Ottawa
1966
May 19
July 29

BETWEEN:

ROY A. HUNT *et al.* .....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....DEFENDANT.

Estate Tax—Situs of company shares—Decedent domiciled in U.S.A.—Company incorporated in Canada—Stock transfer registries in Canada and U.S.A.—Writ of fi. fa.—Seizure in Canada—Whether effective.

Rachel Hunt died in Pittsburgh, Pa. in 1963 domiciled in the U.S.A. Her estate was assessed to Canadian estate tax in respect of 43,560 shares of Aluminium Limited, a company incorporated under the *Companies Act* of Canada and having its head office and principal place of business in Montreal. The company maintained a register of share transfers in Montreal and there were branch registries in the United States. The certificates for the 43,560 shares were physically situate in Pittsburgh. The estate tax assessed was not paid and a *fi fa* was issued out of the Exchequer Court to the sheriff of Montreal and seizure there made of the 43,560 shares. The executors of the estate petitioned for a declaration that the *fi fa* did not attach the estate's shares.

Held, the shares were situate in the province of Quebec at the time of the seizure and were therefore validly seized. The situs of shares for the purposes of judicial seizure is either the place or places where they can be effectively dealt with as between shareholder and company, i.e. where the company's books on which a transfer has to be registered are situated, in this case both Canada and the U.S.A., or at the domicile of the company, in this case Canada. The special rules for attributing the situs of shares to a province for purposes of provincial legislative jurisdiction to levy estate tax and succession duties do not apply to the determination of the situs of shares for purposes of judicial seizure.

Brassard v. Smith [1925] A.C. 371; *Braun v. Custodian* [1944] Ex. C.R. 30; [1944] S.C.R. 339, applied. *Rex. v. Williams* [1942] A.C. 541, distinguished.

PETITION OF RIGHT.

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

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

1966

HUNT *et al* v. THE QUEEN

JACKETT P.:—This is a Petition of Right by the Executors of the Estate of Rachel McM. M. Hunt seeking a determination that a writ of *fieri facias* issued out of this Court did not attach certain shares of Aluminium Limited belonging to the Estate.

Other relief was sought by the Petition of Right but counsel for the suppliants at the hearing limited his claim for relief to a claim for such a declaration.

I doubt whether a Petition of Right is the appropriate procedure to raise that question for determination, but, as I have no doubt that the Court has jurisdiction to determine that question and as the parties were agreed that the Court should determine that question in these proceedings, I propose to determine the question as though it had been raised by whatever procedure would have been appropriate.

The late Rachel McM. M. Hunt died at Pittsburgh in Pennsylvania, one of the United States of America, on February 22, 1963 at which time, she was resident and domiciled in the United States. At the time of her death, she owned, and there was registered in her name in the books of Aluminium Limited, 43,560 shares in the capital stock of that company having a value of $1,038,155.61. There was also, at that time, an unpaid dividend of $5,982.50 payable on such stock.[1]

Aluminium Limited was incorporated under the *Companies Act of Canada,* which is now consolidated in R.S.C. 1952, c. 53. By virtue of section 38(*e*) of the *Estate Tax Act,* c. 29 of 1958, shares of a corporation (subject to certain irrelevant exceptions) are deemed, for the purpose of Part II of that Act, to be situated in the place where the corporation was incorporated. Part II of the Act levies an estate tax on property situated in Canada and belonging to a person domiciled outside Canada at the time of his or her death. An assessment was accordingly made against the estate in the sum of $156,620.73. The validity of this assessment has not been attacked. The tax has not, however, been paid.

[1] These are the figures on the "Calculation of Tax" form attached to the Estates Tax Assessment. Counsel for the suppliants, at the trial, appeared to accept it that for the purposes of estates tax, there was, at the time of Mrs. Hunt's death, property in Canada to the value of $1,044,138.20.

