty assets such as those in question here would in the circumstances have been subject to those duties; and this although the general rule governing the application of those Acts was that stated by Mr. Dicey, p. 313, that the incidence of the duty fell only on property in England at the death of the deceased. And Mr. Dicey, at page 761, says the test was this: Was the property so situate as to give the court power to grant letters of administration or probate?

The single question open, to my mind, to discussion is that which I have discussed—very lengthily I am afraid—should these choses in action be held in the circumstances here to be "property without New Brunswick" within the meaning of sub-section 2 ? For

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the foregoing reasons I think, with great respect, the answer must be in accordance with the judgment below.

ANGLIN J.—Three questions arise upon this appeal; the first, whether upon the proper construction of certain bank deposit receipts issued from a branch office of a bank the moneys represented by them are demandable by the depositor or his representatives only at the branch office at which the deposits were made; the second, whether the debts evidenced by these documents are taxable property at the place of deposit within the purview of the "Succession Duty Act" of New Brunswick; and the third, whether, in so far as it may be held to cover such debts due to a decedent not domiciled in the province, this legislation is *intra vires* of a provincial legislature.

The deposit receipts are in the usual form. Issued and dated at St. John, N.B., where the deposits were made, but naming no place of payment, they purport to bind the Bank of British North America, after fifteen days' notice, to account to the depositor for two sums of $86,775.93 and $3,575.83 with interest, on surrender of the receipts which are non-transferable. The head office of the bank is in London, England. For the purposes of such sections of the "Dominion Bank Act" (R.S.C. ch. 29) as apply to it, its chief office is its office at Montreal (section 7). It maintains a large number of branches throughout Canada under the authority of section 76.

There are in the record no other material facts bearing upon the first question, which comes before us on a stated case without any evidence as to the circumstances in which the deposit receipts were

issued, as to any custom of bankers in regard to their issue or payment, or as to the usual requirements as to the place at which notice is to be given or presentation made in order to payment. At what place or places the debts evidenced by these receipts are demandable must therefore be ascertained from the terms of the documents, unaffected by considerations of "course of business" or "surrounding circumstances." *Bell & Co.* v. *Antwerp, London & Brazil Line*(1).

The terms of the receipts sufficiently imply the exclusion of the general principle of English law, "that the debtor is to seek out his creditor and pay him where he lives." But excepting the fact that they are dated at St. John, N.B., where the deposits were made, they afford no indication of the place of payment. They purport to bind the bank as a body corporate. The bank as a single entity is unquestionably the debtor. *Prince* v. *Oriental Bank Corp.*(2).

Do the facts that the receipts were issued and bear date at St. John and that the debtor stipulates therein for fifteen days' notice of withdrawal and for the surrender of the receipts themselves import a condition that such notice must be given to and demand of payment made at the branch of the bank from which the receipts issued and not elsewhere? That these were implied terms of the transactions was assumed in the Supreme Court of New Brunswick, chiefly on the authority of *The Attorney-General* v. *Newman*(3).

The present record contains nothing which would exempt these documents from the operation of the ordinary rules of evidence and of construction which

(1) [1891] 1 Q.B. 103, at p. 107. (2) 3 App. Cas. 325, at p. 332.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

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govern all contracts reduced to writing. If it had been intended that there should be no right to demand payment elsewhere than at the St. John office of the bank, that restriction upon the debtor's liability could easily have been stated. I am, with great respect, unable from the mere consideration of the terms of these documents to import into them such a distinct qualification or modification of the general and unconditional obligation of the bank which they express. I do not stop to inquire whether the mere statement in such an instrument of a place of payment without the addition of some words equivalent to—"and not elsewhere"—would entitle the debtor to insist upon presentation and demand at the place named. Co. Litt. 210*b*, note 1(1). But in the absence of any designation of a place of payment, while it may be questionable whether the creditor would have the right to give notice of withdrawal and to make demand for payment at some local branch of the bank other than that at St. John (see judgment of Esher M.R., in *Bell* v. *Antwerp*(1), at page 107), a right to give such notice and to demand payment at the head office of the bank in London, England, or, perhaps, at its chief office for Canada, in Montreal, as well as at the St. John branch, is, in my opinion, at all events in the absence of any evidence of custom of bankers or course of business precluding it, conferred by these contracts. *Irwin* v. *Bank of Montreal*(2).

