No. 43 of 1941.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL OF ONTARIO.

BETWEEN—

THE TREASURER OF ONTARIO
(Plaintiff) *Appellant*

— AND —

MRS. FRANCES EUGENIA BLONDE, FLORENCE MAISONVILLE and EMILY F. LYNCH, Executrices of the Estate of Albert Theodore Montreuil, and ALFRED GEORGE THOMCZEK, LOUISE MATILDA THOMCZEK, EUGENIE THOMCZEK, FLORENCE MAISONVILLE and RAYMOND GIRARDOT (Defendants) *Respondents.*

RESPONDENT'S CASE

Case for Respondents.

RECORD.

1. This is an appeal from the judgment of the Court of Appeal for Ontario dated the 24th day of June, 1941, allowing, by a majority of four judges to one, an appeal by the Respondents from the judgment of Rose, C.J., dated the 19th day of February, 1941, upon a Special Case stated by the parties. p. 37 p. 24

2. The late Albert Theodore Montreuil died on the 2nd day of October, 1936, resident and domiciled in the City of Windsor, in the County of Essex, in the Province of Ontario, leaving an estate valued at over One Million Dollars. At the time of his death he owned, among other assets, certain shares of capital stock in the Briggs Manufacturing Company and the Pfeiffer Brewing Company, both duly incorporated under the laws of the State of Michigan, one of p. 4, l. 16 p. 4, l. 29 pp. 4-6

the United States of America, with Head Offices in the City of Detroit, the certificates of which shares of capital stock were in the deceased's possession at Windsor at the time of his death, but registered in the transfer office in the City of Detroit in the name of the deceased. The said shares of capital stock were valued for succession duty purposes in the aggregate at $905,375.00

p. 11, l. 20

3. The share certificate of the Briggs Manufacturing Company specifically provides that it is "transferable in New York or in "Detroit" and declares that the certificate is "transferable in "person or by duly authorized attorney upon surrender of this "certificate properly endorsed" and further provides that "this "certificate is not valid unless countersigned by the transfer agent "and registered by the Registrar."

p. 15, l. 16

4. The share certificate of the Pfeiffer Brewing Company specifically provides that it is "transferable only on the books of "the corporation by the holder thereof in person or by attorney, "upon surrender of this certificate properly endorsed" and "is not "valid until countersigned by the transfer agent and registered by "the Registrar."

p. 5, l. 23
p. 6, l. 30

5. Neither of the said Companies did, at the date of the death of the said deceased, maintain, nor have either of them since maintained a register for the transfer of shares of its capital stock, nor any agent for such purpose, within the Province of Ontario, but both of the said Companies had established agents for the transfer and register of shares in the said City of Detroit, and in the City of New York, in the State of New York, one of the United States of America, and had no other such agents.

p. 5, l. 12
p. 6, l. 18
p. 5, l. 42
p. 5, l. 24
p. 6, l. 30

p. 9, l. 38

6. The deceased left a Will dated the 14th day of July, 1936, Letters Probate of which were granted out of the Surrogate Court of the County of Essex to the first three named Respondents on the 29th day of October, 1936, and in and by the said Will the said deceased, after providing for certain annuities, bequeathed the residue of his estate to seven nephews and nieces, five of whom, named as Respondents in this action, were resident and domiciled in the said City of Detroit, in the State of Michigan, at the time of the death of the said deceased, and still are so resident.

p. 10, l. 27

p. 7, l. 26

p. 7, ll. 31-42

7. The executrices of the said estate have paid to the Province of Ontario the sum of $149,063.14 in full of the succession duty upon all the property of the deceased admittedly situate in the Province of Ontario at the date of his death, and the said sum includes the succession duty in respect of the interests of the two residuary legatees resident and domiciled in the Province of Ontario in the said shares of the capital stock of the companies above named.