The situation is that the Estate has been validly made subject to tax under and by virtue of Canadian law but a judgment for the tax is enforceable only in Canada as, of course, the Courts of another country will not lend their assistance to enforce payment of taxes owing to the Government of Canada. The Government of Canada can only enforce payment of this tax debt, therefore, if it can find property of the Estate subject to execution in Canada.

Recognizing the correctness of this position, the Minister of National Revenue took the necessary steps to have a writ of *fieri facias* issue out of this Court directed to the Sheriff of the Judicial District of Montreal in the Province of Quebec, who is, by virtue of section 74 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, *ex officio* an officer of this Court. The Sheriff took the steps appropriate to the seizure of the aforesaid shares in Aluminium Limited in accordance with the requirements of that writ.

These proceedings are to determine whether those steps were effective. Counsel at the hearing were in agreement that

(*a*) if the shares were, at the time that the Sheriff took such steps, situated, so as to be subject to seizure under judicial process, in the province of Quebec, the seizure was effective, and

(*b*) if the shares were not, at such time, situated, so as to be subject to seizure under judicial process, in the province of Quebec, the seizure was not effective.

The following additional facts are regarded by one party or the other as having relevance to the determination of this question:

4. The individual Suppliants are, and have at all relevant times been, citizens of and domiciled in the United States of America and the Suppliant Mellon National Bank and Trust Company is an American company and has no office or place of business in Canada.

* * *

6. Aluminium Limited is a company incorporated under the Companies Act of Canada and has its head office and principal place of business in the City of Montreal. Almost all of the meetings of Directors and all meetings of shareholders of Aluminium Limited are held at the Company's head office in the City of Montreal and the central management of the Company is located there.

1966

HUNT *et al* v. THE QUEEN

Jackett P.

7. Aluminium Limited at the time of the death of the deceased maintained, and still maintains,

(*a*) its register of transfers of shares in its capital stock and all books required to be kept by it pursuant to section 107 of the Companies Act in the said City of Montreal; and

(*b*) branch registers of transfers of shares in the Cities of Pittsburgh, New York, London (England), Toronto and Vancouver;

* * *

9. At all relevant times shares in the capital stock of Aluminium Limited were listed on the Montreal, Toronto, Vancouver, New York, Midwest, Pacific Coast, London, Paris, Basle, Geneva, Lausanne and Zurich Stock Exchanges, being recognized stock exchanges.

10. The share certificates . . . were at the death of the deceased physically situated in the said City of Pittsburgh.

Counsel for neither party based his submission on any decision or line of decisions dealing explicitly with the question as to what constitutes *situs* of shares within the geographical jurisdiction of a Court so as to subject them to seizure under process issuing out of that Court.

Counsel for the suppliants put his case squarely on the well known line of cases concerning *situs* of shares, for purposes of state tax and succession duties levied by the legislatures of Canadian provinces,[1] of which representative ones are *Brassard v. Smith*,[2] *Rex v. Williams*,[3] *Treasurer of Ontario v. Aberdeen*.[4]

Counsel for the Crown did not seriously contend that, if the rules developed by those cases applied to the determination of the *situs* of the shares in this case for the purpose of this seizure, the shares have been effectively subjected to the process of the Court.

His position was, however, that those cases laid down rules developed for determining the limits of the application of provincial estates tax and succession duty laws and

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[1] I do not overlook his reference to *Stern v. The Queen*, (1896) 1 Q.B. 311, and *In re Clark*, (1904) 1 Ch. 294, in each of which there is a recognition that, in certain circumstances, share *certificates* are property where they are situate. They do not decide that *shares* cannot be situate at some place other than the *situs* of the *certificates*. There is no question here of a seizure of share certificates so endorsed as to be marketable such as were the Canadian Pacific share certificates that were subject matter of the decision in *Secretary of State of Canada v. Alien Property Custodian for the United States*, (1931) S.C.R. 170, in which event the question would be whether the seizure of the certificates gave rise to a right to be registered as owner if the shares. The question here is whether the shares themselves were seized.

[2] [1925] A.C. 371.