In *Attorney-General* v. *Newman*(3), according to the statement in 31 O.R. 340, some of the banks in which the decedent had deposited his monies had head offices in Ontario. Others presumably had head offices

(1) [1891] 1 Q.B. 103.
(2) 38 U.C.Q.B. 375.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

elsewhere. The appeal case, which I have seen, shews that the monies in question were deposited with six different banks, two of which had, and four of which had not, their head offices in Ontario. One of the latter was the Bank of British North America. The form of the deposit receipts there in question, not given in the law reports, may be found in Mr. Bayley's book on Succession Duty in Canada, at page 50. No place of payment is named in the form there published. Neither does it appear that there was before the courts in that case any evidence of a custom of bankers or of a course of business in regard to deposit receipts or of special circumstances accompanying the deposit. The disposition of the case proceeds entirely upon the assumption, made by the learned judges, that the monies were "only properly demandable at the branches of the several banks at which the deposits represented by the receipts had been made." It naturally followed that they were "property which could be only properly administerd in Ontario," and they were therefore "property situate within Ontario" and as such taxable by the province. Unless, in some particular not stated in the reports, the facts in the Newman case are distinguishable from those of this case, I must, with all proper respect, express my dissent from the conclusion there reached that monies represented by deposit receipts issued by Ontario branch offices of banks having their head offices outside of Ontario are property which can only be properly demanded and administered in that province.

The second and third questions may be conveniently dealt with together.

The powers of taxation of a provincial legislature are restricted by section 92 of the "British North

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America Act" to "direct taxation within the province." The "taxation of property not within the province" is forbidden. *Woodruff* v. *Attorney-General for Ontario* (1), at page 513.

Section 5 of the "Succession Duty Act" of New Brunswick (C.S. [1903] ch. 17), as originally enacted, purported to render liable to succession duty

> all property whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, subject to duty, whether the deceased person owning or entitled thereto had or had not a fixed place of abode in or without this province at the time of his death, passing either by will or on intestacy.

Upon the constitutionality of this legislation being challenged by the then Minister of Justice, Sir Oliver Mowat (December 17, 1896), the legislature enacted the following provision, which now appears as subsection 2, of section 5:

> The provisions of this section are not intended to apply and shall not apply to property outside this province and owned at the time of his death by a person not then domiciled within the province, except so much thereof as may be devised or transferred to a person or persons residing within this province.

The property now in question was not "devised or transferred to a person or persons residing within this province," unless the fact that the New Brunswick administrator actually procured payment of the deposit receipts at St. John is to be deemed a transfer to him within the meaning of the exception in subsection 2. I think the devise or transfer intended by the exception in that sub-section is a devise or transfer to a beneficiary within the province of property situate at the time of the decedent's death without the province, and that the exception therefore has no application to this case.

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

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Its presence in the statute, however, having regard to its history, serves to emphasize the intention of the legislature, perhaps otherwise sufficiently manifest, to reach by its legislation all property of a decedent which it can lawfully subject to taxation at the time of his death. To apply the language of a learned New York judge,

> the legislature intended, as I think, to repeal the maxim *mobilia sequuntur personam*, so far as it was an obstacle, and leave it unchanged so far as it was an aid to the imposition of a tax under all property in any respect subject to the laws of this state.

Re Whiting(1).

In order to reach movable property of resident decedents situate outside the province, the legislature proceeds upon this maxim; in order to reach movable property of non-resident decedents, its location in fact, or by legal fiction, is made the test of its situs.