8. The Appellant affirms, and the Respondents deny that the said shares were at the death of the said deceased property situate in the Province of Ontario for succession duty purposes and that succession duty was also payable thereon to the Province of Ontario so far as the interests of the five persons so resident in the State of Michigan are concerned, and the question for decision is as follows: p. 7, ll. 38-42

"Were the said shares of capital stock of Briggs Manufacturing "Company, and Pfeiffer Brewing Company, property locally situate in the "Province of Ontario at the death of the said Albert Theodore Montreuil, for "the purposes of the Succession Duty Act, and as so locally situate, subject to "succession duty?" p. 7, l. 43

and by the provisions of the Special Case it was agreed that if the Court should be of opinion in the affirmative, then the judgment should be entered in favour of the Appellant for the amount claimed with interest and costs, but if the Court should be of opinion in the negative, then the judgment should be entered in favour of the Respondents dismissing the action with costs of suit. p. 8, ll. 4-10

9. The case was argued before Chief Justice Rose on the 7th and 8th days of October, 1940, and judgment was reserved. In the meantime, namely on November 16th, 1940, judgment was delivered by the Court of Appeal in the case of *Williams vs. The King*. 1940 *O.R.* 403. This case involved the question of the local situation of shares of stock, and while the members of the Court of Appeal unanimously affirmed the principle that shares of stock were locally situate where they could be effectively dealt with—that is where there was a transfer office and registry of shares—Masten, J.A. alone in his judgment injected, "though with some hesitancy" a new principle into the determination of the local situation of shares of stock, by expressing the opinion that the certificate of shares of capital stock being under seal were "specialties" and locally situate where the certificates were found at the death, but this opinion was not concurred in by the other members of the Court. p 24, l. 23 p. 26, l. 18 p. 26, l. 25

10. In consequence of this judgment a further argument of this case was had on the 19th day of February, 1941, confined to the question of "specialties" raised in the reasons for judgment of Masten. J.A., but at the conclusion of the argument, or indeed without hearing a reply, the Trial Judge gave judgment for the Plaintiff but based upon other grounds hereinafter more particularly referred to, without expressing any opinion upon the question that day argued. p. 25, l. 38

11. The Statute respecting succession duty in force at the time of the death of the deceased was the Succession Duty Act, 1934, Chapter 55, and that part of the Statute affecting the question involved is Section 6, sub-section 1, which reads as follows:— p. 50, ll. 28-36

"(1) All property situate in Ontario, and any income therefrom passing " on the death of any person, whether the deceased was at the time of his " death domiciled in Ontario or elsewhere, and every transmission within " Ontario owing to the death of a person domiciled therein of personal property " locally situate outside Ontario at the time of such death shall be subject " to duty at the rates hereinafter imposed."

12. The whole question involved in this case, therefore, so far as the five non-resident Respondents are concerned, and the question specifically asked in the Special Case is, whether the shares of capital stock owned by the deceased at his death in the above companies were or were not " situate in Ontario " for the purposes of the Succession Duty Act.

13. The Trial Judge, Chief Justice Rose of the High Court, in his reasons for judgment fully recognised the basic principle established for the determination of the situs of shares of company stock for succession duty purposes, both in the case where the certificates were found at the domicile of the deceased but where there was no place of transfer, and also in the case where there were two or more places of transfer one of which was at the domicile and where the certificates were found at the time of death, but he held that because there were two places for transfer outside, even though none in the jurisdiction of the place of domicile where the certificates were found at the death, a new situation was created to which the old principle did not apply and other methods for determination of situs had to be resorted to.

