in appearance and constituted a concealed danger in a spot frequented by children; the defendant corporation was held liable for breach of its duty to give definite warning or to take adequate precautions to protect them against the danger. As to (*b*)—(the quality of allurement as a determinant of permission), Warrington, L.J., observed in the *Hardy* case:[102] "Much stress was laid in argument on the "allurement" afforded by the moving staircase. Such a fact may be material element in considering whether under all the circumstances leave and license is to be inferred, but where . . . leave and license is distinctly negatived, the fact cases to be relevant."[103]

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SUCCESSION DUTIES IN CANADA.

(*Concluded.*)

NATURE AND CONSTITUTIONALITY.

Part II: Constitutionality of the Tax.

In the United States of America the constitution requires that taxation must be uniform or without discrimination. None of the Canadian legislatures, Dominion or provincial, are subject to a restriction of this character. In case of the abuse of the powers of taxation or other powers possessed by these legislatures, the only remedy is an appeal to the electorate.[30]

Under the provisions of section 92 of the British North America Act, the taxing powers of provincial legislatures are subject to two express limitations, namely:

1. The taxation must be direct; and
2. It must be within the province.

[102] [1920] 3 K. B., at 470.

[103] The duty of occupiers to children was considered in the following Canadian cases:

Pedlar v. *Toronto Power Co.* (1913), 15 D. L. R., 684; affirmed 19 D. L. R., 441; *Robinson* v. *Village of Havelock* (1915), 20 D. L. R., 537; 32 Ont. L. R., 25; *Vick* v. *Morin* (1915), 22 D. L. R., 29; 30 W. L. R., 412; *Geall* v. *Dominion Creosoting Co., Ltd.* (1916), 55 Can. S. C. R., 587; *Fulton* v. *Randall* (1918), 3 W. W. R., 331; (application of *Cooke* v. *Midland Ry.* to trespassing horses); *McLean* v. *Y. M. C. A.* (1918), 3 W. W. R., 522; *Shilson* v. *Northern Ontario Light & Power Co.* (1919), 48 D. L. R., 627; affirmed in Supreme Court of Canada (1920), 50 D. L. R., 696; 59 Can. S. C. R., 443; *Burbridge* v. *Star Mfg. Co.* (1921), 56 D. L. R., 658; *Wallace* v. *Pettit*, 25 Ont. W. N., 364.

The American cases on this subject are collected and discussed in learned articles in (1898) 11 Harv. L. Rev., 349; (1923) 36 Harv. L. Rev., 826; (1923) 57 Amer. L. Rev., 321, and 875.

[30] Fisheries Case (1898) A.C. 700; 67 L. J. P. C. 90.

1. Direct Taxation.

The judgment of the Privy Council in *Rex* v. *Cotton*[31] contains the following passage: "Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in sec. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

Mill's definitions of direct and indirect taxes are as follows:

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

Before proceeding to consider the application of these definitions to provincial succession duties, it may be well, in the first instance, to refer briefly to certain decisions of the Judicial Committee upon tax statutes bearing upon the question of what constitutes direct taxation.

In *Attorney-General of Quebec* v. *Reed*,[32] a duty payable in stamps upon papers filed in court in the course of litigation was held to be indirect, on the ground that the legislature in imposing the tax could not have had in contemplation the ultimate determination of the suit or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else. Therefore it could not be a tax demanded "from the very persons who it is intended or desired should pay it."

In *Bank of Toronto* v. *Lambe*[33] a tax imposed upon banks which carry on business within a province, varying in amount with the paid-up capital, and with the number of its offices, was held to be direct taxation. The judgment of the Privy Council proceeds:

"Whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec Legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it."

In the year 1897, the same question came before the Privy Council in a very similar case, *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*.[34] In this case, the Privy Council held

[31] (1914), A. C. 176; 83 L. J. P. C. 105.
[32] 10 App. Cas. 141; 54 L. J. P. C. 12.
[33] (1887), 12 App. Cas. 575; 56 L. J. P. C. 87.
[34] (1897), A. C. 231.

valid as direct taxation a provincial Act imposing a license fee on brewers and maltsters and other persons (although duly licensed by the Dominion) for leave to sell within the province the liquors manufactured by them.

Succession Duties : Direct and Indirect.