The terms of the New Brunswick legislation clearly exclude the application to its construction of the principles upon which were decided the series of English cases, of which *Thomson* v. *The Advocate-General*(2) is perhaps the most noted. The legislature has expressed its intention not to confine its taxation to property, the title to which is obtained under the law of New Brunswick, but to subject to what it terms "succession duty," not only all property wherever situate of a decedent domiciled within the province, but also all property of a decedent domiciled elsewhere, which is not "outside" the province.

In view of the form of the restriction placed upon the provincial power of taxation by the "British North America Act," if there be any class of property which, though not "outside the province" is yet not

(1) 150 N.Y. 27, at p. 30. (2) 12 Cl. & F. 1.

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"within the province," *ut res mayis valeat quam pereat*, and having regard to its history, which makes manifest the purpose of the legislature not to exceed its constitutional powers, sub-section 2 may, I think, be taken, in the case of a decedent domiciled without New Brunswick, to exclude such property from the operation of section 5. If not, as to such property the legislation would, in my opinion, be *ultra vires*.

We are not now concerned with the purview or the validity of this legislation in so far as it may affect property of a domiciled decedent, which is not within the province at his death and is not brought into the province in the course of administration, if indeed the latter fact be material. *Attorney-General* v. *Dimond* in 1831(1).

It is important and, at this point, convenient to inquire what is the nature of the tax called a "succession duty" which the New Brunswick statute imposes. Is it a tax in the nature of a probate tax, which, like probate fees, is payable as "a condition of the issue of probate" or letters of administration? Or is it in the nature of a duty on the beneficial succession to property which is ultimately paid by the beneficial recipient? Is it a tax on the succession itself, or is it imposed on the property which passes ? If on the property, is it confined to property having a situs actual or legal within the province? If on the succession, is it a direct tax and is it in the present case "taxation within the province?"

Although it contains several provisions which we would expect to find in connection with a probate tax —notably those requiring the filing of an inventory and the giving of a bond by the personal representa-

(1) 1 Cr. & J. 356.

tive (section 6), imposing on him the obligation to pay the tax (sections 15-19), making it payable at death (section 13), and its scale partly dependent upon the aggregate value (section 5), and declaring that the duty shall be "over and above the fees provided by the chapter of these consolidated statutes relating to probate courts" (section 5)—the statute does not impose payment of the duty as a condition of the grant of probate or administration, nor does it make the fact that the title to or possession of particular property can only be acquired, or has in fact been acquired, under local letters the test of liability to the tax. It is true that the duty is made collectable in the course of administration, but it differs from a probate tax in that though paid in the first instance by the executor its ultimate incidence is not on the estate, but on the beneficiary (section 15). The specific and pecuniary legatees, and not the residuary legatee, have to bear the burden (Dicey's Conflict of Laws, 2 ed., p. 747). Its rate depends in part on the residence and on the degree of relationship or the absence of relationship of the beneficiary to the decedent. This tax, therefore, partakes of the nature of a succession or a legacy duty as well as of a probate duty. If it were imposed as a condition of probate or administration, it may well be that the legislature could subject to it all property got in under the authority of a grant from a New Brunswick court. If, however, it is not a duty imposed as a condition of probate, but is a tax on the succession or on the property passing, the fact that the property in question was actually got in under the authority of letters granted in New Brunswick does not determine its liability. That depends upon whether the succession occurs in New Bruns-

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wick or the property is property within New Brunswick within the purview of the statute, and also upon the constitutional power in either case to impose the tax. The property passed from the decedent and passed to the beneficiaries in the sense that they had acquired their beneficial interest in it, subject, of course, to payment of his debts in due course of administration and, in cases of testacy, to the assent of the executor, immediately on the death of the testator. The tax attached to it, if at all, at the date of his death (section 13). Its liability to duty and its legal situs therefore cannot depend upon the fact that the executor some time afterwards, and perhaps unnecessarily, took ancillary probate in New Brunswick and got in the property at St. John. Compare *Attorney-General* v. *Hope*, in 1834(1), a case of probate tax, and *Attorney-General* v. *Forbes*(2), a case of legacy duty.