14. The precise views of the learned Chief Justice are to be found in the following quotations from his reasons for judgment:—

p. 27, ll. 13-25 " Frequently in cases in which the right to collect a tax or duty has arisen " the courts have been called upon to choose between the place in which the " owner of shares was domiciled or resident and had his certificates and the " place in which an effectual transfer of the shares could be made. The classic " case in which that choice has had to be made is *Attorney-General v. Higgins*, " 2 Hurlstone and Norman, 339, and 157 English Reports, 140, in which the " choice was the place in which was located the office in which the transfer " could be made. That case has been referred to and discussed many times, " notably by Mr. Justice Anglin in *Smith v. Provincial Treasurer*, 58 S.C.R. " 570, at 584, and in *Brassard v. Smith* (1925) A.C. 391, and it is not necessary " to restate its facts or the precise point that was decided. In Brassard v. " Smith it was treated as settling the law. All this is set out in Mr. Justice " McTague's judgment in *Williams v. The King* (1940 O.R. 320).". . . . .

He then proceeds to lay the foundation for his judgment as follows:

p. 28, ll. 30-36 " The courts have decided, as I have said, in cases akin to this, against " the place in which the certificates are found and in favour of the place in " which the shares can be transferred, and they have decided which of two

" places in which the shares can be transferred is to be preferred, but they " have not decided as between a place in which the certificates are found but " where the shares cannot be transferred and one or another of several places " in which the shares can be transferred,"

and then follows the statement of the basis upon which his judgment rests:—

" I cannot find in this particular instance that any one office is the office p. 29, ll. 13-21
" in which a transfer of the shares can be made effective, I cannot apply " *Attorney-General v. Higgins* and the cases that have followed it; but I have
10 " a whole series of cases in which some effect has been given to the fact that " the owner of the shares had the certificates with him in the place of his " domicile, and I think that, there being nothing else that can be seized upon, " I ought to take that fact, which the cases show to be important in some " circumstances, as being the governing fact in the circumstances of this case, " and for that reason ought to decide in favour of the Provincial Treasurer."

15. It is respectfully submitted that the learned Chief Justice in his reasoning completely overlooked that which underlies all of the authorities, and, among others, those referred to by him, and that is that the determining factor was the place of transfer and not
20 domicile nor where the shares were found.

16. This failure to recognise the dominant factor of the place of transfer of the shares was emphasised and extended in the reasons for judgment of the Chief Justice of the Court of Appeal in allowing the appeal, where he says:—

" The learned Chief Justice arrived at this conclusion after a review of p. 40, ll. 34-
" many cases that deal with questions as to the method of determining the " place where the personal property of one kind and another is situated for the " purpose of succession duty, some of them being cases where the property " consisted of shares in a corporation. While recognizing that the place where
30 " the shares can be transferred is in ordinary circumstances the situs of the " shares, that being the place where they can be effectively dealt with, as " determined in such cases as *Attorney-General v. Higgins* (1857) 2 H. & N. " 330; and *Brassard v. Smith* (1925) *A.C.* 371, the Chief Justice was of " opinion that special circumstances prevented the application of these " decisions here. The fact that, in the case of each of the companies whose " shares are in question there are two places where its shares can be trans- " ferred, and that there is nothing stated in the special case from which it " can be determined that one of these places rather than the other is the situs " of the shares, made it impossible, in the opinion of the Chief Justice, to find
40 " that the shares are situated within the jurisdiction in which either transfer " office is established. It, therefore, became necessary, in his opinion, to " disregard both places and to find a different place. He held that the situs " of the shares in the circumstances of this case was determined by the " testator's domicile, that being also the place where the testator had in his " possession at the date of his death the certificates for the shares.

" With great respect I think the learned Chief Justice has erred in two " respects. In the first place, the learned Chief Justice has failed to appre- " ciate the essential character of the requirement that the property can be " effectively dealt with there in determining the local situation of intangible " property. In the case of shares in a company, that has been held to mean " that the shares can be transferred within the jurisdiction. As was said in " *Brassard v. Smith* (*supra*) at p. 376, ' That is, in their Lordships' opinion, " ' the true test, where could the shares be effectively dealt with? ' ".

" In the second place, the question stated for the opinion of the Court did " not require him to determine the situs of the shares as between Detroit and 10 " New York. ' Were the shares property locally situate in the Province of " ' Ontario ' is the question asked. One is not entitled to assume that the " parties have agreed upon and have set forth in the special case all the facts " relevant to another question not submitted." . . .