In *Cotton* v. *The King*[35] it was held by the Privy Council that the taxation imposed by the Quebec Succession Duties Act, 1906, was indirect, and that the statute was accordingly ultra vires of the provincial legislature. The Act in question provided that: "All transmissions owing to death, of the property in, usufruct or enjoyment of, moveable or immoveable property shall be liable to the following taxes, etc." Commenting upon the provisions of the statute, Lord Moulton says: "The method of collection appears to be as follows: There is nothing corresponding to probate in the English sense, but there is under art. 1191 (g) an obligation on 'every heir, universal legatee, legatee by general or particular title, executor, trustee and administrator or notary before whom a will has been executed' to forward, within a specified time, to the collector of provincial revenue a complete schedule of the estate, together with a declaration under oath setting forth various matters relating thereto. Although this is an obligation on each member of each of the above classes, it is provided that 'the declaration duly made by one of the above-named persons relieves the others as regards such declaration.' On receipt of such declaration the following provisions with regard to the payment of the duty come into force:

"(4) . . . the said collector shall cause to be prepared a statement of the amount of the duties to be paid by the declarant.

"(5) Such collector of provincial revenue shall inform the declarant of the amount due as aforesaid, by registered letter mailed to his address, and notify him to pay the same within thirty days after the notice is sent; and, if the amount is not then paid to him on the day fixed, the collector of provincial revenue may sue for the recovery thereof before any court of competent jurisdiction in his own district."

In view of the personal liability imposed upon the declarant, their Lordships held that the tax was indirect, being demanded not from the person intended to bear it but from someone who was expected to be recouped by someone else.

At the conclusion of his judgment in the *Cotton* case, Lord Moulton makes the following general observations in regard to the Quebec Succession Duty legislation then in force: "The whole struc-

[35] (1914), A. C. 176; 83 L. J. P. C. 105.

ture of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the Government, as in the cases where the local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not 'direct taxation,' and that the enactment is therefore ultra vires on the part of the Provincial Government."

At first glance one might conclude the meaning of these observations of Lord Moulton to be that all succession duties, as imposed by provincial legislatures, constitute indirect taxation. This broad interpretation of the phraseology used by his Lordship is, however, generally considered to be unwarranted. In *Re Doe*,[36] the Succession Duty Act of the Province of British Columbia was held valid in so far as it related to property within the province. It was considered by the Court that Lord Moulton's observations in the *Cotton* case were confined to the scheme of the Quebec Act then under examination, and did not apply to succession duties in general, as if the phrase "succession duty" had a well-known and definite legal signification. "Its real meaning, I think, must be gathered from the statute in which it is used; the real character of the tax, whatever it may be styled, depends upon its intended incidence as disclosed by the statute itself."

In *Re Cust*[37] the provisions of The Alberta Succession Duty Ordinance were held to impose direct taxation and to be intra vires of the provincial legislature in so far as they relate to property within the province. Per Harvey, C.J.:

"The reasoning (in *Rex* v. *Cotton*) does not, to my mind, apply to the ordinance in question here. The plan of our ordinance is entirely different from that (the Quebec statute). Instead of a person who has no claim to or interest in the estate being called on to pay the duties, they are payable by the executor or administrator, who is, under our law, the legal owner of all the estate, both real and personal, and whose duty it is to pay all the debts and other liabilities of the estate, not out of his own property, but out of the assets of the estate in his hands. As to duty in respect to property in the province he has no need to go to anyone to recover the duties paid, because he pays them out of the property itself, which is directly liable . . .

[36] (1914) 19 B. C. 536.
[37] 21 D. L. R. 366; 8 A. L. R. 308.

"The executor or administrator, before the grant of probate or administration, is required to give a bond for the payment of the duty (sec. 6), but it is limited to the payment 'of any duty to which the estate of the deceased coming into the hands of the said executor or administrator may be found liable.' This is the only personal liability that is imposed on the executor or administrator, and it is no more of a personal liability than is imposed by the bond to be given by an administrator before grant of administration to administer the estate according to law . . .

"Under these provisions the duties appear to come within the definition of direct taxation as accepted in the *Cotton* case."