That the legislature may declare dutiable any property of a non-domiciled decedent, which, though not within the province at the time of his death, shall be received or held therein at any subsequent time and for any purpose by his personal representatives may be conceded. But, in my opinion, this it has not done. The provision of the statute that the tax shall attach at the decedent's death, is not consistent with such an intention. The property is not then within the province, and the provincial power of taxation is only "within the province."

Section 5 indicates an intention to tax the decedent's property at the time of its "passing," and subsection 2 thereof, in the case of the non-domiciled decedent, only property not outside, *i.e.*, within the pro-

(1) 2 Cl. & F. 84.

(2) 2 Cl. & F. 48.

vince at the time of his death. In other words, the statute in effect declares that the only property of a non-domiciled decedent, which is subject to the tax, is that which is within New Brunswick at the time of his death. This view of the scope of the legislation is emphasized by the exception in sub-section 2, of section 5, of "outside" property of a non-domiciled decedent, which is devised or transferred to a resident beneficiary.

But is the tax imposed on the succession, or on the property itself? The statute says (section 5) that "property * * * passing by will or intestacy * * *, shall be subject to a succession duty," and it distinctly declares this duty to be payable where the property which "passes" is that of a non-domiciled decedent, whether it be movable or immovable. This latter fact would seem to raise a most serious, if not an insuperable obstacle to construing this statute as imposing a duty on the succession itself. *Winans* v. *Attorney-General*(1), at pages 32 *et seq.*, 39 *et seq.*

But it is said that we are bound by the decision of this court in *Lovitt* v. *Attorney-General of Nova Scotia*(2), to hold that the duty is imposed on the succession and not on the property. The Nova Scotia statute there under consideration declared "subject to a succession duty,"

> all property situated or being within the province of Nova Scotia and any interest therein or income therefrom, whether the deceased person owning or entitled thereto *last dwelt* within the said province or not.

If the word "dwelt," as here used, means "resided" as distinguished from "was domiciled," this statute may be construed as applicable only in the cases of

(1) [1910] A.C. 27. (2) 33 Can. S.C.R. 350.

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domiciled decedents and therefore clearly distinguishable from the New Brunswick Act; but if "dwelt," as used in the Nova Scotia Act, means "domiciled," the two Acts appear not to be distinguishable in substance, and in that case this court was probably committed by the decision in the 33rd volume to the view that the duty imposed by these Acts is a tax on the succession. Taschereau C.J., and Davies J., pointedly expressed this opinion upon the Nova Scotia Act and, while Armour J. is reported as merely agreeing in the dismissal of the appeal, on a careful examination of the case, I can find no other ground on which he could well have reached this result. Moreover, I am informed by Mr. Justice Davies that this was in fact the late Mr. Justice Armour's *ratio decidendi*. But for this decision, with the most profound respect for these three eminent judges, I would have been of the opinion expressed in that case by Mr. Justice Mills that, although the occasion of the tax is the passing or succession, and it is called a succession duty, yet it is upon the property and not upon the succession that it is fastened.

It may be questionable how far we should deem ourselves bound, if it be not distinguishable, to follow the decision of the majority of this court in *Lovitt* v. *Attorney-General of Nova Scotia*(1), in view of the opinions since expressed in the House of Lords in *Winans* v. *Attorney-General*(2), as to the scope of succession duties proper and the property on which they are imposable. But it seems to me not necessary to determine whether or not the former decision of this court is indistinguishable or whether or not it should be deemed still binding.

(1) 33 Can. S.C.R. 350. (2) [1910] A.C. 27.