Middleton and Gillanders, JJ.A. concurred in the reasons for judgment of Chief Justice Robertson and agreed in the result.

17. Mr. Justice Henderson agreed in the result but wrote separate reasons for judgment, and in particular discussed the opinion of the Chief Justice of the High Court that because there were two places in a foreign jurisdiction where the shares of stock 20 could be transferred and registered, one not to be preferred over the other, he was not able to find in which place the said shares of stock could be said to be locally situate and therefore came to the conclusion that there was no applicable authority to hold that the shares were not situate at the domicile of the deceased. His Lordship proceeded to answer this argument in the following manner:—

p. 56, ll. 25-38 " The fact that there were two offices, one in Michigan and one in New " York State where the shares could be effectively transferred, and any diffi- " culty that might arise in determining which of these had priority over the " other, if any, does not in my opinion give a local situs to the shares in 30 " Ontario. *Attorney-General v. Higgins*, 2 *H. & N.* 239, is referred to as a " classic case on this subject. There, in the case of domicile of a testator in " England, and having in his possession shares in a railway company whose " head office was in Scotland, and whose only register of shares was at its " head office, it was held that the situs of the shares was in Scotland. Suppose " the facts had been different to this extent that the railway company in " question should have had a transfer office in Ireland where the shares could " be transferred in addition to its head office in Scotland, could it be said that " this would change the situs of the shares of the testator so that it could be " held to be in England?" 40

18. Mr. Justice Masten dissented from the judgment of the other members of the Court of Appeal and in his reasons for judgment based his judgment upon several grounds. He took first, what is an unusual one and, it is respectfully submitted, an unsound one;

namely that the "share certificates, as physical assets and muni- p. 51, ll. 1-4
"ments of title constituted property of the testator situate in Ontario
"which on his death passed in Ontario to his executors and trustee". It would seem that the most obvious answer to such a proposition would be the question; if these certificates had been a deed of land in Michigan, for example, could it, and what it represents, become property in Ontario? Added to this a "passing on the death" means the passing of the beneficial interest in the assets, not to a mere conduit, but to the person or persons, who, under the will, "succeed" to that interest. The duty is imposed upon the "succession", and payable by the beneficiary.

19. Then too the learned Justice advanced the view that because the deceased in his lifetime could effectively transfer the p. 52, l. 4
shares in Ontario, there was nothing to prevent the executrices, upon p. 52, l. 39
the strength of the Essex probate, from effectively endorsing the certificates and so effectively deal with the shares upon the "principle stated in *Brassard v. Smith*" (*supra*). One answer to that p. 54, ll. 23-34
view is that the same reasoning would apply with much greater force to an ordinary simple contract debt and yet no one would argue in the face of authority that the right to assign the debt would change its situs from the domicile of the debtor to the domicile of the deceased. Another is that this doctrine entirely overlooks the fact that an effective transfer of the shares cannot be made until authority to act for the deceased is obtained where the shares are registered.

20. Then too the learned Justice adheres to the principle enun- p. 53, l. 13
ciated by him in *Williams v. The King* (*supra*), namely, that the share certificates being under seal were specialties and therefore locally situate where found.

21. The Chief Justice of Ontario also dealt with these arguments in a larger way and his observations respecting them may be found in part in the following language in his reasons for judgment:—

"Certain other propositions are put forward in support of respondent's p. 45, ll. 35-48
"contentions, but the learned Chief Justice did not pronounce upon them.
"It is argued that in fact the shares could have been sold by the executors
"in Ontario without reference to any transfer office. This submission was
"based upon the assumption that the share-certificates are in such form, or
"can be put in such form by the executors, acting under the authority of the
"probate issued to them in Ontario, that the mere delivery of the certifi-
"cates will effect a complete transfer of the property in the shares. This
"assumes that the share-certificates are endorsed, or that the executors them-
"selves, under their present authority, can sufficiently endorse them in the
"manner referred to in such cases as *Smith v. Rogers* (1898) 30 *O.R.* 256;
"*McLeod v. Brazilian Traction. Light & Power Co.* (1927) 60 *O.L.R.* 253.