In *Re Muir Estate,*[38] Cameron, J.A., makes the following comment on the Manitoba Succession Duty legislation as compared with that in force in the Province of Quebec when the *Cotton* case was decided:

"Succession duties under our Act have been generally regarded as direct taxes. Those upon whom the succession devolves have been looked upon as those who have to pay them directly. The fact that the payment may be made temporarily, by the executor, has not been regarded as constituting a tax direct upon the executors, but indirect upon the devisees or others interested. The executor has been regarded merely as an agent in making the payment. The case of a corporation making a payment of an income tax and charging it against the dividends payable to parties ultimately liable seems analogous. In the one case, as in the other, there is no question that the method of payment is more or less indirect, but in neither case is the indirectness of the levy considered so substantial as to withdraw the taxes in question from the classification of direct taxes . . .

"My conclusion, therefore, is that we must read the judgment in *Cotton* v. *Rex* in the light of the unusual provisions of the Quebec law therein referred to. The corresponding provisions of our law are simple and effective in carrying out what I have no doubt was the intention of the legislature, that is, to make the tax payable directly by the parties beneficially interested in the estates of deceased persons . . . The Act directly imposes the tax upon the estate, or rather, upon the persons entitled thereto. The executor is utilised as the agent to collect from those entitled to the estate the duties and to pay the same to the treasury."

On the hearing of the appeal in the Supreme Court of Canada in *Re Muir Estate,*[39] Davies, J. comments upon the decision of the Privy Council in *Cotton* v. *Rex* in the following terms: "To assume that by

[38] 24 Man. L. R. 310; 18 D. L. R. 144.
[39] 51 Can. S. C. R. 428

this judgment the Judicial Committee intended to reverse many previous decisions of the Board, which had held either expressly or by necessary implication that succession duty statutes properly framed and imposing taxes on movable or other property within the province were *intra vires* the legislatures which enacted them, would be unjustifiable."

Legislation followed in the Province of Quebec upon the decision of *The King* v. *Cotton,* and three statutes were passed on 19th February, 1914 — 4 George V. ch. 9, 4 George V. ch. 10, and 4 George V. ch. 11. In *Barthe* v. *Alleyn-Sharples,*[40] Lord Phillimore, in delivering the judgment of the Privy Council, spoke of these statutes as having effectively met the difficulty which was pointed out in the case of *Cotton* v. *Reg.* as to the taxation imposed by the earlier statutes being indirect.

2.—Taxation "Within the Province."

In the *Cotton* case the phrase discussed was "direct taxation," and accordingly the decision in that case throws no light upon the meaning of the words "within the province" in relation to succession duty legislation. The incidence of the tax upon persons was the particular feature of the Quebec legislation, which led the Privy Council in the *Cotton* case to decide that the impost was indirect. It would seem to be quite possible, however, for provincial legislatures to impose a tax on property of deceased persons without reference to any personal liability, provided, of course, that such property is locally situated within the province or forms part of a succession devolving under provincial law.

In nearly all the cases before the Privy Council a property tax, charged upon and payable out of the property, has been regarded as a customary and proper method of taxation.[41] It is equally true, on the other hand, that if a person is found within a province he may be taxed there: *Lambe's case.*[42] Again, the transmission of property, at least to the extent to which such transmission takes place "within the province" may be validly taxed. The succession to property in the English sense may also be the subject of taxation by provincial legislatures so far, in any event, as property locally situate within the province is concerned.

It has been asserted that the maxim *mobilia sequuntur personam* cannot be invoked by a province to bring within the ambit of taxation personal property of a domiciled decedent locally situate without

[40] (1922), 1 W. W. R. 101.
[41] *Rex* v. *Lovitt* (1912) A. C. 212; 81 L. J. P. C. 140.
[42] 12 App. Cas. 575; 56 L. J. P. C. 87.

its boundaries. This contention, however, does not find support in the judgments delivered by Davies, C.J., Anglin, J., and Mignault, J., of the Supreme Court of Canada, in *Smith* v. *Provincial Treasurer of Nova Scotia.*[43] Moreover, in *Cotton* v. *Rex,*[44] and *Barthe* v. *Alleyn-Sharples,*[45] Duff, J., also expresses the opinion that the maxim in question may be validly applied in the construction of provincial succession duty laws. The issue has not yet been directly raised before the Privy Council, but the decision of the Board in *Lambe* v. *Manual,*[46] and *Harding* v. *Commissioners of Stamps for Queensland,*[47] would appear to lend support to the view that the succession to all personal property of a domiciled decedent, irrespective of its location, is subject to the fiscal laws of provincial legislatures.