[3] [1942] A.C. 541.

[4] [1947] A.C. 24.

1966

HUNT *et al* v. THE QUEEN

Jackett P.

have no application to the determination of the problem in this case. He submitted that there were a number of possible tests to be derived from *Braun v. The Custodian*[1], *Bradbury v. English Sewing Cotton Co.*[2], and other cases, any one of which placed the *situs* of the shares in Canada from the point of view of executing a judgment. Alternatively, he relied on section 38(*e*) of the *Estate Tax Act*—read with section 47 of that Act—as determining the matter.

I found it difficult to accept it that the question as to what rules are applicable to determine what shares are subject to judicial seizure in any particular jurisdiction had not previously arisen for decision. For that reason, I delayed rendering my judgment so that I might, myself, endeavour to find some authority where the particular question has been decided. As I might have expected, having regard to the experience and competence of counsel engaged on both sides of this case, my search has been fruitless. I must, therefore, decide this matter by application of the principles evolved for the determination of other matters in so far as, in my view, they are applicable.

As nearly as I can ascertain, having regard to my perusal of the textbooks and cases dealing especially with the law of Quebec[3], and to the argument of counsel in this case, the principles applicable to the determination of this matter, even though it arises in the province of Quebec, may be sought in the authorities applicable in Canada generally.

Having regard to the survey of the authorities contained in the judgment delivered by President Thorson in *Braun v. The Custodian, supra,* to which I am much indebted, I do not propose to review the authorities in detail.

Although there seems to have been little or no occasion to enunciate it, the rule, as I understand it, is that judicial process operates in relation to property situated within the geographical limits of the jurisdiction of the Court from which it issues. This would seem to be a corollary of the principle of private international law that the validity of changes in ownership of property, whether it is moveable or

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[1] [1944] Ex. C.R. 30, (1944) S.C.R. 339.

[2] [1923] A.C. 744.

[3] See, for example, *The Black-Clawson Company v. Montreal Locomotive Works Limited,* (1960) B.R. 514.

1966

HUNT *et al* v. THE QUEEN

Jackett P.

immoveable property, is regulated by the law of the place where the property is at the time of the transaction or action in question.[1] Little difficulty arises in applying the rule to tangible property. It applies equally to some intangible property at least. See *Alcock v. Smith*[2] and *Crosby v. Prescott*[3], in each of which it was found, dealing with a bill of exchange, that the validity of a transaction was regulated by the physical *situs* of the piece of paper constituting the bill of exchange.

In the case of shares in a company, such as one incorporated under the *Canadian Companies Act*, while there are physical pieces of paper—the share certificates—which are capable of ownership and of being transferred in a particular manner from hand to hand, they are something different from the shares. (See Thorson P. in *Braun v. The Custodian, supra,* at pages 38 *et seq.*) It is clear that the *situs* of a share certificate does not of itself determine the *situs* of the shares as a bundle of rights.[4]

In one sense at least, the *situs* of a share in this latter sense is something less than real[5] and must therefore be fixed by arbitrary conventional rules of law.

The earliest approach to *situs* of shares to have been reflected in Canadian jurisprudence seems to have been that of the English Courts when determining *situs* for purposes of probate duty (*Attorney General v. Higgens*)[6]. The rule so developed was adopted for purposes of deciding what shares were situate in a Canadian province for estate tax or succession duty purposes (*Brassard v. Smith, supra*). While it was variously stated in different cases, the rule became settled as being that a share was situate for such

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[1] *Cammell v. Sewell,* 5 H. & N. 728; *Castrique v. Imrie,* L.R. 4 H.L. 414.

[2] [1892] 1 Ch. 238.

[3] [1923] S.C.R. 446.

[4] A share, as I understand it, is the bundle of rights that the statutory law, company charter and other instruments constituting the company's constitution, expressly or impliedly confer on the holder of the share. These are ordinarily (*a*) the right to vote at company meetings, (*b*) the right to receive dividends when declared, and (*c*) the right to participate in a winding-up.