" The initial difficulty in giving effect to this contention is that the share-
" certificates are not endorsed with the signature of the testator, in whose
" name they are registered, and unless and until the executors obtain
" authority to act as the testator's representative in a jurisdiction in which the
" transfer can be registered, their signatures in that capacity go for nothing;
" *New York Breweries Co. Ltd. v. Attorney-General* (1899) *A.C.* 62;
" *Fidelity Trust Co. v. Fenwick* (1921) 51 *O.L.R.* 23 at p. 35,"

and again:—

p. 46, ll. 38-48

" The further point was argued and is referred to in the judgment of the
" Chief Justice of the High Court, that the certificates for the shares being
" under the company's seal are specialties, and that the shares are, therefore,
" to be deemed to be locally situated where the share-certificates were at the
" death of the testator. In support of this contention is cited the judgment
" of Masten J.A. in the case of *Williams v. The King* (*supra*) at p. 413
" et seq.

" With great deference to so eminent an authority on all matters relating
" to company law and practice, I was unable to concur in the opinion of
" Mr. Justice Masten in the Williams case on that point, and I am unable to
" agree now that the share-certificates in the possession of this testator at the
" time of his death fix the local situation of the shares at Windsor. No doubt
" there are definitions to be found of the word ' speciality ' that will include
" any document sealed and delivered, but that is not its common meaning.
" The certificates in this case are mere statements of the ownership of the
" shares and of their being transferable in the manner stated, but they are
" not the primary record even of these matters. ' The certificate is not the
" ' title but evidence of the title to the shares.' *Union Bank v. Morris* (1900)
" *L.* 29 *O.A.R.* 396 at p. 409; and see *Shropshire Union R.W. & Canal Co. v.*
" *Regina* (1875) *L.R.* 7 *H.L.* 496 at p. 509, per Lord Cairns and at p. 512 per
" Lord Hatherley. The certificates are not in themselves contracts. They do
" not contain the statement of any debt, obligation or promise, and in them-
" selves they are not evidence of any. In the cases where it has been held that
" an unpaid dividend or an unpaid call is a specialty debt, it will generally, if
" not always, be found that this is founded upon statute or the terms of the
" certificate, or some deed to which the shareholder is a party."

22. The Respondents adopt the reasoning of the majority judges of the Court of Appeal for Ontario.

23. The Respondents, therefore, humbly submit that this appeal should be dismissed, and that the judgment of the Court of Appeal for Ontario should be affirmed for the following amongst other

REASONS.

(1) Because shares of capital stock of incorporated companies are, for the purposes of taxation in the Province of Ontario under the Succession Duty Act, locally situate where they may be effectively dealt with.

(2) Because these shares can be effectively dealt with only at the place where they can be transferred and registered.

(3) Because there was no place in the Province of Ontario where these shares could be properly transferred or registered.

(4) Because the place of transfer and registry, and not domicile, has always been the dominant factor in determining the situs of shares.

(5) Because the fact of there being two places in a foreign jurisdiction for the transfer and registration of these shares in no way affects the principles applicable to the situs of shares, but simply gives the owner a choice.

(6) Because the Court was not asked to find the local situs of the shares as between Detroit and New York.

(7) Because certificates for shares of stock in incorporated companies are evidence of title simply, and in themselves have no significance so far as the local situs of the shares is concerned.

(8) Because such certificates of shares, though under seal, are in themselves in no sense specialties, but at most help to create specialties only by certain events and by the aid of and in conjunction with other documents, by-laws or statutes.

(9) Because the judgment of the majority judges of the Court of Appeal was right for the reasons given by them.

J. H. RODD.

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