The constitutional questions which have arisen in connection with succession duty legislation in Canada show how important it is to determine whether any particular enactment can be regarded as imposing a tax upon property, a tax upon persons, or as affecting the transmission of, or the succession to, property, and generally to ascertain the exact incidence of the taxation.

The decisions of the Judicial Committee of the Privy Council and of the Supreme Court of Canada on the constitutional aspects of the law indicate that the following duties may be validly imposed by provincial legislatures and constitute direct taxation "within the province":—

(1) A duty or tax in the nature of a probate or estate duty upon real and personal property locally situate within the taxing province, irrespective of the domicile of the deceased owner, where the tax is imposed as a condition of the grant of local probate or administration;

(2) A duty or tax on the transmission of property to a resident beneficiary, on the death of a person domiciled in the taxing province at the time of death, notwithstanding that the property may be locally situated outside of the province at the time of the death, and

(3) A succession or legacy duty upon all the personal property of a deceased person dying domiciled within the province imposing the tax, irrespective of the local situation of the property.

(1) *Probate or Estate Duties.*

The use of the phrase "succession duties" in the title of most of the provincial enactments imposing death duties has led to a more or

[43] 58 S. C. R. 570.
[44] 45 S. C. R. 469.
[45] (1920) 1 W. W. R. 952.
[46] (1903) App. Cas. 68.
[47] (1898) A. C. 769.

less general belief that the object of such taxation is, in all cases, merely to impose a duty similar to the succession or legacy tax in force in England. There is abundant evidence in the laws of several of the provinces of Canada, however, that the scope of the taxation locally is sometimes intended to be much wider in its application, and to include not only a tax similar in some respects to the English succession duty, but also a tax upon property by reason of its local situation in the nature of a probate or estate duty. In *Rex* v. *Lovitt,* (81 L. J. P. C. 140) Lord Robson refers to the object of the New Brunswick Succession Duty Act, 1896, in the following terms:

" Broadly stated, sec. 5 (sub-secs. 1 and 2), seeks to bring within the scope of succession duty—

"(a) All property situate within the province, whether the deceased was domiciled there or not;

" (b) All property outside the province belonging to persons domiciled therein; and

"(c) Even all property outside the province belonging to persons not domiciled therein, if such property be devised to a person resident therein.

In the *Lovitt* case, the Privy Council held that the New Brunswick statute, in imposing a duty upon all property situate within the province, whether the deceased was domiciled there or not, assimilated the tax to a probate duty, and that the taxation was *intra vires* of the provincial legislature. The features of the legislation which led Lord Robson to regard it as imposing a tax in the nature of a probate duty were as follows:

1. Duty laid on the corpus of the property;

2. Payment thereof made a term of the grant of ancillary probate;

3. Executor required to give bond for due payment, and, in default of so doing, probate to be cancelled;

4. Executor required to deduct duty before handing over property, and to pay it forthwith to the Receiver-General of the province.

5. Foreign executor prohibited from transferring the stock of any company in the province liable to duty, such executor, and any company permitting a transfer, to be personally liable in the event of transfer being made prior to actual payment of the duty.

On the basis of this decision of the Privy Council, it would seem reasonable to conclude that if the legislation now in force in any of the provinces contains features similar to those outlined above, such legislation may be regarded as imposing taxation in the nature of a probate duty, and, to quote Lord Robson, " as part of the price to be

paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province."

(2) *Transmission Duties.*

The transmission of the property of deceased persons is the basis of much of the Quebec legislation on the subject of death duties. In delivering the judgment of the Privy Council in *Barthe* v. *Alleyn-Sharples*,[48] Lord Phillimore judicially interprets the words "transmission within the province," and thus, to some extent, defines the power of taxation possessed by a provincial legislature when the subject-matter of the taxation is the transmission of property, rather than the property itself. The facts in that case were as follows: The Hon. J. Sharples died on the 30th July, 1913, domiciled in Quebec. He appointed Dame Margaret Alleyn-Sharples his universal legatee and executrix of his will jointly with two others. On the 15th October, 1913, the executors lodged their declaration, enumerating the property of the deceased, and including therein shares in various companies whose head offices were outside the Province of Quebec. A claim was made for duties in respect of the whole estate. This claim, so far as it related to the property outside the province, was resisted, and proceedings were instituted on the 12th August, 1915, by the Collector of the Revenue to recover payment.