If the duty in question was intended to be a tax on the succession, notwithstanding that it is payable in respect of the movable property of a non-domiciled decedent, and that its amount is made in part to depend upon the value of the whole estate, inasmuch as the succession itself to movable property depends upon the law of the decedent's domicile and the beneficiary acquires his interest under and by virtue of that law (*Harding* v. *The Commissioner of Stamps for Queensland*(1), at page 774), it would seem to have been unnecessary to provide so explicitly that the tax shall be payable in respect of property of a domiciled decedent situate without the province. In the case of a decedent domiciled elsewhere, the duty, though confined to property situate in New Brunswick, if levied on the succession would not be a taxation within the province. Moreover, if the law requires the personal representative to pay a tax on the succession, with a right either to indemnity from the beneficiary or to recoupment out of his property, the tax would savour of the indirect. An instance of an indirect tax, given by the Privy Council in *Attorney-General* v. *Reed*(2), at page 143, is where "a person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards." Because the statute appears to me in terms to impose what it calls a succession duty, not upon the succession, but, by reason of the succession, upon the property itself and also because, viewed as a tax on the succession, it would, in the case of a movable property of non-domiciled decedents, be *ultra vires,* unless bound by *Lovitt* v. *Attorney-General of Nova Scotia*(3), to hold

(1) [1898] A.C. 769. (2) 10 App. Cas. 141.
(3) 33 Can. S.C.R. 350.

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otherwise, I conclude that the duty is a tax upon the property itself.

If it is a tax upon the property, though payable in the first instance by the personal representative, it is his right to pay it out of, or to deduct it from, the property passing through his hands, and I therefore deem him merely the agent of the province to collect the tax from the beneficiary upon whose property it is directly imposed.

If the duty be a tax upon the succession to or acquisition of the property of the decedent, its situs at his death is in the case of movable property not material. But if it be a tax upon the property passing as distinguished from the succession to or acquisition of such property, the situs of the property becomes a matter of prime importance.

Although it is apparently well established in the United States that, as a general rule, the situs of debts for purposes of taxation is that of the domicile of the creditor (and this seems to me the more logical rule: *Re State Tax on Foreign-held Bonds*(1), at pages 318-9;) and a tax imposed by another State, in which the debtor resided, has been held unconstitutional (Wharton's Conflict of Laws, 3 ed., pp. 171-2), under the law of England which prevails in New Brunswick it is equally well established that a simple contract debt owing by an individual is property which has a local situs where the debtor resides: *Commissioner of Stamps* v. *Hope*(2), whereas the situs of specialty debts and of debts represented by documents marketable and transferable by delivery is "where the instruments happen to be." *Winans* v. *The King*(3), at pages

(1) 15 Wall. 300.

(2) [1891] A.C. 476, at pp. 481-2.

(3) [1908] 1 K.B. 1022.

1026, 1030. That the artificial situs ascribed to debts by English law rather than the situs of the domicile of the creditor is the criterion for determining the liability of such property to taxation seems to be indicated by Lord Hobhouse in delivering the judgment of the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland*(1), at page 775. That this is the test in a case of probate duty is well settled. *Commissioner of Stamps* v. *Hope*(2). And as pointed out by Mr. Dicey, an English decision determining liability or non-liability to probate duty is a decision that the property affected was or was not situate in England at the time of the decedent's death. Conflict of Laws (2 ed.), at page 313.

Were the debtor in the present case resident only in New Brunswick, the debts evidenced by the deposit receipts would, I think, have been taxable in that province. Adapting language found in *Attorney-General* v. *Newman*(3), "any property which can only be properly administered in the province is property situate within the province according to the meaning which ought properly to be attributed to those words in the 'Succession Duty Act.'" But if payment of the deposit receipts held by the late Senator Lovitt was exigible as well in London or Montreal as in St. John, can it be said that the debtor's residence was sufficiently established at St. John to make the moneys represented by the receipts property "within the province" of New Brunswick?

That a corporation may for some purposes have many residences may be conceded. For instance, though its head office or chief place of business be else-

(1) [1898] A.C. 769. (2) [1891] A.C. 476.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

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where, if it has a place of business, an office or an agency within a province, it may be resident there for the purpose of conferring jurisdiction upon the provincial courts. But if it be necessary to determine what, for purposes of taxation, is the seat of the corporation—what is the place at which it dwells or carries on its business—what is its residence—there are many authorities which indicate that it should be regarded "as necessarily having its seat or centre of operations in some one spot to the exclusion of all others," and that this will be "the centre where the corporation resides, while the other establishments are merely offices or agencies." See decisions collected in Foote's Int. Law (2 ed.), pages 112-121, and in Lindley on Companies (6 ed.), page 1223.