[5] "Shares in a company are 'things in action' which have in a sense no real situs . . ." per Viscount Maugham in *Rex v. Williams,* [1942] A.C. 541 at page 549.

[6] (1857) 4 M. & W. 171.

purposes in the place where it could be effectively dealt with as between the shareholder and the company (*Rex v. Williams, supra,* at page 558), which is where the books of the company on which the transfer has to be registered to be effective are situate.

If that were the rule applicable in this case, I should have to find that the shares of Aluminum Limited in issue here were situate both in Canada and in the United States because there were company books both in Canada and in the United States, at any of which the shares could have been effectively dealt with. That being so, I see no reason why, for purposes of seizure under judicial execution, the shares might not be regarded in law as having been situated in both countries. (Obviously, if shares may have a dual *situs,* once they have been divested from one owner and vested in another on one register, that would operate to prevent any further dealing with them on that or any other register except as the shares of the new owner.)

There is, as I see it, no reason in principle why shares should not be regarded as being situated in more than one country for purposes of seizure under judicial process just as they may be so situated for purposes of transfer of ownership. It is, however, quite a different situation when *situs* of shares is being considered for purposes of provincial legislative jurisdiction to levy estates tax or succession duties. In *Braun v. The Custodian, supra,* at pages 42-3, President Thorson shows why it was regarded as necessary that there be found some basis for allocating *situs* for such taxation purposes to some one of the places where the shares could be effectively dealt with as between the shareholder and the company.[1] For such purposes, under the further rule developed in *Rex v. Williams* to resolve the provincial succession duty problem raised by the facts of that case, the shares here in question would be situate in the United States. The necessity for additional rules for the specific allocation of *situs* for such cases has no application except in the sort of taxation case for which the additional rules were developed. In particular, it has no application to the determination of *situs* for the purposes of judicial execution. As such additional rules were not held to have any

[1] The necessity is based on the desirability of avoiding double or multiple taxation.

1966

HUNT *et al* v. THE QUEEN

Jackett P.

application for purposes of the regulations concerning enemy property in the *Braun* case, and as I can see no reason in principle for holding them applicable for purposes of judicial seizure, I hold that they have no such application. That conclusion, in effect, disposes of the foundation of the suppliants' contention.

Having thus reached the conclusion that the additional rule developed in *Rex v. Williams* has no application, I am left with the rule applied in *Smith v. Brassard* (under which, as I have indicated, I would find that the shares in issue are situated in Canada as well as in the United States) or the rule enunciated by the Supreme Court of Canada in the *Braun* case, (1944) S.C.R. 339, per Kerwin J. delivering the judgment of the Court at page 345, which is that the stock of a corporation has its *situs* at the domicile of the corporation, which in this case is Canada.[1] Whichever rule is the correct rule for this case, the shares were situate in the province of Quebec at the time of the seizure and were therefore effectively seized. (I regard the rule based on residence of the corporation worked out under English income tax legislation, in such cases as *Bradbury v. English Sewing Cotton Co. supra*, as depending on the scheme of that legislation and as having no application for other purposes.[2]

Having regard to the conclusion that I have thus reached, it is not necessary for me to consider the alternative argument based upon sections 38(*e*) and 47 of the *Estate Tax Act*.

At some time convenient to the parties, I should be glad to consider a motion for judgment in the light of these reasons.

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[1] See also *Brown, Gow, Wilson et al v. Bileggings-Societeit N.V.*, [1961] O.R. 815.

[2] In the absence of any authority concerning the *situs* of company shares, I should have thought, having regard to the nature of an ordinary share (conditional claims against the company for dividends and on winding-up and the right to vote at company meetings) that there would be much to be said for the rule that the share is situated where the company—the conditional debtor—resides. It is the residence of the conditional debtor (which might be regarded as invoking the basic rule that a simple debt is situate where the debtor resides) and the place where the company meetings are most likely to occur.