Chief Justice Lemieux, by whom the action was tried in the Superior Court, decided against the executors, acting upon and applying the rule *mobilia sequuntur personam*. This judgment was reversed on appeal by the Court of King's Bench, a majority of that Court holding that the powers of the provincial legislature were not plenary, but limited to direct taxation within the province, and that any attempt to levy a tax on property locally situated outside the province was not taxation within the province, and was beyond the competence of the provincial legislature. The respondent then appealed to the Supreme Court of Canada, which on the 3rd February, 1920, unanimously decided against the executors. On a further appeal to the Privy Council, the finding of the Supreme Court of Canada was sustained.

In delivering the judgment of the Judicial Committee, Lord Phillimore outlines the legislation then in force in the Province of Quebec, and proceeds:—

"These statutes have effectively met the difficulty which was pointed out in the case of *The King* v. *Cotton* as to the taxation imposed by the earlier statutes being indirect, and it only remains to

[48] (1922) 1 W. W. R. 101.

be considered whether the taxation is within the province. For this purpose 4 George V. ch. 10 is the relevant statute. The conditions there stated upon which taxation attaches to property outside the province are two: (1) that the transmission must be within the province; and (2) that it must be due to the death of a person domiciled within the province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is, as the universal legatee in this case was, either domiciled or ordinarily resident within the province; for in the connection in which the words are found, no other meaning can be attached to the words 'within the province,' which modify and limit the word 'transmission.' So regarded, the taxation is clearly within the powers of the province."

The judgment of the Privy Council in *Barthe* v. *Alleyn-Sharples*[49] conclusively established that the statute law of Quebec, as it then existed, was not sufficiently wide in terms to include property locally situated outside of the province belonging to a deceased person domiciled therein at the time of death, where such property is transmitted to a non-resident of the province. In order to bring this class of property within the ambit of taxation, a tax upon the privilege of transmitting such property was imposed by the statute 12 George V. ch. 90, entitled "An Act respecting the seizin of certain beneficiaries."

(3) *Succession or Legacy Duties.*

While the decision of the Supreme Court of Canada in *Smith* v. *Provincial Treasurer of Nova Scotia*[50] does not in terms directly affirm that succession or legacy duties, as distinguished from probate or estate duties, can only be levied by the province of domicile, the judgments delivered by Davies, C.J., and Anglin, J., indicate that, in their opinion, at all events, the provincial powers of taxation are so limited. This was a special case, stated under the provisions of the Nova Scotia Judicature Act. The facts agreed upon were that one Wiley Smith died at Halifax, Nova Scotia, on 28th February, 1916, and at the time of his death had his domicile in the Province of Nova Scotia; that the aggregate value of the property passing on the death of the said intestate exceeded $100,000, consisting *inter alia*, of 2,076 shares of capital stock of the Royal Bank of Canada of the value of $442,168, or thereabouts; that the Bank had its head office in Montreal, Province of Quebec, and at the time of the passing of said property, and previously thereto, had maintained within

[49] (1922) 1 W. W. R. 101.
[50] 58 S. C. R. 570.

the Province of Nova Scotia a share registry office under the provisions of section 43 of the Bank Act (Canada), at which the shares of shareholders resident within the Province of Nova Scotia were required to be registered, and that the shares in question were so registered there. In the Supreme Court of Nova Scotia, judgment was delivered upholding the tax, on the ground that as the shares were registered in the Province of Nova Scotia, their situs was in Nova Scotia and succession duty was payable on them there. On appeal to the Supreme Court of Canada, the judgment of the Supreme Court of Nova Scotia was affirmed, not only on the ground that the local or physical situs of the shares depended on the place of registration, but also on the further ground that for succession duty purposes personal property has a situs at the domicile of the deceased owner, because of the maxim *mobilia sequuntur personam.*

Referring to the constitutional aspect of the law in Nova Scotia, Davies, C.J., says:—

"I am of the opinion that, inasmuch as the deceased died intestate domiciled in Nova Scotia, owning these shares in the bank, the shares are liable to succession duty in that province.

"The judgment now in question was based on the ground that as the shares were registered in the Province of Nova Scotia, in the registry established pursuant to the 43rd section of the Bank Act, where alone they could be registered, transferred or otherwise effectually dealt with, their situs was in Nova Scotia and succession duty was payable on them there.

"The only doubt I have had is whether that ground is the true and proper one on which to base the conclusion the Court reached. In other words, whether the liability to pay succession or legacy duty does not depend upon the application of the principle *mobilia sequuntur personam.* I am inclined to think that that principle is the one that should govern, and that the law of domicile prevails over that of the locality of the property taxed.