If a corporation, for the purpose of fixing the situs of its debts not otherwise determined, should be deemed resident in each province or state in which it may have an agency, or place of business, it is obvious that, as property of the creditor, every such debt might be subjected to taxation in every such province or state. It would seem unreasonable, that the mere exigibility of a debt by legal process at several places should suffice to render that debt property subject to taxation at each of such places. I should require unquestionable authority to satisfy me that this is the law. Of course it is quite competent for a sovereign legislature untrammelled by constitutional limitations to declare any property, wherever situate, taxable and to declare a corporation, for any reason or without reason, resident within its jurisdiction. The only restriction upon its power is the limitation of inability to enforce its laws. But the legislature of a British province, which is empowered to impose only "taxation within the province," cannot

by legislative declaration make anything property "within the province" which would not otherwise be such according to the recognized principles of English law. If it could, the constitutional limitation upon its power would be a mere dead letter.

The inconvenience and injustice which might result in the case of an insolvent decedent, who leaves property in several jurisdictions in each of which he also leaves creditors, from a holding that, even for purposes of administration, a debt due to him by a corporation should be deemed property having a situs wherever such corporation may have a branch, is obvious. How would the doctrine that creditors within the jurisdiction have a right to satisfaction of their claims out of local assets in priority to foreign creditors be applied? Would the accident of one ancillary administrator rather than another first demanding and obtaining payment of the debt determine the rights in regard to it of the various creditors wherever resident?

The sufficiency and the propriety of a grant of letters of administration in respect of such property by the consistorial court of the diocese within which the general and chief business of the corporation was carried on rather than by the court of another diocese within which the corporation had an office and did part of its business seems to be fairly deducible from *Ex parte Horne*(1). The same idea that in respect to money due to a decedent from a corporation its residence for the purpose of fixing the situs of the debt and thus making it *bonum notabile* is its chief place of business runs through the decisions of Romilly

(1) 7 B. & C. 632.

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M.R., and of Giffard L.J., in the case of *Fernandes' Executors*(1).

In *Willis* v. *Bank of England*(2), at page 38, it is pointed out that

> though the statute, 7 Geo. IV. ch. 46, sec. 15, requires that bank post bills issued by the branch banks shall be payable there as well as at London, yet the converse has not been enacted, and the bank post bills issued in London are not payable at the branch banks.

A not unreasonable inference from this decision is that but for the statute the post bills issued by branch banks would have been payable only at London.

There is a singular dearth of authority upon the important question as to what should be deemed, for purposes of taxation, the situs of a debt owing by a corporation and exigible at more than one of its establishments. But, in the absence of direct authority, applying the principles which seem to underlie decisions in cases somewhat cognate, and deeming that to be the law which appears most consonant with equity and natural justice, I have reached the conclusion that the situs of the debts represented by the deposit receipts in question here was not at St. John, N.B., but was either at Montreal or at London—for the purposes of this action it matters not which.

If this be not so, although their situs may not be definitely outside, neither is it so clearly within New Brunswick that these debts should be deemed subject to the provincial power of taxation. If they are property not "outside the province," within the meaning of that descriptive phrase in the New Brunswick "Succession Duty Act," so far as it includes them that statute is, in my opinion, *ultra vires*.

(1) 5 Ch. App. 314.

(2) 4 A. & E. 21.

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If the duty is imposed upon the succession itself, rather than, as I think, fastened upon the property passing, and if it attaches in respect of the debts represented by these deposit receipts, it is likewise, in my opinion, not "taxation within the province."

I would therefore allow the appeal of the defendants.

Appeal allowed with costs.

Solicitor for the appellants: *H. A. McKeown.*

Solicitor for the respondent: *William Pugsley.*