"In the case of *Harding* v. *Commissioners of Stamps for Queensland,*[51] which was approved of in the case of *Lambe* v. *Manual,*[52] it was held that section 4 of Queensland's 'Succession and Probate Duties Act,' 1892, defining a 'succession' (being the same as section 2 of the English 'Succession Duty Act' of 1853), must be read in the sense affixed to the English Act by the English tribunals; and that it did not include movables locally situated in Queensland which belonged to a testator whose domicile was in Victoria; and it was held,

[51] (1898), A. C. 769.
[52] (1903), A. C. 68.

further, that the amending Act of 1895, section 2, was not retrospective in its operation.

"The amendment, which was held not to be retrospective, provided that succession duty was chargeable with respect to all property within Queensland, although the testator or intestate may not have had his domicile in Queensland, but if it had been restrospective it would have been conclusive. This finding of the Judicial Committee no doubt was reached because the powers of the legislature in that colony were plenary and not limited, and they could, if they chose to do so, displace the domicile rule.

"But I am of the opinion that the powers granted to the provinces of Canada under the 92nd section of the 'British North America Act,' 1867, are not plenary, but limited.

"Among the legislative powers granted to them under sec. 92 of the said Act is subsection 2, 'direct taxation within the province for the raising of revenue for provincial purposes.'

"The taxation imposed, therefore, must be on property 'within the province,' and what is personal property 'within the province' must be determined by the rule so firmly established in Great Britain with respect to it at the time of the passing of the 'British North America Act' as that embodied in the maxim *mobilia sequuntur personam,* under which all the decedent's personal property, wheresoever situated, is brought within the province or country of his domicile and made liable for all succession or legacy duties there imposed upon it.

"After a careful study, not for the first time, of all the cases cited at Bar bearing on the question before us, I have reached the same conclusion with respect to the domicile being the determining factor as to what property is liable for succession and legacy duties as my brother Anglin, and I concur in his reasons for the conclusion reached by him.

"The broad ground on which that judgment rests is that the maxim *mobilia sequuntur personam* embodies the principle applicable to the succession to property of a domiciled decedent of any province of Canada for succession and legacy duties, as distinct from probate or estate duties; that in regard to those special succession and legacy duties the domicile of the decedent, and not the physical or artificial situs of the property, must prevail; that this was the law in England, decided in a series of cases before the 'British North America Act' was passed, and that the power of taxation within the province granted to the provinces in sub-sec. 2 of section 92 of that Act must be con-

strued in accordance with the English law as it then was decided to be; that accordingly each province has the power of levying succession and legacy duties only upon the personal property passed by a domiciled decedent of the province, which either is locally situate therein physically or by virtue of the maxim *mobilia sequuntur personam* is drawn into such province by reason of the domicile; that while the Imperial legislature itself, or a colony possessing plenary powers of taxation, could at any time overrule the principle embodied in the maxim (See *Harding* v. *Commissioner of Stamps for Queensland*[53] above quoted), the several provinces of Canada, being limited in their powers, cannot do so, or by any enactment of their own enlarge or extend the powers of taxation granted to them by section 92 of the 'British North America Act'; that any other construction of these powers of taxation would create endless, if not insuperable, difficulties, and would subject the same property to possible double liability to succession duty taxation, one in the province where the domiciled decedent owned the property, and the other in which it was locally situated at his death. The result of the holding, in which I concur, would be that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situated, and that such taxation could only be levied by the Province of the domicile."

Reference has already been made to the fact that the Privy Council is not yet definitely committed to the view that provincial legislatures may validly impose taxation upon the succession to personal property of domiciled decedents, where such property has a local situs outside of the province, by virtue of the application of the maxim *mobilia sequuntur personam*. The reasoning of the Board in *Lambe* v. *Manuel*,[54] however, would appear to indicate that their Lordships would, in a proper case, probably concur in the opinions expressed in this regard by Davies, C.J., and Anglin, J., in *Smith* v. *Provincial Treasurer of Nova Scotia*.[55]

In *Lambe* v. *Manuel*, the Privy Council held that the succession duties imposed on movables by the Quebec Succession Duty Acts are payable only on property which the successor claims under the law of Quebec, and are not payable on a succession devolving under the law of another Province. Per Lord Macnaghten:—

"The Superior Court unanimously rejected the plaintiff's claim, and the decision of that Court was unanimously affirmed by the Court of King's Bench.

[53] (1898) A. C. 769.
[54] (1903) A. C. 68.
[55] 58 S. C. R. 570.

"The reasons of the learned Judges delivered in these Courts, stated shortly, are that according to their true construction the Quebec Succession Duty Acts only apply in the case of movables to transmission of property resulting from the devolution of a succession in the province of Quebec, or, in other words, that the taxes imposed by those Acts on movable property are imposed only on property which the successor claims under or by virtue of Quebec law, and that in the present case the several items in respect of which succession taxes are claimed form part of a succession devolving under the law of Ontario.

"The decisions of the Quebec Courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*[56]; and *Wallace* v. *Attorney-General*[57]; and by this Board in the case of *Harding* v. *Commissioners of Stamps for Queensland.*[58]

In Re Succession Duty Act and Walker,[59] Hunter, C.J., B.C., expresses the view that the maxim *mobilia sequuntur personam* is inapplicable to the construction of succession duty enactments in Canada, notwithstanding the opinions to the contrary expressed by several of the Judges of the Supreme Court of Canada in the *Smith* case. In the course of his judgment, delivered on 9th February, 1922, he says:—

"By the B. N. A. Act, the legislature is empowered to impose direct taxation within the province in order to raise revenue for provincial purposes. There are, therefore, two limitations, namely, that the taxation must be direct, and that it must be within the province.

"Had the matter been *res integra,* giving the language the meaning which would be in accordance with the ordinary understanding of men, one might have said that this was not 'direct taxation within the province.'

"But the Supreme Court of Canada in *Smith* v. *Provincial Treasurer of Nova Scotia,*[60] in construing a similar statute, only not so explicit in its terms as our own, have held that it is so by reason of the maxim *mobilia sequuntur personam.* The propriety of the application of this rule was re-affirmed by the Court in *Barthe* v. *Alleyn-Sharples,*[61] although that case dealt with a Quebec statute

[56] 12 Cl. & F. 1.
[57] 35 L. J. Ch. 124.
[58] 67 L. J. P. C. 144.
[59] (1922), 1 W. W. R. 803; 63 D. L. R. 397.
[60] 58 S. C. R. 570.
[61] 60 S. C. R. 1; 1920, 1 W. W. R. 952

which is not *in pari materia,* as it imposes a duty on the transmission or succession and not on the property itself. This latter case came before the Judicial Committee,[62] but the Board rested its decision on the ground that as the transmission took place within the province to a person domiciled or resident within the province, the duty was lawfully imposed, and did not consider the applicability of the maxim to the construction of The B. N. A. Act."

In view of the conflict between the judicial opinion thus expressed by Hunter, C.J.B.C., in the *Walker* case, and that expressed by Davies, C.J., and Anglin, J., of the Supreme Court of Canada, in *Smith* v. *Provincial Treasurer of Nova Scotia,* it is to be hoped that the uncertainty which prevails as to the applicability of the maxim *mobilia sequuntur personam* to provincial succession duty laws may shortly be removed by a definite Privy Council pronouncement on this phase of the law.

In concluding this article, a brief reference may be made to the well-known Privy Council decision in *Attorney-General for Ontario* v. *Woodruff,*[63] in which it was held that the Ontario Succession Duty Act, R.S.O. 1897, c. 24, did not apply to movables situate outside the Province of Ontario which a domiciled inhabitant of that province had transferred in his lifetime with intent that the transfers should only take effect after his death. Anglin, J., in his judgment in the *Smith* case, in expressing the view that the maxim *mobilia sequuntur personam* is applicable to succession duties in Canada, proceeds to discuss the *Woodruff* case in the following terms: 'The only authority at all in conflict with this view is *Woodruff* v. *Attorney-General for Ontario.* But the conflict is more apparent than real. The property there in question consisted of bonds and debentures of a foreign company which were at the date of their transfer and remained in custody of a New York deposit company. The transmission of them was not by will or upon intestacy, but by instrument *inter vivos,* which took effect under the law of the State of New York. There was no succession or transmission by virtue of Ontario law. The ground on which the maxim *mobilia sequuntur personam* is applied in this case, therefore, did not exist in Woodruff's case."

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[62] 38 T. L. R. 131.
[63] (1908) Appeal Cases, 508.